(59)

No. 00-1751-CFX
Status: GRANTED

Title: Susan Tave Zelman, Superintendent of Public Instruction of Ohio, et al., Petitioners
v.
Doris Simmons-Harris, et al.

Docketed:
May 23, 2001

Court: United States Court of Appeals for the Sixth Circuit

Vide:
00-1777
00-1779

Counsel for petitioner: French,Judith L.

Counsel for respondent: Chanin,Robert H., Frankel,Marvin E., Bolick,Clint, Young,David J., Latanick,David G., Vasvari,Raymond, Mineberg,Elliot M., Green,Steven K., Williger,Stephen D., Mooney Jr.,Donald J., Lopez,Christopher A., Tucker,Mark D., Tryon,David C., Hessler,David

also 40 copies of appendix; 10 copies of a lodging

Entry	Date	Note	Proceedings and Orders
1	Oct 19 1999	G	Application (99A320) for a stay of district court injunction, submitted to Justice Stevens.
2	Oct 20 1999		Response to application (99A320) from Doris Simmons-Harris requested by Justice Stevens, due October 27, 1999.
3	Oct 25 1999		(99A320)Memorandum of Intervenors Senel Taylor, et al., in support of State of Ohio's Application to stay district court injunction.
4	Oct 25 1999		(99A320)Memorandum of Intervening-defendants Hanna Perkins School, et al., in support of State of Ohio Application to stay district court injunction.
5	Oct 27 1999		Response to application (99A320) filed by Doris Simmons-Harris.
6	Oct 27 1999		Application (99A320) referred to the Court by Justice Stevens.
7	Oct 27 1999		(99A320)Application scheduled for Conference October 29, 1999
8	Oct 28 1999		(99A320)Reply in Support of application filed by Zelman, Supt. of Pub. Inst. et al.,
9	Oct 29 1999		(99A320)Reply of Intervenors Senel Taylor, et al., in support of application for stay filed.
10	Nov 5 1999		Application (99A320) granted by the Court. Justice Stevens, Justice Souter, Justice Ginsburg and Justice Breyer dissent.
11	May 23 2001	G	Petition for writ of certiorari filed. (Response due June 22, 2001)
12	May 23 2001		Brief amici curiae of American Center for Law and Justice, et al. filed.
30	May 23 2001		Appendix of petitioner filed.
13	Jun 13 2001		Waiver of right of respondents Senel Taylor, et al. to respond filed.
14	Jun 14 2001		Brief amicus curiae of Hugh Calkins filed.
16	Jun 20 2001		Brief amicus curiae of Pacific Legal Foundation, et al. filed.

4 pp

Entry	Date	Note	Proceedings and Orders
15	Jun 21 2001		Brief of respondents Doris Simmons-Harris, et al. in opposition filed. VIDED.
17	Jun 21 2001		Brief amici curiae of National School Boards Association, et al. filed. VIDED.
18	Jun 22 2001		Brief of respondents Sue Gatton, M.Murphy,M.Debose,C.Debose,G.Altschuld,D.Pearson in opposition filed. VIDED.
19	Jun 22 2001		Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed. VIDED.
20	Jun 22 2001		Brief amicus curiae of American Civil Rights Union filed.
21	Jun 22 2001		Brief amicus curiae of United States filed. VIDED.
22	Jun 22 2001		Brief amicus curiae of Center for Education Reform filed. VIDED.
23	Jun 22 2001		Brief amici curiae of Florida, et al. filed.
24	Jul 3 2001		DISTRIBUTED. September 24, 2001 (Page 29)
25	Jul 3 2001	X	Reply brief of petitioners Susan Tave Zelman, et al. filed.
26	Sep 25 2001		Petition GRANTED. The case is consolidated with No. 00-1777 and No. 00-1779, and a total of one hour is allotted for oral argument. SET FOR ARGUMENT February 20, 2002. **********
27	Sep 25 2001	N	Motion of petitioners Taylor, et al., for divided argument filed.
28	Oct 9 2001		Hanna Perkins School, et al., response to motion of Taylor, et al.,for divided argument.
29	Oct 9 2001		State petitioners' response to motion of Taylor, et al., for divided argument.
33	Nov 5 2001		Brief amicus curiae of Solidarity Center for Law and Justice filed. VIDED.
54	Nov 7 2001	X	Brief amici curiae of Ira J. Paul, et. al. filed. VIDED.
61	Nov 7 2001		Brief amici curiae of John Coons and Stephen Sugarman filed.
41	Nov 8 2001		Brief amicus curiae of American Civil Rights Union filed.
50	Nov 8 2001		Brief amici curiae of Rudolph Giuliani and John Norquist filed. VIDED.
51	Nov 8 2001		Brief amici curiae of Children First America, et al. filed. VIDED.
56	Nov 8 2001		Brief amicus curiae of Catholic League for Religious and Civil rights filed. VIDED.
59	Nov 8 2001		Brief amicus curiae of Hugh Calkins filed. VIDED.
32	Nov 9 2001		Brief amicus curiae of United States filed. VIDED.
34	Nov 9 2001		Brief amicus curiae of Center for Individual Freedom, et al. filed. VIDED.
35	Nov 9 2001		Brief amicus curiae of National Jewish Commission on Law and Public Affairs filed. VIDED.
36	Nov 9 2001		Brief amicus curiae of American Education Reform Council filed. VIDED.
37	Nov 9 2001		Brief amici curiae of American Center for Law and Justice, et al. filed. VIDED.
38	Nov 9 2001		Brief amicus curiae of National Association of Independent Schools filed.
39	Nov 9 2001		Brief amicus curiae of Becket Fund or Religious Liberty filed. VIDED.
40	Nov 9 2001		Brief amicus curiae of United States Conference of Catholic Bishops filed. VIDED.
42	Nov 9 2001		Brief amicus curiae of Vermonters for Better Education filed.
43	Nov 9 2001		Brief amicus curiae of Gary E. Johnson filed. VIDED.
44	Nov 9 2001		Brief amicus curiae of Wisconsin filed. VIDED.
45	Nov 9 2001		Brief amici curiae of Center for Education Reform, et al. filed. VIDED.
46	Nov 9 2001		Brief amicus curiae of Black Alliance for Educational Options filed. VIDED.
47	Nov 9 2001		Brief amicus curiae of Coalition for Local Sovereignty filed. VIDED.
48	Nov 9 2001		Brief amicus curiae of REACH Alliance filed. VIDED.
49	Nov 9 2001		Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed. VIDED.
52	Nov 9 2001		Brief amicus curiae of Rutherford Institute filed. VIDED.
55	Nov 9 2001		Brief amici curiae of Jesse H, Choper, et al. filed. VIDED.
57	Nov 9 2001	X	Brief amici curiae of Christian Legal Society, et al. filed. VIDED.
60	Nov 9 2001		Brief of petitioners Susan Tave Zelman and State Peitioners filed. VIDED.
72	Nov 9 2001		Brief of petitioner Hanna Perkins School, et al (TBP) filed.
77	Nov 9 2001	X	Brief amicus curiae of Cleveland City Councilwoman Fannie Lewis, filed. VIDED.
80	Nov 9 2001	X	Brief amici curiae of Association of Christian Schools International, et al. filed. VIDED.
82	Nov 9 2001	X	Brief amici curiae of Florida, et al. filed. VIDED.
83	Nov 9 2001	X	Joint appendix filed. VIDED.
85	Nov 26 2001	G	Motion of petitioners Hanna Perkins School, et al., for additional time for oral argument and for divided argument filed.
58	Nov 29 2001	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
62	Dec 5 2001		Motion of petitioners Taylor, et al. for divided argument withdrawn.
74	Dec 10 2001		Brief amicus curiae of Ohio Association for Public Education and Religious Liberty filed. VIDED.
75	Dec 10 2001		LODGING consisting of twenty bound copies of related material submitted by counsel for amicus Ohio Assn. VIDED.
79	Dec 10 2001		Brief amici curiae of National School Boards Association, et al. filed. VIDED.
63	Dec 13 2001		Brief amicus curiae of California Alliance for Public Schools filed. VIDED.
64	Dec 13 2001		Brief amicus curiae of Natl.Committee for Public Education and Religious Liberty filed. VIDED.
65	Dec 13 2001		Brief amici curiae of American Jewish Committee, et al. filed. VIDED.
66	Dec 13 2001		Brief amici curiae of NAACP Legal Defense and Educational

No. 00-1751-CFX

Entry	Date	Note	Proceedings and Orders
			Fund, et al. filed. VIDED.
67	Dec 13 2001		Brief amici curiae of Council on Religious Freedom, et al. filed. VIDED.
68	Dec 13 2001		Brief amicus curiae of Anti-Defamation League filed. VIDED.
81	Dec 13 2001	G	Motion of respondents for additional time for oral argument and for divided argument filed.
69	Dec 14 2001		Brief of respondents *Doris Simmons-Harris, et al. filed. VIDED.
70	Dec 14 2001		Brief of respondents *Sue Gatton,M.Murphy,M.Debose,C.Debose,G.Altschuld,D.Pearson filed. VIDED.
71	Dec 14 2001		LODGING consisting of twenty bound copies of related material submitted by counsel for respondents Gatton, et al.
76	Dec 14 2001	X	Brief amici curiae of Ohio School Boards Association, et al. filed. VIDED.
73	Dec 20 2001		CIRCULATED.
78	Jan 7 2002		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
86	Jan 15 2002		Reply brief of petitioner Hanna Perkins School, et al (TBP) filed.
91	Jan 18 2002		Reply brief of petitioner Taylor, et al. (TBP) filed.
89	Jan 22 2002		Motion of petitioners Hanna Perkins School, et al., for additional time for oral argument and for divided argument GRANTED. and ten additional minutes are allotted for that purpose.
90	Jan 22 2002		Motion of respondents for additional time for oral argument and for divided argument GRANTED. and ten additional minutes are allotted for that purpose.
94	Jan 22 2002	X	Reply brief of petitioners Susan Tave Zelman and State Petitioners filed. VIDED.
92	Jan 25 2002		Lodging consisting of five copies of NSBA publication submitted by counsel for amicus NSBA. One copy is retained in the file folder. VIDED.
93	Feb 4 2002		Letter from counsel for respondents Sue Gatton, et al. received and distributed. VIDED.
95	Feb 20 2002		ARGUED.

(1)
Supreme Court, U.S.
FILED
001751 MAY 23 2001
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

Ohio's experimental school choice program provides tax-funded scholarships to low-income children who live in the Cleveland City School District. Parents of children in kindergarten through eighth grade may use the scholarships to pay tuition for those children at the private schools of their choosing, including religious schools. In light of Ohio's program, the question presented is as follows:

Whether the Establishment Clause prohibits Ohio's program from authorizing parents to use the scholarships at any private school, whether religious or not.

PARTIES TO THE PROCEEDING

Petitioners are Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the State of Ohio, the State of Ohio, and Saundra Berry, in her official capacity as the Director of the Cleveland Scholarship and Tutoring Program.

Respondents are Doris Simmons-Harris, Marla Franklin, Rev. Steven Behr, Sue Gatton, Mary Murphy, Rev. Michael DeBose, Cheryl DeBose, Glenn Altschuld and Deidra Peterson.

Intervening defendants in the proceedings below are Senel Taylor, in his own behalf and as natural guardian of his daughter, Saletta Taylor, Johnnietta McGrady, on her own behalf and as natural guardian of her children, Trinnietta McGrady and Atlas McGrady, Christine Suma, on her own behalf and as natural guardian of her children, Dominic Suma, Gloria Suma, Emeric Suma, and Emily Suma, Arkela Winston, on her own behalf and as natural guardian of her children, Tanashia Winston and Devonte Winston, Amy Hudock, on her own behalf and as natural guardian of her child, Amber Lee Angelo, Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland, and Deloris Jones.

TABLE OF CONTENTS

Question Presented i

Parties To The Proceeding ii

Table Of Authorities v

Petition For A Writ Of Certiorari 1

Opinions Below 1

Jurisdiction 1

Constitutional And Statutory Provisions Involved 1

Statement Of The Case 2

I. The Education Crisis In Cleveland. 2

II. Creation Of The Pilot Scholarship Program. 3

A. The Scholarship Program. 3
B. The Tutoring Program. 6
C. Early Research Findings 6

III. The Litigation. 7

Reasons For Granting The Writ 10

I. This Case Presents An Important Federal Question. 10

II. The Sixth Circuit's Decision Conflicts With The Wisconsin Supreme Court's Decision In *Jackson v. Benson* 12

III. The Sixth Circuit's Decision Conflicts With This Court's Decisions. 18

Conclusion 26

TABLE OF AUTHORITIES

Cases:

Agostini v. Felton,
521 U.S. 203 (1997)..... passim

Bagley v. Raymond School Dept.,
728 A.2d 127 (Me.),
cert. denied, 528 U.S. 947 (1999)..... 13

Board of Educ. v. Allen,
392 U.S. 236 (1968)..... 18

Board of Educ. of Kiryas Joel Village School Dist. v. Grumet,
512 U.S. 687 (1994)..... 19, 20

Campbell v. Manchester Bd. of School Comm'rs,
641 A.2d 352 (Vt. 1994)..... 13

Committee for Pub. Educ. and Religious Liberty v. Nyquist,
413 U.S. 756 (1973)..... passim

Epperson v. Arkansas,
393 U.S. 97 (1968)..... 19

Everson v. Board of Educ.,
330 U.S. 1 (1947)..... 18

Jackson v. Benson,
578 N.W.2d 602 (Wisc. 1998)..... 12, 13, 14, 17

Lee v. Weisman,
505 U.S. 577 (1992)..... 21, 22

Lemon v. Kurtzman,
403 U.S. 602 (1971)..... 13, 14

Mitchell v. Helms,
530 U.S. 793 (2000)..... passim

Mueller v. Allen,
463 U.S. 388 (1983)..... 14, 21, 23

Reed v. Rhodes,
No. 1:73CV1300,
1995 U.S. Dist. Lexis 3814 (N.D. Ohio March 3, 1995).. 2

Rosenberger v. Rector and Visitors of the University of Virginia,
515 U.S. 819 (1995)..... 14, 18, 21

Santa Fe Indep. School Dist. v. Doe,
530 U.S. 290 (2000)..... 21, 22

Simmons-Harris v. Zelman,
234 F.3d 945 (6th Cir. 2000) ..... passim

Simmons-Harris v. Zelman,
54 F.Supp.2d 725 (N.D. Ohio 1999) 1, 8

Simmons-Harris v. Zelman,
72 F.Supp.2d 834 (N.D. Ohio 1999) 1, 8

Stone v. Graham,
449 U.S. 39 (1980)..... 19

Strout v. Albanese,
178 F.3d 57 (1st Cir.),
cert. denied, 528 U.S. 931 (1999)..... 13

Witters v. Washington Dept. of Services for the Blind,
474 U.S. 481 (1986)..... 17, 20, 21

Zobrest v. Catalina Foothills School District,
509 U.S. 1 (1993)..... 20, 22

Constitution, statutes and rules:

U.S. Const., Amend. I..... 1, 21

28 U.S.C. 1254(1)..... 1

R.C. Chapter 3313 1

R.C. Chapter 3314 1

R.C. 3313.974 3

R.C. 3313.975 ..... 3, 6, 15, 19

R.C. 3313.976 ..... 3, 4, 5, 6

R.C. 3313.977 ..... 3, 5, 13

R.C. 3313.978 ..... 3, 4, 5, 6, 13

R.C. 3313.979 ..... 3, 5

R.C. 3317.02 16

R.C. 3317.03 16

R.C. 3317.08 16

R.C. 3327.061 16

Wis. Stat. 119.23(2)(a)(1) 13

Other Authorities:

Martha Minnow, *Reforming School Reform*,
68 Fordham L. Rev. 257 (1999) 16

Ohio Am. Sub. H.B. 282, Section 4.34 (1999) 7

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Dr. Susan Tave Zelman, the State of Ohio, and Saundra Berry, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 234 F.3d 945 (6th Cir. 2000) (Petitioners' Appendix ("Pet. App.") at 1a-58a). The final order of the district court is reported at 72 F.Supp.2d 834 (N.D. Ohio 1999) (Pet. App. at 61a-126a). The order of the district court granting a preliminary injunction is reported at 54 F.Supp.2d 725 (N.D. Ohio 1999) (Pet. App. at 133a-65a).

JURISDICTION

The court of appeals entered judgment on December 11, 2000. (Pet. App. at 1a-58a.) The court of appeals denied a petition for rehearing on February 28, 2001. (Pet. App. at 166a.) The jurisdiction of this Court is proper under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The relevant provisions of state law, Ohio Revised Code Chapters 3313 and 3314, are reprinted in Petitioners' Appendix at 168a-98a.

STATEMENT OF THE CASE

I. The Education Crisis In Cleveland.

In the summer of 1995, Ohio's General Assembly adopted the Pilot Project Scholarship Program to address an educational crisis within the Cleveland City School District. By almost any measure—test scores, graduation rates, student discipline, judicial intervention, and financial stability—an assessment of the Cleveland schools' performance led to the same conclusion: a child's prospect for getting a decent education from Cleveland's public schools was dismal.

Earlier in 1995, the federal district court overseeing the Cleveland desegregation case had ordered the State Superintendent to assume operational and managerial control of the district. *Reed v. Rhodes*, No. 1:73CV1300, 1995 U.S. Dist. Lexis 3814 (N.D. Ohio March 3, 1995). (Petitioners have lodged copies of this unreported decision with the Clerk.) In taking this extraordinary action, the court cited the absence of fiscal, managerial, and operational controls, and the presence of a "financial crisis of magnitude." *Id.* at *6.

In March 1996, the State Auditor echoed the court's concerns in a comprehensive audit of the Cleveland district. Cleveland City School District Performance Audit (March 15, 1996), http://www.auditor.state.oh.us. The district, the State Auditor noted, was mired in a "financial crisis that is perhaps unprecedented in the history of American education." *Id.* at pp. 1-1, 2-1. The crisis had reached such proportions that it prevented the district from providing even a minimally adequate education for its students. *Id.* Indeed, at the time of the 1996 report, only 9% of the district's high school students had passed all four sections of Ohio's ninth grade proficiency test. *See id.* at p. 2-3.

In these circumstances, many parents would have withdrawn their children from the public schools. In Cleveland, however, most of the families with school-age children were economically disadvantaged. *See* 1996 Audit at p. 1-4 ("72.5%" of the district's student body "are economically and academically disadvantaged. . . ."). They simply had no choice but to accept what the Cleveland public schools offered them.

II. Creation Of The Pilot Scholarship Program.

In response to these disturbing facts, the Ohio legislature offered one immediate innovation. On June 28, 1995, it passed an experimental low-income scholarship law. *See* Ohio Revised Code ("R.C.") 3313.974-979. The Pilot Project Scholarship Program ("Program") provides two types of general relief for poverty level families in the Cleveland school district: (1) it gives scholarship awards that may be used at the qualifying school of the parents' choice; and (2) it offers to public school students money grants that may be used to pay for private tutoring. R.C. 3313.975.

A. The Scholarship Program.

Ohio's Scholarship Program establishes a pilot project for *any* school district in the State that has been the subject of a federal court order "requiring supervision and operational management of the district by the state superintendent." R.C. 3313.975(A). Cleveland is currently the only Ohio school district falling within that category.

The Program provides scholarships to children residing in the Cleveland school district in grades kindergarten through eighth grade. In determining which resident children are awarded these scholarships, the Program

requires the State Superintendent to establish eligibility criteria that "give preference to students from low income families," which the Program defines as families whose income is below 200% of the poverty line. R.C. 3313.978(A). In implementing this provision, the State Superintendent gives an absolute preference to children from low-income families: "Scholarships may be awarded to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement." Cleveland Scholarship and Tutoring Program, Administration Procedures Manual at p. 1-11 (emphasis in original) (R. 96 at 759, Court of Appeals' Appendix ("C.A. App.") at 1358). When there are more qualified low-income applicants than scholarships available, the State Superintendent conducts a lottery to award scholarships among these applicants.

The amount of the scholarship likewise depends on family income. For low-income families, the State caps a participating school's tuition at $2,500 and pays 90% of whatever tuition the school actually charges. R.C. 3313.976(A)(8); 3313.978(A). For other families, the State pays 75% of a school's tuition, up to a maximum of $1,875 (75% of $2,500). *Id.* Since the Program gives a preference to low-income families, most scholarships fall into the former category.

The Program permits the participation of all private schools, whether religious or nonreligious, so long as they are located within the boundaries of the Cleveland school district and meet the State's secular educational adequacy standards, which apply statewide. R.C. 3313.976(A)(1), (3). Eligibility to participate in no manner turns on whether a private school has a religious affiliation or includes religious teaching in its curriculum. Because scholarship recipients themselves select among the participating schools, the State

exercises no control over the extent to which these scholarships are used to attend religious rather than nonreligious private schools.

The State Superintendent provides information about the Program to all students in the Cleveland School District, and sets a deadline for the submission of applications. R.C. 3313.978(A). After a student is selected to participate in the Program, his parent applies to a participating private school. R.C. 3313.978(A)(2)(a). The school then notifies the parent as to whether the child has been admitted. R.C. 3313.978(A)(2)(b). To ensure that scholarship recipients may choose which school to attend, the Program requires participating schools to admit students in accordance with rules and procedures established by the State Superintendent. If the number of applicants exceeds the available spaces in a particular school, the school must give priority to students enrolled during the preceding year, siblings of students enrolled during the preceding year, and students from low-income families. R.C. 3313.977(A)(1)-(A)(3). The school must fill any remaining spaces by lot. R.C. 3313.977(A)(4).

No school participating in the Program may "discriminate on the basis of race, religion, or ethnic background." R.C. 3313.976(A)(4). Thus, no participating religious school may limit admission to students of its own faith. Furthermore, participating schools must "not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." R.C. 3313.976(A)(6).

Each scholarship is "payable to the parents of the student entitled to the scholarship," to be used at whichever participating school has been selected by the student's parents. R.C. 3313.979. The State mails these scholarship checks to the selected school, where the parents endorse the

checks over to the school to meet their tuition obligations. *Simmons-Harris*, 234 F.3d at 948 (Pet. App. at 4a). The Program also permits public school districts adjacent to the pilot project district to participate in the Program and "receive scholarship payments on behalf of parents." R.C. 3313.976(C).

Approximately 3,800 students enrolled in the Program during the 1999-2000 school year. Affidavit of Saundra Berry ¶ 5 (R. 96 at 733, C.A. App. at 1332). Over 60% of these children came from families with income at or below the poverty line. *Id.* at ¶10 (R. 96 at 1082, C.A. App. at 1679). The students chose among 56 participating schools, 46 of which were religiously affiliated. *Simmons-Harris*, 234 F.3d at 949 (Pet. App. at 5a).

B. The Tutoring Program.

The Program also provides tutorial assistance grants for kindergarten through eighth grade students who remain in the public schools in Cleveland. R.C. 3313.978(B). Under these provisions, parents may arrange for registered tutors to provide assistance to their children and then submit bills for those services to the Superintendent for payment. R.C. 3313.976(D). The Superintendent must offer as many tutorial assistance grants as she does scholarships. R.C. 3313.975(A). Students apply for the grants by the first day of the school year, and qualify for either 75% or 90% of the grant amount (up to $360), depending on family income. R.C. 3313.978(B), (C)(3). *See* Affidavit of Lytle Davis ¶ 4 (R. 96 at 1088, C.A. App. at 1685).

C. Early Research Findings

The Ohio General Assembly, in enacting the Program, required the State to contract with an independent

research entity to assess and evaluate the Program's operation and results. Ohio Am. Sub. H.B. 282, Section 4.34 (1999). Accordingly, the Ohio Department of Education retained researchers at Indiana University to evaluate the Program, which took effect in the 1996-97 school year. The Indiana researchers found improved test scores in language and science for scholarship students, as compared with public school students. Affidavit of Kim Metcalf ¶17 (R. 95 at 62, C.A. App. at 658). Paul E. Peterson of Harvard University conducted a similar study, concluding that scholarship students "did at least as well – and in some subjects better than – the students in the public schools." Affidavit of Paul E. Peterson at 34 (R. 95 at 281, C.A. App. at 876). Both researchers also found that parents of scholarship students are significantly more satisfied with their children's schools than parents of public school students, particularly with regard to teachers, academic standards, order and discipline, social activities, and other pupils at the school. Metcalf Aff. at ¶16 (R. 95 at 62, C.A. App. at 658). *See, also,* Peterson Aff. at 42-44 (R. 95 at 289-91, C.A. App. at 884-86) (confirming evidence of parental satisfaction).

III. The Litigation.

In January 1996, respondents challenged the Program in state court on a variety of grounds. The state trial court upheld the constitutionality of the Program, but the state court of appeals reversed. On appeal, the Ohio Supreme Court found that the Program does not violate the Establishment Clause, but held that the original enactment of the Program violated the "single subject" requirement imposed by the Ohio Constitution. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). The Ohio General Assembly reenacted the Program on June 29, 1999.

In July 1999, respondents mounted a challenge against the revised program, this time in federal district court. In contrast to their earlier multi-pronged attack, respondents in their federal action relied solely on the Establishment Clause. Two groups of students and schools participating in the Program intervened in the Program's defense. On August 24, 1999, the District Court granted a preliminary injunction against the Program. *Simmons-Harris*, 54 F.Supp.2d at 741-42 (Pet. App. at 164a-65a). Three days later, on the State's motion, the District Court stayed its preliminary injunction insofar as it applied to students who had participated in the Program during the previous academic year. (Pet. App. at 130a-32a). The State then sought relief from the United States Court of Appeals for the Sixth Circuit to extend the stay of the preliminary injunction to encompass children new to the Program in 1999; however, that court did not rule on the motion. On November 5, 1999, this Court, by a five to four vote, granted the State's application for a full stay of the preliminary injunction. *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999) (Pet. App. at 127a).

The District Court issued its final opinion and order on December 20, 1999, granting summary judgment in favor of the plaintiffs and enjoining administration of the Program in its entirety. *Simmons-Harris v. Zelman*, 72 F.Supp.2d 834, 865 (Pet. App. at 126a). The District Court stayed its own injunction pending review by the Sixth Circuit. *Id.*

On December 11, 2000, a divided panel of the Sixth Circuit affirmed the District Court's permanent injunction. The Court held that the Program violates the Establishment Clause on the grounds that it (1) has the primary effect of advancing religion, and (2) constitutes an endorsement of religion and sectarian education. *Simmons-Harris v. Zelman*, 234 F.3d 945 (Pet. App. at 1a-58a).

The Sixth Circuit determined, first, that it could not consider other educational options available to Cleveland parents, such as community schools. (Community, or "charter," schools are public schools that operate independently of any school district.) Since the Program is set forth in a separate chapter of the Ohio Revised Code and respondents had challenged only the Scholarship Program, the Court concluded that the other options available were "at best irrelevant." *Id.* at 958 (Pet. App. at 23a-24a).

The panel majority further concluded that this Court's decision in *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), controlled. The Court of Appeals reasoned that in both *Nyquist* and the Cleveland program, the majority of schools participating in the programs were religious. *Simmons-Harris*, 234 F.3d at 958 (Pet. App. at 25a). Even though the Ohio program is open to both religious and non-religious schools, the panel determined that, in fact, the Program was not neutral. Referring to "facts" not in the record, the panel found that the relatively low scholarship amount discourages non-religious schools from participating. *Id.* at 959 (Pet. App. at 25a-26a). Since the majority of students receiving scholarships attend religious schools, the court found that parents had no "meaningful public school choice." *Id.* at 960 (Pet. App. at 28a). Putting aside the feature of the Program that money flows to religious schools solely as a result of parental decisions, the Court of Appeals concluded that the Cleveland program directly funnels monetary subsidies to religious institutions. *Id.*

Judge Ryan dissented. In his view, the New York statute at issue in *Nyquist* was "totally different" from the Ohio statute in all essential respects. *Id.* at 963 (Pet. App. at 34a) (Ryan, J., dissenting). The purpose of the New York statute, Judge Ryan noted, was to benefit financially pressed

private schools, whereas the purpose of the Ohio program was to assist poverty-level students attending public schools. *Id.* at 964 (Pet. App. at 37a-38a). Unlike the New York City schools in *Nyquist*, the schools participating in Ohio's program do not receive direct financial grants and may not discriminate on the basis of religion. *Id.* at 965 (Pet. App. at 38a). Quite apart from these factual distinctions, Judge Ryan concluded that this Court's post-*Nyquist* decisions may well undermine *Nyquist*'s continuing vitality—at least as applied to a genuine private choice program such as Ohio's. *Id.* at 973 (Pet. App. at 55a-56a).

On December 22, 2000, the State filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Court of Appeals denied the petition on February 28, 2001. (Pet. App. at 166a-67a.) On March 8, 2001, the court issued a stay of its mandate pending the filing of petitions for certiorari.

REASONS FOR GRANTING THE WRIT

I. This Case Presents An Important Federal Question.

This case presents a fundamental constitutional issue of profound importance to education policy in the United States. In 1995, the City of Cleveland faced a crisis in public education. The State of Ohio responded carefully and comprehensively to the systemic social and economic challenges presented by that crisis, relying, in part, on parental choice created through low-income scholarships. But these challenges are far from unique to Cleveland. They are, rather, part of the national debate over education reform, in general, and the vices or virtues of parental choice, in particular. This case now comes before the Court because, as this debate rages and lawmakers and parents nationwide

struggle to find answers, a cloud of constitutional uncertainty has cast its shadow on many of the most important policy questions under discussion.

In particular, there is genuine confusion over the proper meaning of this Court's Establishment Clause jurisprudence. This Court saw fit to leave unreviewed the landmark decision of the Wisconsin Supreme Court upholding, by an overwhelming margin, the constitutionality of a pioneering school choice program in Milwaukee. Nevertheless, opponents of choice have remained steadfast and unshaken. They have carried on an unrelenting nationwide battle against school choice, and they have now succeeded in the Sixth Circuit. As a result, the entire issue of the constitutionality of school choice cries out for resolution.

This case presents an ideal vehicle for addressing the important constitutional question it presents. Earlier state court litigation has resolved all state constitutional issues. The only issue remaining is whether the Cleveland Scholarship Program is consistent with the Establishment Clause. This sharply defined question arises on a fully developed record that elaborately documents the operation of the Program and the range of educational choices available to Cleveland parents.

Not only is the resolution of this issue of vital interest to the parents and children of Ohio, it is of pivotal importance to the future of education policy across the country. Virtually any lawmaker in any State knows to a near certainty that new parental choice initiatives will face immediate constitutional challenge. Lawmakers also understand the disruption that the all-too-familiar cycle of lawsuits, injunctions, and stays inevitably has on educators, parents, and children. These realizations cannot help but influence lawmakers' and educators' decisions as to parental

choice's proper place, if any, within the overall context of education reform. Public policy debates accordingly are being shunted onto constitutional sidetracks, delaying reform efforts, while the underlying legal issues await this Court's attention.

Meanwhile, parents in Ohio and elsewhere face the here-and-now problem of providing a proper education for their young children. These families, understandably, do not wish to wait several years—what may amount to an educational lifetime for a child—to learn whether traditional educational methods will work and current conditions will improve. Both Ohio's families and States across the nation need guidance that only this Court can provide.

II. The Sixth Circuit's Decision Conflicts With The Wisconsin Supreme Court's Decision In *Jackson v. Benson*.

The State of Wisconsin was the pioneer in school choice. There, as in Ohio, opponents of reform assailed a carefully crafted program that aids thousands of children in failing schools, claiming that the program violated this Court's pronouncements on the meaning of the Establishment Clause. The resulting litigation was protracted but, ultimately, the Wisconsin Supreme Court, by a 4-2 vote, sustained a Milwaukee program—a program remarkably similar to Ohio's. *Jackson v. Benson*, 578 N.W.2d 602 (Wisc. 1998). We now explain the similarities between the two programs, and then show how the two decisions squarely conflict.[1]

---

[1] The Wisconsin Supreme Court's decision presents the most demonstrable conflict with the Sixth Circuit's decision because of the close similarities between the programs at issue. We note, however, the serious tensions in the burgeoning case law, as illustrated by the Ohio Supreme Court's review of the Cleveland program, the protracted litigation over Florida's school choice program, and the conflicting outcomes being reached in choice-related cases in other regions of the country. *See, e.g., Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999), and *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999) (both holding that exclusion of religious schools from Maine's education tuition program does not violate the Establishment Clause); *Campbell v. Manchester Bd. of School Comm'rs*, 641 A.2d 352 (Vt. 1994) (finding that tuition reimbursement for a religious school does not violate the Establishment Clause). These tensions reinforce the need for this Court to bring clarity to this constitutional arena.

Both the Wisconsin and Ohio programs provide scholarships to low-income elementary school students in troubled, urban school districts. Wis. Stat. 119.23(2)(a)(1); R.C. 3313.977-3313.978. Both programs make scholarship checks payable to the parents of participating students, who must endorse the checks over to the schools. *Jackson*, 578 N.W.2d at 609; *Simmons-Harris*, 234 F.3d at 948-49 (Pet. App. at 4a). In both programs, most participating schools are religiously affiliated, *see Jackson*, 578 N.W.2d at 619, n. 17; *Simmons-Harris*, 234 F.3d at 949 (Pet. App. at 5a), and there are no restrictions on the use of the available funds. *Jackson*, 578 N.W.2d at 609; *Simmons-Harris*, 234 F.3d at 949 (Pet. App. at 5a). Moreover, in analyzing the constitutionality of these two programs, both the Wisconsin Supreme Court and the Sixth Circuit applied the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and later precedents of this Court.

But despite all of these factual similarities and the common use of the *Lemon* framework, the Wisconsin court and the Sixth Circuit arrived at diametrically opposite conclusions. The Wisconsin Supreme Court upheld the Milwaukee scholarship program on the grounds that it "provide[s] public aid to both sectarian and non-sectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion, and (2) only as a result of numerous private choices of the individual parents of school-age children." *Jackson*, 578 N.W.2d at 617. The Wisconsin court concluded that this Court's *Nyquist* decision was not controlling because the program at issue in *Nyquist* directed aid "exclusively to private schools and their students." *Id.* at 614, n. 9. The Wisconsin court found that the Milwaukee program, in contrast, "provides a neutral benefit to qualifying parents of school-age children in Milwaukee Public Schools." *Id.*

The Wisconsin Supreme Court squarely rejected an argument that the program was invalid because 89 out of the 122 participating schools in Milwaukee were religiously affiliated. In that court's view, a proper constitutional analysis focuses not on the money expended by the government, but on "the nature of the benefit received by the recipient." *Id.* at 619, n. 17, citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 843 (1995). Additionally, the court took guidance from *Mueller v. Allen*, 463 U.S. 388 (1983), in finding that the percentage of participating religious schools was irrelevant to the constitutional inquiry. *Jackson v. Benson*, 578 N.W.2d at 619, n. 17, citing *Mueller*, 463 U.S. at 401.

The Sixth Circuit took an opposite analytical tack and reached a flatly contrary result. Unlike the Wisconsin court, the Sixth Circuit defined the beneficiaries of the Ohio program as the schools that participate, not the students or

their parents. In branding the Program indistinguishable from the one at issue in *Nyquist*, the Sixth Circuit stated: "[I]n both cases, the great majority of *the schools benefited by these tuition dollars* are sectarian." *Simmons-Harris*, 234 F.3d at 958 (Pet. App. at 25a). (Emphasis added.) The court further stated that the Ohio program is *not* an instance where "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." *Id.* at 960 (Pet. App. at 27a), citing *Nyquist* at 782, n. 38. The Sixth Circuit brushed aside the fact that the Ohio program was specifically designed for the benefit of the poorest of the many poor children in the Cleveland school district. The court further disregarded the state law requirement that at least half of the children participating in the Program must be drawn from the public schools. R.C. 3313.975(B).

The Sixth Circuit's assessment of the Cleveland program's neutrality between secular and sectarian education also focuses on the nature of the participating schools, rather than on individual parents and students. Despite the fact that the Program does not restrict entry into the Program to religious schools, the Sixth Circuit found this important facial neutrality insufficient. *Simmons-Harris*, 234 F.3d at 959 (Pet. App. at 25a). The court concluded that, since most participating schools are religious and most of the participating students are enrolled at religious schools, "the program clearly has the impermissible effect of promoting sectarian schools." *Id.* at 959 (Pet. App. at 25a-27a).[2]

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[2] In part because the briefing never addressed the issue, the Sixth Circuit also seriously misconstrued Ohio law in finding a "financial disincentive" for the participation in the reform initiative of adjacent public schools—namely, the better performing suburban schools that surround Cleveland. The Sixth Circuit found (incorrectly) that such schools would receive a *total* of $2,250 for each Cleveland public school

The judicial focus on schools, not parents and children, led the court below to bypass the voluminous evidence regarding the range of educational alternatives within the Cleveland School District, including affidavits from parents of participating students who described the alternatives they considered and their reasons for selecting a particular school. (R. 96 at 1026-76, C.A. App. at 1624-73.) The Sixth Circuit instead relied upon a law review article and concluded that the relatively low scholarship amount discouraged the participation of non-religious schools. *See Simmons-Harris*, 234 F.3d at 959 (Pet. App. at 25a-26a), citing Martha Minnow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999). Indeed, the Sixth Circuit dismissed other educational options available to Cleveland parents as irrelevant. Taking a rigidly formalistic view, the court below emphasized that the scholarship program and another Cleveland educational alternative, the Community School program, are codified in separate chapters of the Ohio Revised Code. *Simmons-Harris*, 234 F.3d at 958 (Pet. App. at 23a-24a). It then held that this fact alone demands that the scholarship program's sectarian "effects" be viewed in

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student they admitted. *Simmons-Harris*, 234 F.3d at 959 (Pet. App. at 26a). In fact, any adjacent public school districts would receive an *additional* $2,250 in state funding, because scholarship students would be included in each suburban school district's total number of students (the "average daily membership," or "ADM") for purposes of calculating the amount of state funds the district receives. *See* R.C. 3317.03(I)(1), 3327.061 and 3317.08(A)(1). For instance, if a suburban public school district had chosen to participate in the Program during 2000-01, it would have received as much as $6,544 for each scholarship student it enrolled ($2,250 from the scholarship itself, in addition to the $4,294 amount from the ADM formula). *See* R.C. 3317.02(B), (N).

isolation from the incentives and choices made available by this 42-strong network of Cleveland community schools.

Unlike the Sixth Circuit, the Wisconsin court was deeply contextual in its approach, examining the Milwaukee scholarship program in light of other educational options available to Milwaukee's children. These options included, in addition to schools participating in the Scholarship Program, neighborhood public schools, other general public schools within the district, and specialized public schools. Only after reviewing these available options did the Wisconsin court conclude the Milwaukee program was not "skewed toward religion." *Jackson*, 578 N.W.2d at 618. Examined in its surrounding context, the Milwaukee program merely added religious schools to a pre-existing range of options for eligible children. This "seminal fact" took the Milwaukee program "out of the *Nyquist* construct" and "place[d] it within the framework of neutral education assistance programs." *Id.* at 614, n. 9. In contrast, the Sixth Circuit invalidated the Ohio program largely because that court focused not on the children receiving benefits, but on the private schools participating in the program. "We conclude that unlike *Mitchell*, *Agostini*, *Witters* and *Mueller*, the Ohio Scholarship Program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria." *Simmons-Harris*, 234 F.3d at 961 (Pet. App. at 29a).

These differences between the two decisions point not only to a stark conflict, but even more importantly to the lingering confusion over this Court's elaborate body of Establishment Clause precedents. This conflict not only clouds the school reform debate in Wisconsin and Ohio, it promises to affect the development of education reforms nationwide.

III. The Sixth Circuit's Decision Conflicts With This Court's Decisions.

In condemning the Cleveland Scholarship Program as violative of the Establishment Clause, the Sixth Circuit all but ignored two key, uncontested facts about the Program: (1) it is neutral on its face, giving no preference to religious schools over secular schools; and (2) no money flows to religious schools unless the parent of a scholarship student makes an independent choice to send her child to such a school. In brushing aside these factors, the Court failed to take into account the considerable post-*Nyquist* developments in this Court's Establishment Clause jurisprudence. The resulting decision—in particular its extreme reading of *Nyquist*—cannot be squared with this Court's recent pronouncements.

Since its earliest decisions applying the Establishment Clause to the States, this Court's religion cases have stressed the pivotal importance of neutrality. Neutrality has thus played an important role in almost every effort to interpret the Establishment Clause or to reconcile it with the Free Exercise Clause. *See, e.g., Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). In *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995), the Court noted that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Again in *Agostini v. Felton*, 521 U.S. 203, 231 (1997), the Court emphasized that a program's criteria do not create financial incentive to undertake religious education where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." And *Mitchell v. Helms*, 530 U.S. 793, 830 (2000) (plurality), observes that the Court has

"consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."

To that end, a government may not gerrymander the contours of a program in order to benefit or disfavor particular religions. *See, e.g., Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 690 (1994). But there is no suggestion that Ohio has done so here. To the contrary, the Ohio program provides eligible parents with a neutral, secular benefit—funds enabling them to select the best possible educational opportunities for their children. This case is therefore *not* one where the nature of the benefits themselves—like creationism reading materials or Ten Commandments wall placards—are imbued with overtones of sectarianism. *Cf. Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down statute prohibiting the teaching of evolution theory); *Stone v. Graham*, 449 U.S. 39 (1980) (striking down statute requiring posting of Ten Commandments in public schools).

Having chosen to provide facially non-religious benefits, the Ohio program distributes them neutrally to students within "any school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent," R.C. 3313.975(A), and especially to low-income students. Although Cleveland, where religious schools are predominant, is currently the only district falling into that category, it is possible that other school districts, including districts with different religious demographics, could be included in the Scholarship Program in the future. *See Simmons-Harris v. Goff*, 711 N.E.2d at 213-14.

This latter point is fundamental because Cleveland's longstanding preponderance of religiously-affiliated private

schools serving low- and moderate-income students did not arise as a result of any government action, much less the Scholarship Program. It would be incongruous—and unconstitutional under the Establishment Clause—to strike down a scholarship program in Cleveland while permitting an identical program in another community, with equally troubled schools, where secular schools happened to control a larger share of the market. Because "[t]he Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools," *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring), the "proper" principle for Establishment Clause jurisprudence is "government impartiality, not animosity, toward religion." *Id.* at 717-18. That impartiality is manifest here.

A further hallmark of this Court's governing Establishment Clause precedents is emphasis on private choice. The Court's decisions therefore distinguish between programs that provide direct governmental funding to religious organizations and those in which governmental assistance flows to religious institutions only indirectly and as a result of decisions made by individual aid recipients. Just last Term, in *Mitchell v. Helms*, both the plurality opinion and the concurring opinion stressed the importance of independent choice. Both opinions noted that governmental aid is permissible when, as the concurrence puts it, "the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use." *Mitchell*, 530 U.S. at 841 (O'Connor, J., joined by Breyer, J., concurring), citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 488 (1986), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 10 (1993). In these circumstances, "[a]ny aid. . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Mitchell*, 530 U.S. at 841 (O'Connor, J., joined by Breyer, J., concurring) (internal citations omitted). *See, also, Mueller v. Allen*, 463 U.S. 388, 399 (1983) (distinguishing between private choice programs and direct aid programs).

True private choice programs, by their very nature, cannot have the forbidden "primary effect" of the government "advancing religion." That is because, when students or parents decide where aid will be applied, any religious "advancement" that occurs is attributable to private choices, not governmental action. "The fact that aid flows to the religious school and is used for the advancement of religion is therefore wholly dependent on the student's private decision." *Mitchell*, 530 U.S. at 842 (O'Connor, J., joined by Breyer, J., concurring). Accordingly, this Court's decisions hold, contrary to the Sixth Circuit, that when individuals determine whether and how much money flows to religious institutions, it is no more troubling than when a government employee donates her paycheck (all derived from public funds) to a church. *Witters*, 474 U.S. at 486-88; accord *Rosenberger*, 515 U.S. at 880 (Souter, J., dissenting).

To be sure, the individuals' private choices must be truly independent to pass constitutional muster. This Court has made clear that the First Amendment does not tolerate government coercion of religious beliefs or practices or the imposition of the majority's viewpoint through social or financial pressures, however subtle. *See, e.g., Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 310-12 (2000); *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Here, however, there can be no realistic contention that Ohio is fostering subtle social coercion of parents to withdraw from public schools and enroll their children in private, sectarian schools. Ohio law offers parents a range of educational options: attending a public school in Cleveland, with or without tutoring assistance; attending a private school in Cleveland, with a scholarship for tuition; attending a community school in

Cleveland; or attending a participating public school outside the Cleveland School District. *See Simmons-Harris* at 964-65 (Pet. App. at 37a-38a) (Ryan, J., dissenting). The parental decision as to which of these options to choose—far from being subject to subtle coercion favoring religion—is made in private, with enrollment in the secular, Cleveland public schools the default option. *Cf. Santa Fe*, 530 U.S. at 312 (pre-game prayer had improper effect of coercing those present to participate in an act of worship); *Lee*, 505 U.S. at 593 (clergy-led invocation had coercive and intrusive effect).

Likewise, the Program also "creates no *financial* incentive for parents to choose a sectarian school," *Zobrest*, 509 U.S. at 10 (emphasis added), and so parents remain free to choose, without any skewing of their decision, the best educational option for their child. The court below counted the Program's comparatively low per-pupil expenditure as a factor undermining its constitutionality. But it might more rationally have concluded the opposite: that the Program can in no way be deemed to favor sectarian schools because it permits students to choose sectarian schools *only* if they are willing to shoulder a significant $250 annual co-payment (not required of public school students) and *only* if they are willing to forego the much higher State-aid levels that would follow them to a school chosen from one of the three categories of necessarily secular schools—a Cleveland public school ($7,097 in State aid versus the $2,250 scholarship), a suburban public school (a maximum of $6,544 in State aid versus the $2,250 scholarship), or a Cleveland community school ($4,518.79 in State aid). *See Simmons-Harris*, 234 F.3d at 959 (Pet. App. at 26a); R.C. 3317.02(B), (N); Affidavit of Steven Puckett ¶ 14 (R. 96 at 1017, C.A. App. at 1615).

Where, as here, no social coercion or financial incentives are brought to bear on behalf of religion, this Court has specifically rejected the conclusion reached below—that an educational program does not offer "real choice" if a high percentage of participating schools are religious. In *Mueller*, for example, the Court held that it was not constitutionally relevant that the overwhelming majority of the tax deductions ("96%") were for the expenses of parents who sent their children to religious schools. *Mueller*, 463 U.S. at 401. *Mueller* emphasized that it is the *ex ante* neutrality of a program that matters, not the statistician's tally of *ex post* results aggregated over thousands of independent parental decisions:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

Id.

Similarly, in *Agostini v. Felton*, more than 90% of the private schools participating in the program were religious. *Agostini*, 521 U.S. at 210. Even so, this Court reaffirmed the principle that a neutral program will not be invalidated solely on the basis of statistics concerning the number of students using aid in parochial settings. *Id.* at 229-30.

The Sixth Circuit majority nevertheless held the precise opposite, relying almost exclusively on *Nyquist*. *See Simmons-Harris*, 234 F.3d at 958 (Pet. App. at 24a-25a). *Nyquist* found the Establishment Clause neutrality requirement violated by a New York City tuition-reimbursement program that was designed exclusively to benefit the parents of private (as opposed to public) schoolchildren in a geographic area that was not identified on a basis of educational need. *Nyquist*, 413 U.S. at 782-83 & n. 38. But, although the Sixth Circuit gave inadequate weight to it, *Nyquist* carefully reserved decision on "a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782, n. 38.

In conspicuous contrast to *Nyquist*, the Ohio program extends as many tutorial assistance grants to public school students as it does scholarships to private school students, permits all suburban Cleveland public schools to participate, is open to *any* Ohio district that meets neutral criteria of educational and management failure, and is focused on the needs of low-income students. The Cleveland initiative is therefore precisely the type of public *and* private "scholarship" program on which *Nyquist* carefully reserved judgment.

Because the Ohio program is vastly different from the New York program considered in *Nyquist*, the Court need not decide in this case whether *Nyquist* remains good law. Nevertheless, even a cursory review of the Court's recent Establishment Clause precedents attests that *Nyquist*'s analysis has not withstood the test of time. As this Court emphasized in *Agostini*, the "general principles" the Court uses "to evaluate whether government aid violates the Establishment Clause have not changed" in recent years.

Agostini, 521 U.S. at 222. The Court continues to ask, as it always has, "whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Id.* at 222-23. What *has* changed is the Court's articulation of "the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. As *Agostini* and *Mitchell* illustrate, those criteria have recently come into much sharper focus. In particular, where, as here, (1) a non-religious category of benefit is (2) conferred on a neutrally defined class (3) in circumstances of true private choice, the Court has uniformly held that no Establishment Clause violation exists.

We acknowledge, of course, that no lower court, including the Sixth Circuit, should conclude that the Court's "more recent cases have, by implication, overruled an earlier precedent." *Agostini*, 521 U.S. at 237. In the final analysis, it is precisely this exclusive authority to overrule this Court's decisions that brings the State of Ohio and its senior education officials to the Court today. Educators nationwide now confront paralyzing judicial confusion, rooted ultimately in *Nyquist*, over the question of how recent Establishment Clause jurisprudence applies to neutral, indirect programs of non-religious aid that benefit religious schools solely as a result of independent choice. Only this Court can answer that question.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

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May 23, 2001

(2)

Supreme Court, U.S.
FILED

No. 00 1751 MAY 23 2001

OFFICE OF THE CLERK

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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8 01 AP

TABLE OF CONTENTS

PAGE

Appendix A
(U.S. Court of Appeals Opinion, dated December 11, 2000)..... 1a

Appendix B
(U.S. District Court, Northern District of Ohio, Eastern Division, Judgment Entry, dated December 20, 1999) 59a

Appendix C
(U.S. District Court, Northern District of Ohio, Eastern Division, Order, dated December 20, 1999)..... 61a

Appendix D
(U.S. Supreme Court, Case No. 99A320, Order in Pending Case, dated November 5, 1999). 127a

Appendix E
(U.S. District Court, Northern District of Ohio, Eastern Division, Order, dated August 27, 1999) .. 128a

Appendix F
(U.S. District Court, Northern District of Ohio, Eastern Division, Order, dated August 24, 1999) .. 133a

Appendix G
(U.S. Court of Appeals, Case No. 00-3055/3060 /3063, Order denying rehearing, dated February 28, 2001)..... 166a

Appendix H
(Ohio Rev. Code 3313.974)..... 168a

Appendix I
(Ohio Rev. Code 3313.975)..... 170a

Appendix J
(Ohio Rev. Code 3313.976)..... 173a

Appendix K
(Ohio Rev. Code 3313.977)..... 176a

Appendix L
(Ohio Rev. Code 3313.978)..... 178a

Appendix M
(Ohio Rev. Code 3313.979)..... 183a

Appendix N
(Ohio Rev. Code 3314.01)..... 186a

Appendix O
(Ohio Rev. Code 3314.02)..... 189a

Appendix P
(Ohio Rev. Code 3314.04)..... 194a

Appendix Q
(Ohio Rev. Code 3314.06)..... 195a

Appendix R
(Ohio Rev. Code 3314.11)..... 197a

Appendix S
(Ohio Rev. Code 3314.12)..... 198a

Appendix A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

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File Name: 00a0411p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DORIS SIMMONS-HARRIS; MARLA FRANKLIN; STEVEN BEHR, Rev.; SUE GATTON; MARY MURPHY; MICHAEL DEBOSE; CHERYL DEBOSE; GLENN ALTSCHULD; DEIDRA PEARSON, *Plaintiffs-Appellees,*	:	Nos. 00-3055/ 3060/3063
v.	:	
SUSAN TAVE ZELMAN, Superintendent of Public Instruction, State of Ohio, et al., *Defendants-Appellants (00-3055/3060),*	:	
SENEL HERMAN TAYLOR, et al., *Intervenors-Defendants-Appellants (00-3055),*	:	
HANNA PERKINS SCHOOL, et al., *Intervenors-Defendants-Appellants (00-3063).*	:	

Appeal from the United States District Court
For the Northern District of Ohio at Cleveland.
Nos. 99-01740, 99-01818—Solomon Oliver, Jr.,
District Judge.

Argued: June 20, 2000

Decided and Filed: December 11, 2000

Before: RYAN, SILER, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Clint Bolick, INSTITUTE FOR JUSTICE, Washington, D.C., Edward B. Foley, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, David J. Young, SQUIRE, SANDERS & DEMPSEY, Columbus, Ohio, for Appellants. Robert H. Chanin, BREDHOFF & KAISER, Washington, D.C., Marvin E. Frankel, KRAMER, LEVIN, NAFTALIS & FRANKEL, New York, New York, for Appellees. **ON BRIEF:** Clint Bolick, Matthew Berry, INSTITUTE FOR JUSTICE, Washington, D.C., David C. Tryon, PORTER, WRIGHT, MORRIS & ARTHUR, Cleveland, Ohio, Edward B. Foley, Karen L. Lazorishak, Roger F. Carroll, James G. Tassie, Mary Lynn Readey, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, David J. Young, Michael R. Reed, SQUIRE, SANDERS & DEMPSEY, Columbus, Ohio, for Appellants. Robert H. Chanin, Andrew D. Roth, BREDHOFF & KAISER, Washington, D.C., David G. Latanick, CLOPPERT, PORTMAN, SAUTER, LATANICK & FOLEY, Columbus, Ohio, Elliot M. Mincberg, Judith E. Schaeffer, PEOPLE FOR THE AMERICAN WAY,

Washington, D.C., Raymond Vasvari, ACLU OF OHIO FOUNDATION, INC., Cleveland, Ohio, Steven K. Green, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., Marvin E. Frankel, KRAMER, LEVIN, NAFTALIS & FRANKEL, New York, New York, for Appellees. William E. Thro, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, M. Reed Hopper, PACIFIC LEGAL FOUNDATION, Sacramento, California, Paul Clement, KING & SPALDING, Washington, D.C., Victoria W. Ni, REBOUL, MACMURRAY, HEWITT, MAYNARD & KRISTOL, New York, New York, Joshua R. Cohen, KAHRMAN, JACKSON & KRANTZ, Cleveland, Ohio, Nicholas A. Pittner, BRICKER & ECKLER, Columbus, Ohio, for Amici Curiae.

CLAY, J., delivered the opinion of the court, in which SILER, J., joined. RYAN, J. (32-53), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Defendants and Intervenors Dr. Susan Tave Zelman, *et al.*; Senel Taylor, *et al.*; and Hanna Perkins School, *et al.*, appeal from the order entered by the United States District Court for the Northern District of Ohio, enjoining on summary judgment the Ohio Pilot Project Scholarship Program on the ground that it violates the Establishment Clause of the First Amendment. For the following reasons, we **AFFIRM.**

I.

In 1995, Ohio's General Assembly adopted the Ohio Pilot Project Scholarship Program ("voucher program" or

"the program") in response to an order by the United States District Court that placed the Cleveland School District under the direct management and supervision of the State Superintendent of Public Instruction due to mismanagement by the local school board. The voucher program covers any state school district that has been the subject of a federal court order "requiring supervision and operational management of the district by the state superintendent." Ohio Rev. Code § 3313.975(A). The program provides scholarships to children residing within the applicable district in grades kindergarten through eighth grade. *See* Ohio Rev. Code § 3313.975(C)(1). The program gives "preference to students from low-income families," defining them as those whose families' income is less than 200% of the poverty line. *See* Ohio Rev. Code § 3313.978(A). "Scholarships may be awarded to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement." Cleveland Scholarship and Tutoring Program, Administration Procedures Manual, 1-11 (J.A. at 1358) (emphasis original). Over sixty percent of the children receiving scholarships in the program are from families with incomes at or below the poverty line.

The voucher program pays scholarships according to family income. The program requires participating private schools to cap tuition at $2500 per student per year and pays 90% of whatever tuition the school actually charges for low-income families; for other families, the State pays 75% of the school's tuition up to a maximum of $1875. *See* Ohio Rev. Code §§ 3313.976(A)(8), 3313.978(A). Each scholarship for children attending a private school is payable to the parents of the student entitled to the scholarship. Ohio Rev. Code § 3313.979. Scholarship checks are mailed to the school selected by the parents, where the parents are required to endorse the checks over to the school in order to pay tuition.

Schools wishing to be designated as program participants eligible to enroll scholarship students must register with the voucher program. Private schools located within the boundaries of the Cleveland school district which meet the State's educational standards may participate. *See* Ohio Rev. Code § 3313.976(A)(1) and (3). Schools are required to follow the program's priority rules regarding the placement of students and may not discriminate on the basis of race, religion, or ethnic background; advocate or foster unlawful behavior; or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion. *See* Ohio Rev. Code § 3313.976(A)(6). Public schools in districts adjacent to the district in which the voucher program is implemented may also register for the program and "receive scholarship payments on behalf of parents," but none of the public schools in districts adjacent to Cleveland have done so. Ohio Rev. Code § 3313.976(C). The checks for program participants at public schools are made out to the participating school district rather than to the parents. No public schools have registered for the program since its enactment.

For the 1999-2000 school year, 3,761 students enrolled in the program; 60% of the enrollees are from families at or below the poverty level. Of these, 3,632 (96%) are enrolled in sectarian schools. At one time in the course of the program, as many as 22% of the students enrolled in the program attended nonreligious schools. During the 1999-2000 school year, fifty-six schools registered to participate in the program; forty-six (82%) are church-affiliated. Program monies may be used by the participating schools for whatever purpose they deem appropriate; the voucher program does not place restrictions on the use of funds made available under the program.

The sectarian schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects. The sectarian schools also follow religious guidelines, including instruction in religion and mandated participation in religious services; interweaving of Christian doctrines with science and language arts classes; requiring that "all learning take place in an atmosphere of religious ideals," St. Vincent de Paul School, Parent Handbook 11 (1999-2000); and designing educational scholarship in order "to make ... faith become living, conscious, and active through the light of instruction ... religious truths and values permeate the whole atmosphere of the school." Saint Rocco School, Parent-Student Handbook 1 (1999-2000). Other sectarian schools in the voucher program believe that "the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer, and Sanctifier," Saint John Nottingham Lutheran School, Parent Handbook 2 (1999-2000); and to require students to "pledge allegiance to the Christian flag and to the Savior for whose Kingdom it stands, One Savior crucified, risen and coming again with life and liberty for all who believe." Calvary Center Academy, Parent-Student Handbook 24 (1999-2000).

In prior litigation, Doris Simmons-Harris, one of the Plaintiffs herein, brought a state court lawsuit challenging the constitutionality of the voucher program under multiple provisions of the Ohio Constitution, and under the Establishment Clause of the United States Constitution. On May 27, 1999, the Ohio Supreme Court issued a judgment in favor of Plaintiffs, holding that the 1995 voucher program had been enacted in violation of the one-subject rule of the Ohio Constitution, and "must be stricken" from the Ohio statute books. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). However, a majority of the justices

rejected Plaintiffs' claims that the program violated the Establishment Clause. *Id.* at 207-11, 218-19. Those justices reasoned that "[t]he *Nyquist* holding [had been] undermined" by subsequent cases and was thus no longer good law. *Id.* at 208. A concurring opinion noted that "[w]ith regard to the rest of the majority opinion [the section not dealing with the one-subject rule], ... I find a number of the other assertions by the majority to be advisory in nature." *Id.* at 216 (Douglas, J., joined by Resnick and Sweeney, JJ., concurring in the judgment only). Since this case, the Ohio Legislature has re-enacted the voucher program in a manner remedying the one-subject problem; however, the 1999 program is in all relevant aspects, the same as the original pilot scholarship program enacted by the Legislature in 1995.

On July 20, 1999, Simmons-Harris, the parent of a minor child enrolled in the Cleveland City School District for the 1999-2000 school year; Marla Franklin, a teacher in the Lorain City School District; and Steven Behr, pastor of Our Savior/Nuestro Salvado Church in Lorain, Ohio, filed suit in Case No. 1:99cv1740, against Defendant Dr. Susan Tave Zelman in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education, seeking to enjoin a portion of the program on the ground that it violated the Establishment Clause of the First Amendment. On July 29, 1999, Sue Gatton, chair of Citizens Against Vouchers; Mary Murphy, a teacher in the Cleveland City School District; Michael Debose, a pastor in Cuyahoga County, Ohio; Cheryl Debose and Glen Altschuld, Ohio Taxpayers; and Deidra Pearson, the parent of a child enrolled in the Cleveland City School District, filed suit in Case No. 1:99cv1818 against Defendants Dr. Susan Tave Zelman, in her official capacity as Superintendent; the State of Ohio through its General Assembly, Governor and other agents; and Saundra Berry, in her official capacity as Program

Administrator of the Ohio Pilot Scholarship Program, seeking the same injunctive relief as in Case No. 1:99cv1740.

Proposed Intervenors Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, and Amy Hudock, on their own behalf and as natural guardians of their respective children, filed an answer to Simmons-Harris' complaint on July 27, 1999. Proposed Intervenors Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland, and Delores Jones, filed an answer to Simmons-Harris' complaint on August 2, 1999.

On August 13, 1999, the district court held a preliminary injunction hearing in both cases, and on August 24, 1999, granted Plaintiffs the injunctive relief sought. In the same order, the district court consolidated the two cases, and found that the Ohio Supreme Court's decision in *Simmons v. Goff*, 711 N.E.2d 203 (Ohio 1999), did not preclude federal consideration of the constitutional challenge to the voucher program because the Ohio court's decision rested on a state ground which independently supported its resolution of the case. Thereafter, on August 27, 1999, the district court granted in part Defendants' motion for a stay of the preliminary injunction.

On August 24, 1999, the same day that the district court granted Plaintiffs' motion for a preliminary injunction, the State and the two intervening Defendants appealed that decision to this Court. After the district court's August 27, 1999, order granting a limited stay of its preliminary injunction, all Defendants filed revised briefs with this Court, appealing the preliminary injunction with regard to students who were new to the voucher program—i.e., the portion of the preliminary injunction not stayed by the district court's

August 27, 1999 order. While those appeals were pending, the State filed a motion for a stay of the preliminary injunction with the United States Supreme Court, which the Supreme Court granted by a vote of 5-4 on November 5, 1999, pending this Court's final disposition of the entire appeal. *See Simmons-Harris v. Zelman*, 120 S. Ct. 443 (1999). Thereafter, this Court entered an order on November 15, 1999, concluding that the Supreme Court's decision granting the State's motion for a stay rendered moot Defendants' pending motions for a stay in this Court. The case proceeded in the district court on an expedited basis.

On October 15, 1999, all parties stipulated that the handbooks, mission statements and brochures of the schools participating in the Cleveland scholarship program are "authentic, speak for themselves, have been made available to the parents of the scholarship students and are not false or misleading. Some of these documents however may not accurately reflect admission standards that had to be revised." Plaintiffs and Defendants both filed motions for summary judgment on November 1, 1999.

On November 29, 1999, the district court denied Intervenor Taylor's motion to have the following question certified to the Ohio Supreme Court: "Does Ohio law give preclusive effect to the resolution of the Establishment Clause claim in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999)?"

The district court granted Plaintiffs' motion for summary judgment on December 20, 1999, finding that the voucher program violated the Establishment Clause; enjoined Defendants from administering the program; and denied Defendants' motion for summary judgment. *See Simmons-Harris v. Zelman*, 72 F. Supp.2d 834, 836 (N.D. Ohio 1999). The court stayed its summary judgment order with Plaintiffs'

consent pending review by this Court. Defendants and Intervenors appealed to this Court on January 12, 2000.

II.

We recognize the significance that this issue holds for many members of our society. The issue of school vouchers has been the subject of intense political and public commentary, discussion, and attention in recent years, and we would be remiss if we failed to acknowledge the seriousness of the concerns this case has raised. We do not, however, have the luxury of responding to advents in educational policy with academic discourse on practical solutions to the problem of failing schools; nor may we entertain a discussion on what might be legally acceptable in a hypothetical school district. We may only apply the controlling law to the case and statute before us.

The courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another. The design or specifics of a program intended to remedy the problem of failing schools and to rectify educational inequality must be reserved to the states and the school boards within them, with one caveat: the proposed program may not run afoul of the freedoms guaranteed to all citizens in the Constitution. In other words, the determinations of states and school boards cannot infringe upon the necessary separation between church and state. We therefore consider the program presented before us under the controlling precedents of the United States Supreme Court and this Court to determine whether such infringement has occurred.

This Court reviews the district court's grant of summary judgment *de novo*. *See Coles v. Cleveland Bd. of Educ.*, 171 F.2d 369, 376 (6th Cir. 1999). Summary

judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no genuine issue of material fact when the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion...." U.S. Const., amend. I. In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the Supreme Court set forth the following test to determine whether a statute passes muster under the Establishment Clause: 1) the statute must have a secular legislative purpose; 2) the principal or primary effect of the statute must be one that neither advances nor inhibits religion; and 3) the statute must not foster excessive entanglement with religion. If a statute fails any portion of this test, it violates the Establishment Clause. *Id.* The Supreme Court has applied the *Lemon* test regularly in the context of schools and education. *See, e.g., Kiryas Joel Sch. Dist. v. Gromet*, 512 U.S. 687 (1994) (drawing a separate school district for one religion violates the Establishment Clause); *Stone v. Graham*, 449 U.S. 39 (1989) (posting Ten Commandments on walls of public school violates Establishment Clause); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (holding that Establishment Clause does not prevent religious organizations from participating in federally funded program); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (overturning statute which required the teaching of Creationism in public schools); *Aguilar v. Felton*, 473 U.S. 402 (1985) (paying public school employees to teach in parochial school violates the Establishment Clause), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Grand*

Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985) (finding a shared time program to be a violation of Establishment Clause), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Mueller v. Allen*, 463 U.S. 388 (1983) (permitting taxpayers to deduct from state income tax expenses incurred in sending children to parochial schools does not violate Establishment Clause); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976) (finding no violation of Establishment Clause in providing government aid to both public and private universities).

The Supreme Court and individual justices have introduced variations on the *Lemon* test in other contexts. *See Lee v. Wiseman*, 505 U.S. 577, 592-98 (1992) (using coercion test developed by Justice Kennedy to hold that school could not provide for nonsectarian prayer to be given at graduation by school-selected clergyman); *County of Allegheny v. ACLU*, 492 U.S. 573, 594-602, 655-79 (1989) (using two-part test developed by Justice O'Connor—Establishment Clause is violated when 1) government is excessively entangled with religion, or 2) government endorses or disapproves of religion—as part of the *Lemon* test regarding government displays of objects with religious connotations; introducing Justice Kennedy's two-part coercion test – 1) government may not coerce participation in religion, and 2) government may not directly benefit religion – in his concurrence); *Wallace v. Jaffree*, 472 U.S. 38, 56 & n.42 (1985) (using Justice O'Connor's two-part test as part of the *Lemon* analysis and finding it appropriate to determine whether the government's purpose is to endorse or disapprove of religion); *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (introducing Justice O'Connor's two-part test).

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court reaffirmed the importance of the *Lemon* test in Establishment

Clause cases involving school aid, but noted that the entanglement prong could be considered as an aspect of the effects inquiry. *Agostini* found "three primary criteria" used by the Court in evaluating whether government aid has the effect of advancing religion: whether the statute or programs in question "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234.

The Supreme Court has not overturned or rescinded the *Lemon* test even as it has used its framework to shape differing analyses. Although in *Agostini*, the Court articulated the primary criteria it would utilize to determine whether a government-aid program impermissibly advanced or endorsed religion, the Court has not necessarily limited itself to considering solely those criteria. Rather, it seems evident that the *Agostini* Court illustrated the *Lemon* test's flexibility and its evolution from the relatively rigid three-part test to an approach in which the varying components of a particular program or statute are analyzed with regard to their impact on, in the context of schools, the relevant students or communities. We therefore look to these components as aspects of the proper analysis under *Lemon*, but acknowledge that precedent does not limit itself to only these components should other components previously utilized by the Court be relevant, such as coercion of citizens, endorsement of religion, and direct benefit to religion. *See Mitchell v. Helms*, 120 S. Ct. 2530, 2556 (2000) (O'Connor, J., concurring) (finding that *Agostini* represents a general framework for approaching questions concerning neutral school-aid programs but recognizing that these types of cases depend on the particular facts of each case).

Of the cases which follow *Lemon*, we find the most persuasive, in that it is on point with the matter at hand, to be *Committee for Public Education v. Nyquist*, 413 U.S. 756

(1973). In *Nyquist*, a New York State statute established, among other aid, a tuition grant program which provided for partial tuition reimbursement to low-income parents whose children attended private elementary or secondary schools. *See id.* at 761-70. The tuition reimbursement plan applied to parents of children who attended any private school, not solely sectarian schools, and was limited to 50% of tuition paid. *Id.* at 764. At the time the plan was challenged, nearly 20% of New York's school-age children attended nonpublic schools, and approximately 85% of these schools were sectarian. *Id.* at 768. The *Nyquist* Court noted that although "the characteristics of individual schools may vary widely from [the] profile," institutions which qualified for assistance under the statute were ones that included religious instruction and requirements as part of their academic curriculum. *See id.* at 767-68.

Following *Lemon*, the *Nyquist* Court found that the New York statute passed the first prong of the *Lemon* test—whether the statute had a secular purpose—because the tuition reimbursement program promoted pluralism and diversity among New York's public and private schools, and alleviated concern that the State's overburdened public schools would be harmed if a large number of children who had previously been attending private schools decided to return to the public schools. *See* 413 U.S. at 773. The Court did "not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren." *Id.*

Under the second prong of the *Lemon* test—that the statute neither advance nor inhibit religion—the New York statute did not fare as well. The Court next found that the New York reimbursement program failed because "[I]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for

secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 413 U.S. at 780. The Court opined that the fact that program grants were delivered to parents rather than schools was "only one among many factors to be considered." *Id.* at 781. The Court rested its analysis on the premise that there had been "'no endeavor to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.'" *Id.* at 783 (quoting *Lemon*, 403 U.S. at 613). "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools." *Id.* The Court noted that "while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.*

The *Nyquist* Court also recognized and discarded the state's arguments that it was of controlling significance that New York's program called for reimbursement of tuition already paid, thus ensuring that the parent is free to spend that tuition money in any manner he or she sees fit. 413 U.S. at 785-86. "[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated.... Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same." *Id.* at 786. The Court also rejected the state's argument that the plan paid for only a portion of the tuition at a sectarian school, saying "if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools." *Id.* at 787.

The cases of *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968) were carefully distinguished by the Court. In *Everson*, the Court upheld tax deductions for parents who expended bus fare for children who attended religious schools, reasoning that the bus fare program was analogous to the provision of services such as police and fire protection, sewage disposal, highways and sidewalks for parochial schools. *See* 330 U.S. at 17-18. The Court found that these services, common to all citizens, are "so separate and so indisputably marked off from the religious function, that they may fairly be viewed as reflections of a neutral posture toward religious institutions." *Id.* at 18. In *Allen*, the Court upheld a statute which allowed secular textbooks to be provided to children attending religious schools, finding that "the State claims no right to distribute religious literature," and noting that "we cannot assume that school authorities ... are unable to distinguish between secular and religious books." 392 U.S. at 244-45. The *Nyquist* Court distinguished these two cases not only based on their neutral posture toward religion, but on the fact that in both of those cases, "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." 413 U.S. at 782 n.38, (citing *Tilton v. Richardson*, 403 U.S. 672 (1970) (making federal aid available to all institutions of higher learning)).

The Court noted that unlike in *Everson* and *Allen*, the tuition grants in *Nyquist* were not a neutral attempt to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools, as the "grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools totally at state expense." 413 U.S. at 782 n.38 (internal quotations marks omitted). The Court additionally determined that this argument of neutrality, if upheld, would

be overly broad, providing "a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause." *Id.*

The Supreme Court has revisited many of the issues raised in *Nyquist*. In *Agostini v. Felton*, 521 U.S. 203, 237 (1997), the Court stated that "[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent." The Court continued to reaffirm "that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, *the Court of Appeals should follow the case which directly controls*, leaving to this Court the prerogative of overruling its own decisions." *Id.* (emphasis added). The Supreme Court has refrained from overruling *Nyquist*, and has instead distinguished various cases on the basis of their facts; this Court has accordingly followed that approach. "A single factual difference consequently can serve to entangle or free a particular governmental practice from the reach of the [Establishment] Clause's constitutional prohibition." *Coles*, 171 F.3d at 376. We therefore look to relevant case law to assist us by analogy in analyzing the factual discrepancies between this case and *Nyquist*.

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court found constitutional a Minnesota statute which allowed state taxpayers to deduct on their state income tax certain tuition, transportation and educational expenses of their children attending elementary or secondary schools. Following the *Lemon* test, the Court agreed that the statute had the secular purpose of defraying the cost of education for all parents, regardless of the type of school their children attend. *Id.* at

395. Analyzing the effect of the statute, the Court held that the program did not have a primary effect of advancing religion because the tax deduction was a traditional area for state legislatures to codify policies which "achieve an equitable distribution of the tax burden," and because the deduction was available for educational expenses incurred by all parents, whether their children attended public schools, nonsectarian private schools, or church-affiliated schools. *Id.* at 396-98.

The Court found it compelling that the deduction was available for all parents with school age children, stating that this aspect was "vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Id.* at 398. The Court analogized the tax deduction scheme as similar to the G.I. Bill, or other forms of "public assistance made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Id.* The Court found it significant that under the Minnesota plan, governmental aid was only channeled through the parents, rather than directly paid to the parochial institutions, and noted that it would not base the constitutionality of a statute on the consideration of yearly statistical evidence concerning which nonsectarian schools—religious or otherwise—benefitted from the tax deduction. *Id.* at 401. The Court stated that the Establishment Clause is not a bar to "the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Supreme Court found constitutional a Washington State program which provided

vocational rehabilitation assistance grants to a blind individual who attended a Christian college in the hope of becoming a pastor. The Court found the statute's purpose "unmistakably secular," *id.* at 486, and found that unlike *Nyquist*, "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488. The fact that the vocational assistance was paid directly to the student, who could expend the educational funds on "wholly secular education," persuaded the Court to find that the program did not create an incentive to apply the aid to religious education. *Id.* "Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian.... Nothing in the record indicates that ... any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." *Id.* The Court also found that "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion." *Id.* at 489.

In *Agostini v. Felton*, the Court held that the Establishment Clause did not bar a New York program which sent public school teachers into parochial schools to provide remedial education to disadvantaged children. Recognizing that there had been significant changes in Establishment Clause jurisprudence, the Court found that it could no longer presume "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." 521 U.S. at 223. The Court noted that those direct aid programs where grants are "made available generally without regard to the sectarian-nonsectarian, or public-

nonpublic nature of the institution benefitted [are valid departures from the general rule] that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225. Relying on an earlier case which had found it permissible to place a public school sign language interpreter into a private parochial school under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, the Court determined that these instances involve situations where money ultimately goes to religious schools "only as a result of the genuinely independent and private choices of individuals." *Id.* at 225-26 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)). The Court noted as a central part of its analysis that the services provided by public school employees were remedial, stating that the "services do not, therefore, reliev[e] sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at 228. The Court concluded that the New York program services "are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school." *Id.* at 232.

The Supreme Court revisited this issue this past term. By a plurality, the Court upheld a program to loan educational materials and equipment to private religious schools which channeled federal funds through state agencies. *See Mitchell v. Helms*, 120 S. Ct. 2530 (2000). Writing for four justices, Justice Thomas concluded that the critical question in cases of government aid to religious schools is whether the government aid is neutral: whether it results from the genuinely independent and private choices of individual parents. *See id.* at 2541-44. Justice Thomas noted that the nexus between neutrality and private choice was the prominent, even the chief factor, in upholding government aid in *Agostini*, *Zobrest*, *Witters*, and *Mueller*, and found that there is a close relationship between private choice and the

question of whether a program creates a financial incentive to undertake religious schooling. *See id.* at 2543.

The opinion goes on to state that "[i]f aid to schools, even direct aid, is neutrally available and, before reaching or benefitting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion." 120 S. Ct. at 2544 (internal citations omitted). The opinion recognizes that there exist "special Establishment Clause dangers when money is given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly." *Id.* at 2546 (internal citations omitted). In a footnote, Justice Thomas hypothesized "that the principles of neutrality and private choice would be adequate to address those special risks." *Id.* at 2547 n.8. He continued to find that at least in regards to *Nyquist*, the prohibition against direct payments was linked to "serious concerns about whether the payments were truly neutral." *Id.*

Although Justice O'Connor concurred in the judgment, she wrote separately in *Mitchell* based upon her belief that "the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs." 120 S. Ct. at 2556. Justice O'Connor's concurring opinion shows disagreement not only with the "expansive scope of the plurality's rule[,]" but with two specific aspects of its analysis. *Id.* First, she found the plurality's "treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs." *Id.* Second, she found "the plurality's approval of actual diversion of government aid to religious indoctrination is in

tension without precedents and ... unnecessary to decide the instant case." *Id.*

While agreeing with Justice Thomas that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges," Justice O'Connor opined that "neutrality is not alone sufficient to qualify the aid as constitutional." 120 S. Ct. at 2557-58. She criticized Justice Thomas's opinion for relying on logic which would support direct government aid to religious organizations based on the number of persons belonging to each organization. "[T]he plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives." *Id.* at 2560. Justice O'Connor rejected an outright ban on any diversion of government funds to sectarian uses, but would enact a rule which requires plaintiffs to prove that the aid in question is, or has been, used for religious purposes, and found that "presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause." *Id.* at 2567.

Justice O'Connor concluded that because the school-aid program in *Agostini* was similar to that at issue in *Mitchell*, the *Agostini* criteria should control the outcome of the case; however, she noted that the "school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule." 120 S. Ct. at 2560.

In regard to *Mitchell* and its sharply divided plurality, we note that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the

judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Accordingly, we find that the opinion of Justice O'Connor is the narrower of the plurality, as it utilizes the standard of *Agostini* based on a factual similarity rather than creating a new standard centered on neutrality, thereby making its mandates controlling.

III.

We now apply the framework established by precedent to the case before us, recognizing the predominating theme in this area of law to be the need for careful judicial attention to the factual detail in the challenged statutory scheme.

At the outset, we note that Defendants' argument concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant. Analyzing the scholarship program choices as compared to choices or schools outside the program is asking this Court to examine the entire context of Ohio education. Such a question is not before this Court. The Defendants' argument would rewrite the law to require that the courts look to all possible alternatives to a challenged program, thus visiting issues of legislative choice and educational policy which no plaintiff has raised.

At oral argument, Defendants asserted repeatedly that the Community Schools program should be considered coterminous with the voucher program, arguing that the programs are merely separate sections in the statute. However, the statutory record does not support this argument, except for perhaps the literal meaning that the two programs do indeed occupy separate sections in the Ohio Code. The school voucher program is enacted as a complete

program in the Ohio Revised Code. *See* Ohio Rev. Code §§ 3313.974-3313.983. The program is enacted as a part of the chapter on Boards of Education. *See* Ohio Rev. Code § 3313.01 *et seq*. Furthermore, the school voucher program, and only the school voucher program, was challenged by Plaintiffs in this lawsuit. In contrast, Community Schools program is codified in its own chapter. *See* Ohio Rev. Code §§ 3314.01 *et seq*. It is similarly a complete program within the Code: the statutory provisions govern all aspects of the program without reference to the voucher program. We may not view these two programs as inextricably interdependent when the plain language of the statutory scheme demonstrates the opposite. It is simply not the proper role of the courts to change statutory construction by judicial fiat. *See Brogan v. United States*, 552 U.S. 398, 408 (1998); *Nat'l Life and Accident Ins. Co. v. United States*, 524 F.2d 559, 560 (6th Cir. 1975) ("The Courts ... do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather it is their function to give the natural and plain meaning effect to statutes...."). Should we consider the Community Schools program in our analysis of the constitutionality of the school voucher program, we would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship programs available to children who qualify for the school voucher program: we would be considering and comparing every available option for Cleveland children. Such an analysis would expand our jurisdiction far beyond the case at hand; we are presented only with the question of whether the school voucher program violates the Establishment Clause, and we must limit ourselves to that issue, regardless of the temptations Defendants' arguments present.

We find that *Nyquist* governs our result. Factually, the program at hand is a tuition grant program for low-

income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*. Under both the New York statute in *Nyquist*, as well as the Ohio Statute at issue, parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same, and in both cases, the great majority of schools benefitted by these tuition dollars are sectarian. The *Nyquist* Court itself found there to be no distinction between "a reimbursement, a reward, or a subsidy, [as in all three,] the substantive impact is still the same." 413 U.S. at 786. As in *Nyquist*, the Ohio program contains no "effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." *Id.* at 780. Here, there is clearly "no endeavor to guarantee the separation between secular and religious functions and to ensure that State financial aid supports only the former." *Id.* at 783. In both *Nyquist* and this case, there are no restrictions on the religious schools as to their use of the tuition funds—the funds may be used for religious instruction or materials as easily as for erasers and playground equipment.

Despite the language of the statute, there is no evidence that the tuition vouchers serve as a neutral form of state assistance which would excuse the direct funding of religious institutions by the state, despite the statute's language. Admittedly, the voucher program does not restrict entry into the program to religious or sectarian schools, but facial neutrality alone does not bring state action into compliance with the First Amendment. *See Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). The school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions, and the Cleveland program limits the schools to which a parent can apply the voucher funds to those within the program. Practically speaking, the tuition

restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs. *See* Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999) (finding that voucher funding levels typically "approximate[] the tuition level set by parochial schools [which] reflects subsidies from other sources"). In fact, Defendants admit that there is incentive for private nonsectarian schools to participate in the community schools program rather than in the school voucher program. *See* Brief of State at 10. The evidence illustrates this point in that 82% of participating schools are sectarian, just as in *Nyquist* where 85% of the participating schools were sectarian. Beyond that, we note that the number of available places for students in sectarian schools is higher than 82%, as many of the sectarian schools are larger and provide a greater number of places for children in the voucher program. Moreover, close to 96% of the students enrolled in the program for the 1999-2000 school year attended sectarian institutions.

The alleged choice afforded both public and private school participants in this program is illusory in that the program's design does not result in the participation of the adjacent public schools from outside the Cleveland school district. Per pupil expenditures in the public schools are backed by $7,097 in public funding. *See* Brief of Senel Taylor Intervenors at 17. At a maximum of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program. Since its inception, no public schools from outside Cleveland have registered in the school voucher program, and there are no spaces available for children who wish to attend a suburban public school in place of a private school under the program.

Therefore, the program clearly has the impermissible effect of promoting sectarian schools.

This is not the type of case which would fall into the exception to the *Nyquist* rules. Here, state assistance is only available to those students who attend private schools—the aid is clearly dependent on whether parents choose public or private schools. That the majority of places available in the program are for students attending sectarian schools is not unpersuasive. This program provides incentives for parents to choose schools other than mainstream public ones, but that choice does not extend to schools outside of the program. Students may not choose to attend community or magnet schools using a voucher, they may not apply a voucher to tuition at a private school outside the Cleveland School District, and they may not receive a voucher for a private school within the Cleveland School District which has not registered as part of the program. Rather, the program provides financial assistance for those parents who wish to place their children in the particular private schools, mostly religious, which take part in the program. We find such a scheme directly akin to *Nyquist's* offensive aid to only private school students, and not an instance where "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." 413 U.S. at 782 n.38. The effect of this program, like *Nyquist* and unlike *Mueller* and subsequent cases, is one where "public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Mueller*, 463 U.S. at 398.

Contrary to the tax deduction generally available in *Mueller*, the Ohio voucher program is available to curtail only those expenses which students attending certain private schools accrue. *See* 463 U.S. at 398 (distinguishing the *Mueller* program from that in *Nyquist* because in *Nyquist*, "tuition grants [were] provided only to parents of children in

nonpublic schools"). The idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation of the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program. The absence of any meaningful public school choice from the decision matrix yields a limited and restricted palette for parents which is solely caused by state legislative structuring.

In contradistinction to *Witters*, a student under the Ohio statute cannot apply state aid to any school he or she chooses, including public schools, since under the Ohio program, no public schools have enrolled, nor are likely to enroll. Similarly, *Agostini* is inapposite because the services made available to students at parochial schools through the placement of public school teachers to teach secular subjects were available to all qualifying students without regard to the nature of the institution they attended. 521 U.S. at 232 (finding that under the New York program at issue in *Agostini*, and unlike the *Nyquist* program, services "are available to all children who meet the Act's eligibility requirements no matter ... where they go to school). While the program upheld in *Mitchell* provided for the loan of instructional equipment by state agencies to both public and private schools, in this case aid predominantly flows directly to the coffers of religious institutions. Unlike *Mitchell*, under the Ohio statute, there are not "numerous private citizens who are free to direct the aid elsewhere" as the majority of the choices available to parents and students are religious institutions. 120 S. Ct. at 2533 (Thomas, J. plurality). The voucher program at issue constitutes the type of "direct monetary subsidies to religious institutions," that Justice O'Connor found impermissible in *Mitchell*. *Id.* at 2559-60 (O'Connor, J. concurring). This program is dissimilar to that upheld in both *Agostini* and *Mitchell*, as here aid goes only to

students enrolled in private schools, thereby fostering the type of government entanglement prohibited under the Establishment Clause.

To approve this program would approve the actual diversion of government aid to religious institutions in endorsement of religious education, something "in tension" with the precedents of the Supreme Court. *Mitchell*, 120 S. Ct. at 2556. We find that when, as here, the government has established a program which does not permit private citizens to direct government aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated. This scheme involves the grant of state aid directly and predominantly to the coffers of the private, religious schools, and it is unquestioned that these institutions incorporate religious concepts, motives, and themes into all facets of their educational planning. There is no neutral aid when that aid principally flows to religious institutions; nor is there truly "private choice" when the available choices resulting from the program design are predominantly religious.

We conclude that unlike *Mitchell*, *Agostini*, *Witters* and *Mueller*, the Ohio scholarship program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria. The effect of the voucher program is in direct contravention to these Supreme Court cases which mandate that the state aid be neutrally available to all students who qualify, that the parents receiving the state aid have the option of applying the funds to secular organizations or causes as well as to religious institutions, and that the state aid does not provide an incentive to choose a religious institution over a secular institution. Accordingly, we hold that no genuine issue of material fact remains for trial that the voucher program has

the primary effect of advancing religion, and that it constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause. We therefore affirm the district court's order granting summary judgment to Plaintiffs.

IV.

Intervenor Taylor asserts that the district court erred by holding that the Ohio Supreme Court's opinion in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), did not estop Plaintiffs' claim, and by refusing to certify the question of estoppel to the Ohio Supreme Court. This Court reviews the issue of collateral estoppel as part of the summary judgment determination *de novo*. This Court reviews the district court's denial of certification for an abuse of discretion. *See Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995).

Under both federal and state law, an "issue must have been necessary to support the judgment ... in the prior proceeding" in order to find collateral estoppel. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 376-77 (6th Cir. 1998); *accord MetroHealth Med. Ctr. v. Hoffmann-LaRoche, Inc.*, 685 N.E.2d 529, 533 (Ohio 1997) ("Issue preclusion precludes the relitigation of an issue that has been actually and necessarily litigated and determined in a prior action."); *cf. Ameigh v. Baycliffs Corp.*, 690 N.E.2d 872, 875 (Ohio 1998) ("Where the judgment of a court is not dispositive on issues which a party later seeks to litigate, *res judicata* is not applicable ... even if the prior court decision has discussed the issues that are the subject of the current litigation."). A determination is not essential to the judgment if the judgment could be supported by an adequate and independent state ground. *See Lambrix v. Singletary*, 520 U.S. 518, 522-24 (1997). In *Goff*, the Ohio Supreme Court

held that the 1995 school voucher program was enacted in violation of the one-subject rule of the Ohio Constitution, and on that basis, ordered the program in its entirety "stricken" from the Ohio statute books. 711 N.E.2d at 203. That ruling entitled the plaintiffs to the relief they requested, and therefore, any discussion of other grounds for striking or upholding the statute could be neither necessary nor essential to the holding. The Ohio Court determined that the entire program could not stand; therefore, any analysis as to the constitutionality of particular portions of the program was by definition advisory or dicta, and cannot be relied upon to bar further litigation. Because Plaintiffs would not be able to obtain Supreme Court review of the Ohio Supreme Court's determination as to the Establishment Clause, such determinations cannot constitute collateral estoppel. *See Cal. v. Rooney*, 483 U.S. 307, 311 (1987) (declining to review a Fourth Amendment ruling adverse to the state of California where that ruling was unnecessary to a judgment in favor of the state).

Similarly, the district court did not err in refusing to certify the question to the Ohio Supreme Court. The governing law as to whether a party is estopped from relitigating an issue not essential to the court's determination is clear and uncontroverted; we therefore find no abuse of discretion in the district court's determination.

V.

Before concluding, we must pause to briefly address the dissent, not for the purpose of dignifying its hyperbole, but to quash any putatively substantive argument which may have found its way through the gratuitous insults. The dissent first makes the bald-faced assertion that the majority has struck down the voucher program as unconstitutional without any "meaningful" independent analysis, and that the

majority simply concludes that the program is "foreordained" to be found unconstitutional under *Nyquist*. According to the dissent, the New York statute in *Nyquist* is "totally different" from the Ohio statute before us today, thus making it impossible to "take seriously" the majority's conclusion that *Nyquist* is controlling. However, even a cursory reading of the majority opinion clearly indicates that it is the dissent and its rhetoric which should not be taken seriously. As carefully set forth in Part III of this opinion, the Ohio statute at issue has the same effect as that of the New York statute held unconstitutional under the Establishment Clause in *Nyquist*. Both statutes have the impermissible effect of benefitting only students in particular private, and mostly religious, schools, irrespective of the illusory choice provided on the face of the Ohio statute. The fact that the dissent may not agree with the analysis set forth in the opinion to illustrate this point does not *ipso facto* render the analysis "meaningless."

Second, in a similar vein, the dissent claims that the majority reaches its conclusion that the voucher program is unconstitutional under the Establishment Clause without conducting any "meaningful" analysis into the Supreme Court's several cases on this issue since *Nyquist* was handed down. However, in Part II of this opinion, the majority painstakingly sets forth First Amendment Establishment Clause jurisprudence and its evolution since *Nyquist*, while carefully applying that law to the statute at hand in the following section. Again, it is obvious that the dissent's bald-faced assertion that this analysis not "meaningful" is apparently born out of nothing more than its disagreement with the outcome of this case, rather than with an objective observation. It is the majority which employs the evolving jurisprudential standards in reaching its outcome, while the dissent employs a rigid antiquated standard to reach its result driven outcome in contravention of the Supreme Court's

latest pronouncements.[1] *See, e.g., Agostini*, 521 U.S. at 222-26.

VI.

We recognize the importance of this case and the precedential value it espouses. Equally as important, we are aware of the critical nature of questions of educational policy, and the need to establish successful schools and academic programs for children. We find, however, that even more important is the need to uphold the Constitution of the United States and, in this case, to override the State of Ohio's statutory scheme where it constitutes an impermissible infringement under the Establishment Clause of the First Amendment. We there **AFFIRM** the district court's order finding the school voucher program unconstitutional, as well as the court's determination that Plaintiffs are not collaterally estopped.

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[1] Judge Ryan inappropriately calls for an *en banc* review of the matter in his dissent. There are rules and procedures governing a call for *en banc* review once a case has been decided, whether the call is made by a party or *sua sponte* by an active judge of this Court or member of the original panel, and it is the process contemplated by these rules and procedures which should be used to invoke *en banc* review after the Court's opinion has been issued. *See Craft v. CIR*, Nos. 99-1734, 99-1737, 2000 WL 1726906, at n.18 (6th Cir. Nov. 22, 2000) (criticizing the concurring opinion's exhortation for *en banc* review of the matter, while noting that Fed. R. App. P. 35(b) and 6 Cir. I.O.P. 35(c) set forth the appropriate procedures to follow when calling for such review). The unfortunate practice of arguing for *en banc* review of a case in a panel member's separate opinion—instead of simply permitting the Court's regular operating procedures for seeking such review to be followed subsequent to the issuance of the majority opinion—is one which should not be perpetuated.

CONCURRING IN PART, DISSENTING IN PART

RYAN, Circuit Judge, concurring in part and dissenting in part. My colleagues' resolution of the question presented by the plaintiffs' collateral estoppel claim is eminently correct and so I joint part IV of the court's opinion. However, because I believe Ohio's voucher program to be constitutional under the First Amendment and the Supreme Court's Establishment Clause cases interpreting the amendment, I must respectfully dissent from the majority's treatment of the voucher program's constitutionality.

My brothers have struck down as unconstitutional Ohio's effort to establish a school-choice voucher program whose primary purpose is to enable mostly minority poverty-level school children, in Cleveland, Ohio, to escape the devastating consequences of attending Cleveland's demonstrably failed public schools. My colleagues have done so not on the basis of any independent constitutional analysis of the Ohio Pilot Project Scholarship Program, as the voucher program is formally known, but because they claim the invalidity of the statute is a conclusion foreordained by the United States Supreme Court's decision in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). I disagree. The New York statute interpreted in *Nyquist* and the Ohio statute before us are totally different in all of their essential respects, both in their purposes and their provisions for carrying out their respective purposes. It is impossible to take seriously the majority's claim that *Nyquist* governs our result and, *for that reason*, requires that the Ohio voucher program must be struck down.

Moreover, the majority's refusal to conduct any meaningful analysis of the Supreme Court's several Establishment Clause decisions handed down in the 27 years since *Nyquist* was decided, its insistence that the plainly distinguishable *Nyquist* case is directly on point, and the factually unsupported antireligious-schools arguments in the opinion strongly suggest that the majority has simply signed onto the familiar anti-voucher mantra that voucher programs are no more than a scheme to funnel public funds into religious schools.

I.

It is implicit in the majority's reasoning that there is no need for any independent analysis whether Ohio's voucher program violates the Establishment Clause because *Nyquist* is "on point with the matter at hand." Slip op. at 13. In my judgment, the majority is mistaken as a matter of *fact* (the two statutes are totally different) and as a matter of *law* (the relevant Establishment Clause jurisprudence has changed since *Nyquist*). As to the latter, a reading of the Supreme Court's Establishment Clause cases decided since 1973 makes it unmistakably clear that the voucher program passes constitutional muster. I do not claim that the *Nyquist* decision has been overruled, although some of the reasoning in the *Nyquist* opinion has been "undermined," as the Ohio Supreme Court put it in *Simmons-Harris v. Goff*, 711 N.E.2d 203, 208 (Ohio 1999); *Nyquist* is simply inapposite to the appeal before us.

The New York statutory provisions struck down in *Nyquist* and the Ohio voucher program are essentially different laws; they are plainly distinguishable both in their

declared purposes and in the manner of their application. For that reason alone, the reasoning and the holding of the *Nyquist* decision cannot govern our result.

A.

I begin with a comparison of the New York statutory provisions construed in *Nyquist* and the Ohio statute before us; a comparison that shows very clearly that the two laws are essentially different. I then examine the Supreme Court Establishment Clause cases decided since *Nyquist*, which clearly indicate that the Ohio voucher program is not unconstitutional.

1.

In *Nyquist*, the Supreme Court was required to decide whether a New York statute containing provisions for both direct and indirect financial assistance to New York's private schools violated the Establishment Clause. The statute provided for three forms of assistance: (1) direct grants for building maintenance and repairs for private school buildings; (2) tuition reimbursement grants for some low-income parents of children already attending the private schools; and (3) a form of tax relief for parents who failed to qualify for tuition reimbursement under the statute. *See Nyquist*, 413 U.S. at 762-65.

The New York legislature enacted the statute for the *sole* purpose of directly benefitting New York state's 2,038 financially pressed *private* schools, wherein some 700,000-800,000 students—almost 20% of the state's entire elementary and secondary school population—were being educated. *See id.* at 768. The legislative "findings" in the New York statute declared: (1) it was in the state's interest to provide funding for "maintenance and repair" of the state's

private schools in order to protect the health and safety of those attending the schools; (2) the state had an interest in promoting "alternative educational systems"; and (3) a "precipitous decline" in the number of children attending private schools would perpetuate an already existing fiscal crisis in public schools. *Id.* at 763-65.

The *Nyquist* Court held that the New York law offended the Establishment Clause because "the effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783. Furthermore, the *Nyquist* Court concluded that "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.* at 780.

The Ohio voucher program, which is adequately described in the majority opinion, could not be more unlike the New York statute both in its purpose and in the manner of its application. The essential differences between the New York and Ohio statutes may be summarized as follows:

First, the purpose of the New York statute was to provide financial help to New York's financially troubled *private schools* because their closing would force New York's public schools to absorb the private school students, resulting in massive increased costs and the related burdens of absorbing as many as three quarters of a million new students.

The purpose of the Ohio statute, on the other hand, is to provide financial help to poverty-level students attending the *public schools* in Cleveland in order to enable them, if they wish, to attend nonreligious private schools, religious

private schools, public schools in neighboring districts that wish to participate in the voucher program, or to obtain special tutoring while remaining in the Cleveland public schools.

Second, the New York program involved *direct* financial grants to New York's *private* schools, religious and nonreligious, primarily for maintenance and repair. Although the tuition reimbursement and tax relief sections of the statute appeared to benefit the parents of private school children, the *Nyquist* Court stated that the "tuition reimbursement program also fails the 'effect' test, for much the same reasons that govern its maintenance and repair grants." *Id.*

Under the Ohio voucher program, on the other hand, there is no provision for any financial grants in any form to any private schools. A voucher recipient receives a scholarship check, and the funds therefrom reach a private religious school only after a child's parents have considered a variety of options available to them and have chosen the religious private school as the best option for their child.

Third, the New York statute permitted government aid to schools that discriminated against children on the basis of religion and, in fact, several qualifying schools imposed religious restrictions on admissions. *See id.* at 767-68.

The Ohio voucher program, on the other hand contains a provision explicitly forbidding participating schools from discriminating against prospective students on the basis of religion. *See* Ohio Rev. Code § 3313.976(A)(4).

It is clear that the New York statute struck down in *Nyquist* and the Ohio statute before us are dissimilar laws both in their purposes and the methodologies for carrying out

their purposes. As the majority acknowledges, "[a] single factual difference consequently can serve to entangle or free a particular governmental practice from the reach of the [Establishment] Clause's constitutional prohibition." Slip op. at __ (internal quotation marks and citation omitted). A case construing a statute so manifestly different than the one before us could hardly, as a *factual* matter, be a binding precedent on this court.

2.

The substantial differences in the purpose and application of the two statutes is not the only reason *Nyquist* does not govern our result. The additional reason is that the rule of law upon which *Nyquist* was decided has changed. First, the *Nyquist* era categorical prohibition against direct grants to aid religious schools is no longer the law; and second, the criteria for determining when a statute has the forbidden "primary effect" of advancing religion have been modified.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court fashioned the following test for assessing whether a statute violates the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or *primary effect* must be one that neither *advances* nor inhibits *religion* ...; finally, the statute must not foster an excessive government entanglement with religion.

Id. at 612-13 (emphasis added) (internal quotation marks and citation omitted).

The *Nyquist* Court ruled that the New York statute violated the *Lemon* test because it had the "impermissible effect of advancing religion." *Nyquist*, 413 U.S. at 794. It did so, the Court said, by providing direct financial assistance to religious schools without any restrictions as to the schools' use of the funds, therefore "advanc[ing] the religious mission of sectarian schools." *Id.* at 779-80. But three years ago in *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court declared unmistakably that "we have departed from the rule ... that all government aid that directly assists the educational function of religious schools is invalid." *Id.* at 225. The *Agostini* Court then proceeded to redefine and narrow the criteria for determining when government aid that finds its way to a religious school has the primary effect of advancing religion.

Again, I do not question for a moment the correctness of the Supreme Court's decision in *Nyquist*. I accept it both analytically and precedentially as a faithful 1973 application of the "primary effect" test of *Lemon*. However, *Nyquist* was not analyzed and decided under what the *Agostini* Court called its "changed ... understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. Since this appeal is also an "impermissible effect" case, our decision cannot be controlled by *Nyquist*.

B.

What then is the Supreme Court's "changed ... understanding" of the proper test for determining whether a law has the primary effect of advancing religion?

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court held that a Minnesota statute authorizing a tax deduction for certain educational expenses for parents of students attending either public or private schools, religious or nonreligious, did

not violate the "impermissible effect" prong of the *Lemon* test. The Court focused on the fact that the deduction was given directly to the parents, without regard to the type of school, religious or nonreligious, to which the parents might choose to send their children, as a strong indicator of the statute's "neutrality." *See id.* at 397-400. Any money received at a religious school, the Court said, was "ultimately controlled by the private choices of individual parents." *Id.* at 400.

This principle—that whether public funds find their way to a religious school is of no constitutional consequence if they get there as a result of genuinely private choice—was reasserted in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). There, a Washington state program survived an Establishment Clause challenge even though it provided vocational rehabilitation assistance for a blind individual to attend a Christian college in order to study to be a Christian pastor. Funds under the program were [disbursed] directly to the eligible applicants who made the choice of where to expend the educational funds; therefore, "[a]ny aid ... that ultimately flow[ed] to religious institutions [did] so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488.

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court upheld the constitutionality of a program providing a sign-language interpreter for a deaf student in a Catholic high school. Relying upon *Witters* and *Mueller*, the *Zobrest* Court concluded that the statute gave parents the choice of where to send their eligible children to school and "distributes benefits neutrally ... without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school." *Id.* at 10 (quoting *Witters*, 474 U.S. at 487).

This line of cases culminated in the *Agostini* decision in 1997, in which the Supreme Court declared that its understanding of the criteria for determining whether, in any specific program, government aid has the primary effect of advancing religion had "changed." Indeed, in *Agostini* the Supreme Court went so far as to modify the *Lemon* test it had relied upon in *Nyquist*. The *Agostini* Court began by recasting *Lemon*'s "entanglement" inquiry as a factor under the "impermissible effect" prong rather than as a separate and independent criterion. *See Agostini*, 521 U.S. at 232-34. It then identified three new sub-criteria to consider when evaluating whether a government-aid program violates *Lemon*'s "impermissible effect" prong. These are:

> (1) whether the aid results in governmental indoctrination;
>
> (2) whether the aid program defines its recipients by reference to religion; and
>
> (3) whether the aid creates an excessive entanglement between government and religion.

See id. at 234.

Using this modified *Lemon* test, the *Agostini* Court found constitutional a federally mandated New York program that sent public school teachers into private parochial schools to provide remedial education to eligible children. Under the program, children meeting the eligibility requirements received the services, whether they attended a private or public school. *See id.* at 232. The *Agostini* Court concluded that programs in which money ultimately flows to a private, religious school based on the "'genuinely independent and private choices of' individuals" do not violate the

Establishment Clause. *Id.* at 226 (quoting *Witters*, 474 U.S. at 488).

Finally, in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), a plurality opinion written by Justice Thomas, the Court upheld the constitutionality of a federally mandated Louisiana program where educational materials were loaned to public and private schools, both religious and nonreligious. Justice Thomas emphasized that the statute did not have an "impermissible effect" because the "principles of neutrality and private choice, and their relationship to each other [that] were [also] prominent" in the Court's decisions in *Agostini*, *Zobrest*, *Witters*, and *Mueller* were present. *Id.* at 2542.

II.

It is against this background of changed Supreme Court Establishment Clause jurisprudence that we must test the constitutionality of the Ohio voucher program.

The Ohio statute is the product of a 1994 order issued by the United States District Court in Cleveland, directing the Ohio Superintendent of Education to address the educational crisis in Cleveland's public schools. *See Reed v. Rhodes*, 869 F.Supp. 1274 (N.D. Ohio 1994). The Ohio legislature and the state's governor responded with the voucher program that is before us today. *See* Ohio Rev. Code §§ 3313.974-3313.979. We may safely assume that in fashioning the new law, the Ohio legislators and the governor knew that the challenge they faced was to design a law that would survive a federal constitutional challenge on Establishment Clause grounds. That is not to say that the statute the legislators wrote and the governor signed into law is insulated from federal judicial constitutional scrutiny. Rather, it is to say what the majority does not even acknowledge: this statute is *presumed* to be constitutional. *See McDonald v. Board of*

Election Comm'rs, 394 U.S. 802, 809 (1969); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1366 (6th Cir. 1984). This presumption is not a mere literary figure for rote recitation in all appellate opinions addressing the constitutionality of legislative enactments; it is a bedrock rule of statutory construction, one we are bound assiduously to honor as we begin our assessment of the validity of the Ohio statute.

The first of the *Lemon* criteria that must be met if a statute is to survive an Establishment Clause challenge is that it have a "secular purpose." The Ohio voucher program meets this criterion and the plaintiffs agree that it does. The *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority, public school children from the devastating consequences of requiring them to remain in the failed Cleveland schools, if they wish to escape. There is also no serious claim that the statute is constitutionally invalid solely because it fosters an "excessive entanglement" between government and religion. Rather, the only issue in the case is whether the voucher program has the forbidden "primary effect" of advancing religion. This court's first duty, therefore, after recognizing that *Nyquist*'s factually and legally outdated decision is of no help, is to proceed to examine the first two criteria from *Agostini*'s "impermissible effect" test to determine whether the effect of Ohio's voucher program is to advance religion, either because (1) the aid it provides results in governmental indoctrination, or (2) the program defines its recipients by reference to religion. *See Agostini*, 521 U.S. at 234. These are the *only* two issues properly before us.

A.

In addressing *Agostini*'s first criterion for testing a statute's claimed impermissible effect, we must ask whether

the government aid in the form of the tuition voucher results in "governmental indoctrination." It is obvious that the Ohio statute does not have the remotest effect of providing governmental indoctrination in any religion, to say nothing of having such a primary effect.

The Supreme Court decisions since *Lemon* and *Nyquist* have emphasized that the critical question in determining whether government aid ultimately flowing to religious schools results in governmental indoctrination is if the recipient beneficiaries make a "genuinely independent and private choice[]" to "spend" the funds in a religious school. *Id.* at 226 (internal quotation marks and citation omitted). If the recipients have such an independent and private choice, then the government's decision to provide the money to fund that choice does not have the effect of advancing religion. The government is, of necessity, neutral in the matter. Implicit in that constitutional rule of law, as it applies in this case, is that there must be a *genuine* choice from among a range of alternatives that indicate complete neutrality on the part of the government as to where the recipient parents may choose to spend the government-aid funds. The voucher program does not offend the Establishment Clause because the statute allows parents to make a *genuine* choice for their children who are currently in Cleveland public schools.

What are the choices Ohio has given these Cleveland parents?

(1) To permit their children to remain in the Cleveland public schools as before;

(2) To accept a tuition voucher for them to attend a Cleveland area nonreligious private school;

(3) To accept a tuition voucher for them to attend a Cleveland area religious private school;

(4) To accept a voucher for them to obtain special tutorial help in the Cleveland schools; or

(5) To accept a voucher for them to attend a public school in a district adjacent to Cleveland, although for the present these districts have declined to participate in the program.

See Ohio Rev. Code §§ 3313.976-3313.978.

It is difficult to imagine a statute that could afford its voucher recipients a broader spectrum of educational choice. It is true, of course, that the public school districts adjacent to Cleveland have declined to participate in the voucher program, but there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate. What we measure today is not whether the children in Cleveland have the fullest conceivable range of options available to them that a panel of federal judges might think to be ideal, but rather, whether the statute, as enacted, has the primary effect of advancing religion by involving the state in governmental indoctrination under *Agostini*'s first criterion. *See Mitchell*, 120 S. Ct. at 2541-44. To my knowledge, no federal court has *ever* held that a school-choice voucher program is unconstitutional because the range of choices does not include a public school option; certainly the majority does not cite such a case.

B.

Neither does the Ohio program "define its recipients by reference to religion," the second *Agostini* factor for testing for "impermissible effect." *Agostini*, 521 U.S. at 234. The program defines the first-priority voucher recipients by reference to (1) their attendance in one of Cleveland's public schools; and (2) a family income that is not more than 200 percent of the federally established poverty level. *See* Ohio Rev. Code § 3313.978(A). And the statute explicitly forbids a religious test for admission to a participating school, including religious schools. *See id.* at § 3313.976(A)(4). A parent has the choice of using the voucher in a private religious school, a private nonreligious school, for tutoring in the public school, or in a public school in a neighboring district if any wish to participate. The statute expresses no preference, explicitly or implicitly, either as to the religion of the voucher recipients, or if the recipient chooses a private school, whether the voucher is applied to a religious or nonreligious school.

The *Agostini* Court recognized, of course, that the eligibility requirements of a government-aid program could "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. The Court noted that a financial incentive to choose a religious school over a nonreligious school is not present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

Despite the plain evidence that the aid to the parents of the Cleveland school children is indeed "allocated on the basis of neutral, secular criteria that neither favor nor

disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," *id.*, the majority continues to insist that the voucher program is not neutral because it creates a forbidden "incentive" for parents in Cleveland to choose a religious school. As best I can understand it, they rest this conclusion—unsupported though it is by any evidence in the record—on two further conclusions. The first is that because the vast majority—82 percent—of the private schools participating in the Ohio program are religious, the people of Cleveland are denied a "genuine" choice. This argument is made despite the indisputable fact that of *all* the private nonreligious private schools participating in the program, not one has ever turned away a voucher applicant for any reason. This not very thinly veiled antipathy the majority has shown toward religious schools—its argument that there are too many religious schools in the program—is meritless for another reason: the Supreme Court has flatly rejected the argument that a high percentage of religious schools participating in a government-aid program is an indicator that the government is engaging in governmental indoctrination of religion. *See Mitchell*, 120 S. Ct. at 2542; *id.* at 2562 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 229; *Mueller*, 463 U.S. at 401.

The majority then attempts to support its view that the Ohio statute creates a forbidden incentive for parents to choose a religious school by utilizing the transparent argument that this statute should be struck down because the religious schools in the program are too religious. In support of this proposition, the majority devotes considerable attention to the mission statements of several religious schools, which indicate the pervasively religious character of their programs. My brothers conclude therefrom that these schools "believe in interweaving religious beliefs with secular subjects" and "incorporate [in their curriculum]

religious concepts, motives, and themes." Slip op. at 5, 27. Imagine, religious schools that are truly religious!

This plainly hostile attack on the religious schools in the Ohio voucher program is one I would [have] thought unworthy of mention in an opinion from this great court. Is the point being made here that religious schools may participate in a voucher program providing they are not too religious? Or, is it that these poverty-level parents in Cleveland cannot be trusted to understand what they will be exposing their children to if they choose on of these religious schools? One would have thought that the nail was long ago driven into the coffin bearing the discredited arguments that if a voucher program involved too many religious schools, or if those involved are honestly, genuinely, and essentially religious, the statute is therefore invalid as "advancing religion." This most unattractive argument was utterly rejected in *Witters*, 474 U.S. at 486-88, and *Mueller*, 463 U.S. at 397-400, and also was rejected in Justice Powell's concurring opinion in *Witters*. *See Witters*, 474 U.S. at 492 (Powell, J., concurring). Moreover, Justice Thomas, writing for a clear majority *on this point* in *Mitchell*, stated:

> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

Mitchell, 120 S. Ct. at 2552.

The majority, in this case, straining mightily to strike down this law, then conjures still another anti-voucher argument (the reader will recall that the majority's decisional

premise is that this case is controlled by *Nyquist* and, implicitly, that all else is irrelevant).

My colleagues' next non-*Nyquist* argument is that the "school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions." Slip op. at 23. This statement in the majority opinion, which, like so many others in the opinion, is totally without any basis in the evidence, is then fortified by my brothers' *ipse dixit* that "religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." *Id.* at 24. The only authority my colleagues offer for this speculation is a Fordham University Law Review article. I can only surmise that the point my colleagues wish to make here is that nonreligious schools will not participate in Ohio's voucher program because the voucher will not cover the cost of educating a student in a nonreligious school. This, my brothers reason, creates an "incentive" for the parents to send their children to the religious schools where they can be educated more efficiently and for fewer dollars.

There is absolutely no evidence in the record to support the majority's argument that the Ohio statute creates a financial "disincentive" for Cleveland's neighboring, suburban public school districts to participate in the program. There is no evidence to support what the majority seems to imply—that some parents wishing to use a voucher choose not to do so because other Cleveland area public schools are not participating. And there is no evidence that if a public school chooses to participate in the voucher program, it will lose its state funding.

These arguments are built on a "factual" predicate that has absolutely no basis in the record. There is not a scintilla of evidence in this case that any school, public or

private, has been discouraged from participating in the school voucher program because it cannot "afford" to do so. The import of this argument, as best I can understand it, is that the parents of the Cleveland school children have an "incentive" to choose Cleveland's religious schools because there are not enough nonreligious schools participating in the program. Of course, there is no evidence of that either. And there is no evidence that any of the several nonreligious, private schools participating in the program have *ever* rejected a single voucher applicant for any reason, including a supposed inability to afford the differential between the value of a $2,500 voucher and the actual cost of a nonreligious, private school education.

While I hesitate to dignify that majority's speculation with speculation of my own, what is at stake in this case is too important to let any of my colleagues' meritless arguments go unanswered.

It is indisputable that no nonreligious, private school, or any other school for that matter, has ever been discouraged from participating in the Cleveland voucher program and there is no evidence that any private school, religious or nonreligious, has ever turned away a voucher applicant for any reason. Therefore, what my colleagues must be getting at is even more insidious and offensive. The point apparently is that Cleveland parents would never choose to send their children to a religious school in Cleveland if they could afford to send them to a nonreligious, private school, or another public school, but that they cannot do so because the cost differential between the value of a $2,500 voucher and the actual tuition of Cleveland's nonreligious, private schools is prohibitive. Again, it is of no small importance that there is absolutely no evidence in the record that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because

there was a differential cost that was prohibitive. It is probably true that no private school, religious or nonreligious, can educate a child for the voucher value of $2,500. But, in all probability, the participating private schools are willing to accept the voucher as meeting a portion of the actual educational costs for these children and are willing to absorb the differential cost as part of their *pro bono* service in Cleveland to help save as many of these children as possible from the disastrous consequences of continuing in the city's failed public schools.

But more important that all of this speculation is the reality that the majority's "neutral only if affordable to all" test is utterly meritless *as a matter of law* because the now settled Establishment Clause jurisprudence is that whether aid is allocated on the basis of neutral, secular criteria is the key determinant of whether, having made the aid available, the state has engaged in governmental indoctrination in religion. *See Agostini*, 521 U.S. at 231.

If the simplicity and clarity of the Supreme Court's language in *Agostini* is not sufficient to demonstrate that the Ohio statute does not in any respect operate to advance religion, confirmatory language of crystal clarity appears in the Supreme Court's recent decision in *Mitchell*. In a passage in his opinion which enjoys the support of a majority of the Justices, and arguably even the support of the dissenters, Justice Thomas states:

> [T]he question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in these schools could reasonably be attributed to governmental action.

Mitchell, 120 S. Ct. at 2541.

The line of cases decided in the Supreme Court beginning with *Mueller* in 1983 and ending with *Mitchell* in 2000 make it unmistakably clear that the majority's "impermissible incentive" argument has no basis in our Establishment Clause jurisprudence. The rule is now settled that a government program that permits financial aid ultimately to reach religious schools does not offend the Establishment Clause if the government's role in the program is neutral. Neutrality exists if the "governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.* (quoting *Agostini*, 521 U.S. at 226). Justice Thomas wrote that "simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates ... an 'incentive' for parents to choose such an education for their children." *Id.* at 2543-44. Finally, Justice Thomas concluded that the possibility that government aid might be diverted by a sectarian school towards some religious end is irrelevant, for Establishment Clause purposes, if the government aid program provides the aid in a neutral manner. *See id.* at 2547.

In her concurring opinion in *Mitchell*, Justice O'Connor, joined by Justice Bryer, agreed that "neutrality is an important reason for upholding government-aid programs" against Establishment Clause challenges, but she reiterated that it was just one factor to consider in challenges to government school-aid programs and not a "factor [of] singular importance." *Id.* at 2556-57 (O'Connor, J., concurring). Even Justice Souter's dissenting opinion, which Justices Stevens and Ginsburg joined, conceded that the Establishment Clause presents no obstacle to government aid

if it reaches sectarian schools as a result of the private choices of aid recipients. *See id.* at 2584 (Souter, J., dissenting).

Justice O'Connor emphasized the distinction between "true private-choice programs" and "per-capita school-aid programs." *Id.* at 2559 (O'Connor, J., concurring). The Ohio voucher program, like the programs in *Zobrest* and *Witters*, is a true private-choice program because the aid is given directly to eligible individuals, who in turn decide where to spend it. The programs considered in *Mitchell* and *Agostini* were examples of per-capita school-aid programs because aid was distributed based on the number of students attending each school, regardless of whether the school was religiously based or not. Justice O'Connor concluded that true private-choice programs were more likely to survive Establishment Clause challenges, even though government aid was diverted to the religious schools, because "'[a]ny aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.'" *Id.* at 2558 (quoting *Witters*, 474 U.S. at 488) (O'Connor, J., concurring).

True private-choice programs, by their very nature, cannot have the forbidden "primary effect" of the government "advancing religion" because the aid is given directly to the beneficiary and that student or parent retains control over where the aid will be applied. "The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision." *Id.* at 2559. Furthermore, when government aid flows to a religious school as a result of "independent decisions made by numerous individuals ..., [n]o reasonable observer is likely to draw from the facts ... an inference that the State itself is endorsing a religious

practice or belief." *Id.* (internal quotation marks and citation omitted).

The majority opinion in this case claims the voucher program "involves the grant of state aid directly and predominantly to the coffers of the private, religious schools." Slip op. at 27. Furthermore, according to the majority, "[t]here is no neutral aid when that aid principally flows to religious institutions...." *Id.* at 27. The majority ignores that this view has been flat-out rejected by the Supreme Court in the decisions I have discussed which make it very clear that the *number* of religious schools participating in the voucher program, the thoroughness of the religious training that occurs there, and the use to which such schools might put the funds are all totally irrelevant to the question of the government's neutrality, when the government aid reaches a religious school only as a result of the recipient's "'genuinely independent and private choice[].'" *See Mitchell*, 120 S. Ct. at 2541 (citation omitted); *Zobrest*, 509 U.S. at 8; *Witters*, 474 U.S. at 486. By ignoring the recent Supreme Court cases emphasizing the importance of genuinely independent and private choices and the distinction between true private-choice programs and per-capita school-aid programs, the majority has failed to conduct a "meaningful" independent analysis of the voucher program's constitutionality.

III.

In summary, and to repeat, according to the Supreme Court, a true private-choice program does not result in "governmental indoctrination" so long as the path of the government aid is determined by the "'genuinely independent and private choice[]'" of the aid recipients. *See Mitchell*, 120 S. Ct. at 2541 (citation omitted); *id.* at 2557-60 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 226; *Zobrest*, 509 U.S.

at 10, 12; *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at. 397-98, 400.

Ohio's voucher program easily meets this test. Before a voucher is "spent" at a religious school, Cleveland parents must independently make two important choices:

First, they must decide whether their child will take advantage of the voucher alternatives at all, or select another option, such as remaining in the Cleveland schools, undertaking home schooling, or attending one of Cleveland's well regarded community schools. Second, if a child's parents choose the voucher option, they must make the further "genuinely independent and private choice[]" whether to use the voucher at a private school, nonreligious or religious, or for special tutoring in the Cleveland public schools. The voucher-use choice of attending a public school in a neighboring district is not presently available to Cleveland parents because no neighboring district has opted into the voucher program.

It is difficult to image how a voucher statute could be crafted that more clearly and decisively forecloses the government from having any role in the religious indoctrination of Cleveland school children, or forecloses it from defining the recipients of the vouchers by reference to religion, than through the range of free and independent choices the statute gives to the parents whose children attend the Cleveland public schools.

IV.

In striking down this statute today, the majority perpetuates the long history of lower federal court hostility to educational choice. It does so by reaching back to a 1973 Supreme Court decision, *Nyquist*, that construes a statute that

is light years away from the voucher program before us and that rests upon law that has been altered in an important respect by subsequent Supreme Court decisions. My colleagues refuse to acknowledge that the program in *Nyquist* is factually distinguishable in essential ways from the Ohio voucher program and that the Supreme Court has explicitly declared that the criteria for determining whether a statute authorizing government aid to schools violates the Establishment Clause have changed. And then, almost as if recognizing that its *Nyquist*-is-directly-on-point argument cannot withstand close scrutiny, the majority resorts to the lamentable tactic of attempting to arouse support for its view by making the familiar but unworthy arguments that the voucher program has too many religious schools and that they are too religious. This argument should fail, first, because it is rooted in nativist hostility toward religious schools and, second, because it has been explicitly rejected by the Supreme Court as a legitimate determinant of whether a government is engaging in religious indoctrination.

Despite the majority's disclaimer that "courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another," slip op. at 9, the majority opinion is nothing more than an attack upon the philosophical and cultural desirability of publicly funded educational choice for the poor. This case and its result—sentencing nearly 4,000 poverty-level, mostly minority, children in Cleveland to return to the indisputably failed Cleveland public schools from which, in many cases, they escaped as long as three years ago—is an exercise in raw judicial power having no basis in the First Amendment or in the Supreme Court's Establishment Clause jurisprudence.

In all events, a matter of this gravity and of such immense importance to the Cleveland children who are

directly affected, and indeed to the nation, should not be determined by just two judges of this court. Therefore, I respectfully urge my colleagues to take this case for *en banc* review, if they are asked to do so, and decide the vitally important Establishment Clause issue it presents, after giving careful consideration to the full panoply of Supreme Court Establishment Clause jurisprudence, and not just one, inapposite 1973 case.

As to what is written in part IV of the majority opinion, I have no disagreement.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, *et al.*,	)	Case No.: 1:99CV1740
Plaintiffs	)	JUDGE SOLOMON OLIVER, JR.
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO,	)	
Defendant	)	
SUE GATTON, *et al.*,	)	Case No.: 1:99CV1818
Plaintiffs	)	
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, *et al.*,	)	[Filed: December 20, 1999]
Defendants	)	*JUDGMENT ENTRY*

The court, having granted Plaintiffs' motions for summary judgment in a separate order of this same date and having denied Defendants' motions for summary judgment, now enters judgment for Plaintiffs Doris Simmons-Harris, *et al.* and Plaintiffs Sue Gatton, *et al.* and against Defendants Susan Tave Zelman, *et al.*, Intervening Defendants Senel Taylor, *et al.* and Intervening Defendants Hanna Perkins School, *et al.*

IT IS SO ORDERED.

SOLOMON OLIVER, JR.
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, *et al.*,	) Case No. 1:99CV1740
Plaintiffs	) JUDGE SOLOMON OLIVER, JR.
v.	
DR. SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO	
Defendant	
SUE GATTON, *et al.*,	) Case No. 1:99CV1818
Plaintiffs	
v.	
DR. SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, *et al.*,	) [Filed: Dec. 20, 1999]
Defendants	) ORDER

I. INTRODUCTION AND FACTS

Plaintiffs brought this action seeking to enjoin permanently a portion of the Ohio Pilot Scholarship Program

on the ground that it violates the Establishment Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment to the U.S. Constitution. All plaintiffs and all defendants in these consolidated actions have filed motions for summary judgment except for Intervenor/Defendant Hanna Perkins, who filed a brief in support of the other Defendants' motions for summary judgment. For the reasons set forth below, the court grants the Motions for Summary Judgment of Plaintiffs Doris Simmons-Harris, *et al.* and Plaintiffs Sue Gatton, *et al.* (Doc. Nos. 83 and 97, respectively), and denies the Motions for Summary Judgment of Intervening Defendants Senel Taylor, *et al.* and the State Defendants, *et al.* (Doc. Nos. 82 and 92, respectively). Accordingly, the State Defendants are permanently enjoined from administering the Voucher Program.

In 1995 the Ohio Legislature enacted a pilot scholarship program to address an educational crisis in Cleveland's public schools in the wake of a U.S. District Court-ordered takeover of the administration of the Cleveland City School District (the "District") by the State. This program, as more fully discussed herein, was struck down by the Ohio Supreme Court as being in violation of the Ohio Constitution. The program was re-enacted in all pertinent respects by the Ohio Legislature in June 1999. The 1999 program is applicable, as was the 1995 program, to students residing in the District. The program has two components: a scholarship program to enable students to attend "alternative schools" ("Voucher Program" or "Program"); and a tutorial program for children attending the Cleveland Public Schools ("Tutorial Program"). Plaintiffs, while challenging the constitutionality of the Voucher

Program, do not challenge the Tutorial Program in this action.[1]

Private schools within the geographic boundaries of the District and public schools adjacent to the District are eligible to participate in the Voucher Program as "alternative schools." In order to do so, private schools must register with the State Superintendent. Recipients are chosen by lot an receive a fixed percentage of the tuition charged by the alternative school of their choice, up to $2,500. Students whose family income is not more that 200% of the federally-established poverty level receive 90% of their school tuition; other scholarship recipients whose family income is above this threshold receive 75% of their tuition. Participating students may first enroll in the Program as early as when they enter kindergarten and must do so by third grade. Once admitted to the Program, they are eligible for scholarships through eighth grade. Disbursement of scholarship money to a private school is accomplished by the State sending a check to the chosen school made payable to the parents of the recipient; thereafter, the parents must endorse the check to the school. The State places no restriction on how the private school may utilize the money. In the event that an adjacent public school is involved, the State would issue a check made payable to the school district.

In the three years prior to the Ohio Supreme Court's holding the 1995 program unconstitutional, no public schools registered for the program. None have registered since the enactment of the Program in 1999. For the 1999-2000 school

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[1] Tutorial grants may be used to obtain tutorial services for students enrolled in the Cleveland Public Schools. The same number of scholarships and tutorial grants must be awarded in a given year. The eligibility criteria for tutorial grants are the same as those for the scholarship grants, discussed below. The maximum allowable tutorial grant is $500.

year, 3,761 students were to be enrolled in the Program. Sixty percent of these students are from families at or below the poverty level. At the beginning of the 1999-2000 school year, fifty-six schools were registered to participate in the Program. Forty-six of the schools, or over 82%, are church-affiliated.[2] Of the 3,761 students enrolled in the Program, 3,632, or over 96%, are enrolled in sectarian schools. Pl. J.A. vol. I, Ex. E.

Religious characteristics vary from school to school, but participating schools share certain traits. For example, it can generally be said that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience. A review of several schools' parent handbooks perhaps provides better insight into the religious nature of the schools at issue.[3]

For example, Saint Patrick School includes in its Family handbook the following:

PHILOSOPHY OF CATHOLIC EDUCATION

> We believe that a philosophy of Catholic education begins with faith that God, in

[2] The number of participating schools and number of participating religious schools were reached by Plaintiffs as a result of obtaining discovery from the State and the Hanna Perkins Intervenors/Defendants. O'Brien Aff. at ¶6, Pl. J.A. vol. I. Defendants do not dispute Plaintiffs' figures.

[3] The parties have stipulated that the handbooks and mission statements produced by the schools participating in the Voucher Program "are authentic, speak for themselves, have been made available to the parents of the scholarship students and are not false or misleading." Stipulation by the parties of October 15, 1999, at 2.

> creating, gifted us with life. He became one of us in His Son Jesus, and in the person of His Spirit awaits our response to His unconditional overture of love. Jesus remains with the community He formed, witnessing and sharing the Good News in every age and with all people, ever yearning for a return of love either by a sincere response to conscience or by membership in His Church. It is from this perspective that the educational ministry of the Catholic community flows.

* * *

MISSION STATEMENT

St. Patrick School is a Catholic School in the Diocese of Cleveland, Ohio. The mission of St. Patrick School is to live and teach the Gospel message. We are dedicated to the formation of youth according to our Catholic Traditions within an innovative academic environment which provides students with the opportunity to develop spiritually, academically, and socially to the best of their abilities.

Objectives of Education

1. To communicate the gospel message of Jesus.
2. To provide opportunities to build and experience a faith community.
3. To orient students to the responsibility and experience of service because of their membership in the Christian community.

4. To provide students with opportunity for growth in prayer.
5. To provide instruction in religious truths and values in such a way that they become an integrated part of the school program.
6. To develop a faculty and staff who by their presence and teaching express an integrated approach to learning and living in their lives.
7. To provide an academic program and environment conducive to the optimal development of each student.

St. Patrick Handbook at 1, Pl. J.A. vol. III, Ex. I, Tab 26.[4] Additionally, all students are required to participate in religion classes, which are taught daily, and to attend all religious, liturgical, and paraliturgical celebrations. *Id.* at 10.

At St. Rocco School, "[a]n integral part of the school program is instruction in religious truths and values. These values permeates [*sic*] the whole atmosphere of the school." St. Rocco School Handbook at 3, Pl. J.A. vol. III, Ex. I, Tab 27. Each student at St. Rocco School is expected to contribute a nominal amount for membership in the Society for the Propagation of the Faith. *Id.* at 11. Like St. Patrick School, "[a]ll students, whether Catholic or not, participates [*sic*] in religion classes, mass, religious activities, and receive a religion grade." *Id.* at 11. Parents are asked to help their children practice specific prayers at each grade level. For example, they are to teach their children the Sign of the Cross

[4] These are the "goals for Catholic schools in the Diocese of Cleveland." Pl. J.A. vol. IV, Ex. J, Tab 2 at *v.* Thirty-four of the forty-six participating religious schools are affiliated with the Diocese. Pl. J.A. vol. I, Ex. B, Tab 3.

and the Hail Mary in kindergarten and the Our Father and Glory Be to the Father in first grade. *Id.*

St. Stanislaus School "is an integral part of the St. Stanislaus community whose shared mission with parents is to facilitate Christian values within the context of the core curriculum. [They] commit [them]selves to the formation of a faith-filled Catholic community, preparing students for spiritual development, and future roles as responsible, knowledgeable, productive Christian individuals." St. Stanislaus School Materials, Pl. J.A. vol. III, Ex. I, Tab 28. As one of its goals, "St. Stanislaus School will increase their Catholic Identity by developing opportunities for faith development of faculty and students." *Id.* As at St. Patrick and St. Rocco Schools, religion classes are taught daily at all grade levels and "[n]on-Catholic students attending [the school] are expected to be a part of the religion program and activities throughout the year." *Id.* Likewise, students and their families "are expected and obligated to attend and participate in the week-end liturgy." *Id.*

The philosophy of education at St. John Nottingham Lutheran School is:

> It is our belief that the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer, and Sanctifier, whose love for us moves us to show in our every act, thought, word and desire, our love for Him.
>
> "The Fear of the Lord is the Beginning of Knowledge." Proverbs 1:7.

St. John Nottingham Handbook at 2, Pl. J.A. vol. III Ex. I, Tab 34. Religion is taught at St. John Nottingham Lutheran

through weekly worship chapel services, Bible studies, catechism, church history, confirmation instruction and memory. Additionally, the school teaches reading, mathematics, spelling, language, social studies, science and handwriting *"with a Christ-centered approach."* *Id.* at 14 (emphasis in original).

> At St. Mark Lutheran School:
>
> The primary focus ... is on our Lord and Savior, Jesus Christ. In all of our goals, Jesus Christ must be preeminent. Because of our commitment to that focus and to our beliefs and philosophy, it is highly inconsistent for any parents to send a child to this school if they:
>
> - Are not a Christian and/or are not interested in learning about Jesus Christ
> - Are not living a Christian life or willing to learn how to lead such a life
> - Are not a supporting part of a Christian congregation through worship and sharing of time and talents

St. Mark Handbook at 2, Pl. J.A. vol. III, Ex. I, Tab 35. All students at St. Mark are required to participate in daily religion classes and to "be instructed in the basic teachings of God's Word through an organized program of Christian education." *Id.* at 28. Each day begins with a classroom devotion and prayer and the school day is ended with

classroom prayer. *Id.* Children also attend weekly chapel services.[5] *Id.*

II. PROCEDURAL HISTORY

Case No. 1:99 CV 1740 was filed on July 20, 1999, by Plaintiffs Doris Simmons-Harris, the parent of a minor child enrolled in the Cleveland City School District for the 1999-2000 school year; Marla Franklin, a teacher in the Lorain City School District; and Steven Behr, pastor of Our Savior/Nuestro Salvador Church in Lorain, Ohio, against Defendant Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education.

Case No: 1:99 CV 1818 was filed on July 29, 1999, by Plaintiffs Sue Gatton, Chairperson of Citizens Against Vouchers; Mary Murphy, a teacher in the Cleveland City School District; Michael Debose, a pastor in Cuyahoga County, Ohio; Cheryl Debose and Glenn Altschuld, Ohio taxpayers; and Deidra Pearson, the parent of a child enrolled in the Cleveland City School District against Defendants Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education; the State of Ohio through its General Assembly, Governor and other agents; and Sandra Berry, in

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[5] By reciting only those portions of parent handbooks relating to religion, the court does not mean to diminish the importance of the instruction that each school participating in the Voucher Program offers in core subjects such as math, reading, science and social studies. Given the context within which this case is presented, however, the relevant question is not whether or how well these schools educate students in secular subjects, but whether the aid received through the Voucher Program violates the Establishment Clause. Accordingly, a review of the way in which religion is incorporated into the educational philosophy of participating schools is important to this court's analysis of the Voucher Program.

her official capacity as Program Administrator for the Ohio Pilot Scholarship Program.

Two groups have intervened as defendants in both cases. The first group consists of parents and students who have been enrolled, or seek to enroll, in private schools under the Program. That group includes Senel Taylor, parent of a ten-year old child who has attended private school under the Program for the last two years; Johnnietta McGrady, parent of two children who seek to attend a private school under the Program; Christine Suma, parent of three children who have attended private school under the Program and one child who, at the time this action was filed, was on a waiting list to attend private school under the Program; Arkela Winston, parent of two children who have attended private school under the Program; and Amy Hudock, parent of a child who has attended private school under the Program for the past three school years.

The second group of Intervenors includes nonpublic schools and parents of students who wish to participate in the Program. That group includes Hanna Perkins School, Our Lady of Peace School, Westpark Lutheran School, Lutheran Memorial Association of Cleveland, Ivy Chambers, Carol Lambert, and Delories Jones.

As is the case in the instant matter, Doris Simmons-Harris and Sue Gatton were the lead plaintiffs in the state court litigation challenging the 1995 program. The Plaintiffs challenged the 1995 program as a violation of the Establishment Clause of the First Amendment, and under several provisions of the Ohio Constitution.

The state trial court consolidated the two cases before it. On cross-motions for summary judgment, the court concluded that the 1995 program violated neither the United

States Constitution nor the Ohio Constitution. The Plaintiffs then appealed the trial court's decision. In concluding that the 1995 program violated the Establishment Clause as well as one provision of the Ohio Constitution, the appeals court reversed the trial court's decision. Thereafter, the Defendants appealed that decision to the Ohio Supreme Court.

The 1995 program was struck down by the Ohio Supreme Court in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). The court held that the program was enacted in violation of Section 15(D), Article II, of the Ohio Constitution in "that creation of a substantive program in a general appropriations bill violates the one-subject rule" found in that provision. *Id.* at 216. The Ohio Supreme Court also addressed the federal constitutional issue raised in that case, whether the pilot program violated the Establishment Clause of the First Amendment. It concluded, contrary to the holding of the Ohio Court of Appeals, that it did not.

The Voucher Program was enacted by the Ohio Legislature on June 29, 1999, as part of the Education Budget Bill. *See* Ohio Rev. Code § 3313.974-3313.979 (Anderson 1999). It is, in all respects pertinent to this litigation, the same as the original pilot scholarship program enacted by the Legislature in 1995, which was operative for three successive school years. As detailed above, the first challenge to the 1999 Program, case no. 1:99 CV 1740 was filed on July 20, 1999, and the second challenge, case no. 1:99 CV 1818, was filed on July 29, 1999.

On August 13, 1999, a preliminary injunction hearing was conducted in which the court entertained oral argument from counsel representing Plaintiffs in both cases, the State, and both groups of Intervening Defendants. After considering the submissions on behalf of all the parties and

the arguments of counsel, this court issued its twenty-eight page order on August 24, 1999, granting Plaintiffs' Motion for a Preliminary Injunction.

On August 27, 1999, the court granted a limited stay of its order enjoining the Program. The stay was made applicable only to those students who were enrolled in the 1995 program during the previous academic year and was granted only for one semester or until the court rendered a final decision on permanent injunctive relief, whichever first occurred. In light of the limited stay, the court set an expedited discovery and trial schedule.

The court conducted telephone conferences with counsel for all parties on September 3 and 17, 1999, in order to make changes as needed to the discovery and trial schedules set by the court in its August 27, 1999 order. As a result of those conferences, the following discovery schedule was established. On September 10, 1999, counsel for all parties were to exchange proposed factual stipulations and requests for documents. Prior to September 17, 1999, counsel for all parties were ordered to attempt to agree upon the factual record which would serve as a basis for the consideration of any summary judgment motions to be filed. In the event that counsel were unable to agree upon a factual record, they had until September 22, 1999, to serve formal discovery requests and notices of deposition. Written discovery responses were due October 8, 1999. All remaining discovery was to be concluded by October 29, 1999. The schedule for the briefing of dispositive motions was set as follows: (a) the dispositive motion deadline was November 1, 1999; (b) responses were due November 15, 1999; and (c) replies were due November 23, 1999. As in the court's August 27, 1999 order, trial was scheduled for December 13, 1999, at 9:00 a.m.

On August 24, 1999, the State appealed this court's order granting Plaintiffs' Motion for Preliminary Injunction to the Sixth Circuit Court of Appeals. Both Intervening Defendants also filed notices of appeal. All Defendants requested a stay of this court's preliminary injunction pending appeal. After this court's August 27, 1999 order granting a limited stay of its preliminary injunction, all Defendants filed revised briefs with the Sixth Circuit, appealing the preliminary injunction with regard to students who were new to the Voucher Program.

While the aforementioned motions were pending before the Sixth Circuit, the State filed a motion for a stay of the preliminary injunction with the United States Supreme Court. On November 5, 1999, by a vote of 5-4, the Supreme Court granted the State's motion. The complete text of that order read:

> Treating the application as a request for a stay of the preliminary injunction, the application for stay presented to Justice Stevens and by him referred to the Court is granted. The preliminary injunction entered by the United States District Court for the Northern District of Ohio, case No. 99 CV 1740, on August 24, 1999, is stayed pending final disposition of the appeal by the Untied States Court of Appeals for the Sixth Circuit.

Zelman, Superintendent of Pub. Instruction, et al. v. Simmons-Harris, Doris, et al., No. 99A320 (U.S. Nov. 5, 1999).

On November 15, 1999, the Sixth Circuit entered an order, wherein it concluded that the Supreme Court's decision granting the State's motion for a stay rendered moot

the Defendants' motions for stay pending in that Court. In light of the expedited schedule set by this court, the Sixth Circuit placed all appeals in this matter in abeyance pending this court's final determination of the case.

III. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific

> facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986).

In reviewing summary judgment motions, this court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252, 106 S.Ct. at 2512.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th

Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more that a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id.*

IV. THE ESTABLISHMENT CLAUSE

A. *History*

In promulgating the First Amendment, the framers of the Bill of Rights sought to protect the colonists' right to be free from government inculcation of the theologies and doctrines of a faith to which they did not subscribe. James Madison, one of the authors of the First Amendment, feared that without such protection, the risk of governmental oppression intensified: "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents." James Madison to Thomas Jefferson, October 17, 1788, *reprinted in The Essential Bill of Rights* 326 (Gordon Lloyd et al. eds., University Press of America 1998) (emphasis in original). To Madison, the freedom to believe and practice the religion of one's choice was a fundamental right and was central to a bill of rights.

In his famous Memorial and Remonstrance in which he urged the State of Virginia to reject legislation which

would financially support the propagation of Christianity as the state religion, Madison voiced his opinion on the proper relationship between government and religion: "[A] Government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any sect, nor suffering any Sect to invade those of another." James Madison's Memorial and Remonstrance, June 20, 1785, *reprinted in The Essential Bill of Rights, supra*, at 228. The basis for his belief that the two should remain separate was his fear of what would happen to citizens if the government were to use laws to regulate their beliefs:

> The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Id. at 226.

Thomas Jefferson's convictions and concerns mirrored those of Madison. In his Statute of Religious

Liberty, he spoke out against the dangers of requiring citizens to support a faith which was not their own: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness...." Jefferson's Statute of Religious Liberty, *reprinted in The Essential Bill of Rights, supra*, at 231.

Madison's and Jefferson's fears and concerns are reflective of those which resulted in the passage of the Establishment Clause—the first clause of the First Amendment of the U.S. Constitution. Its words are simple enough: "Congress shall make no law respecting an establishment of religion...." Since its inception, though, the Establishment Clause has presented some of the most difficult questions of interpretation and application faced by the courts. As the Supreme Court has stated, "in many of these decisions 'we have expressly or implicitly acknowledged that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.'" *Mueller v. Allen*, 463 U.S. 388, 393, 103 S.Ct. 3062, 3065-66 (1983) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111 (1971)).

While Madison and Jefferson may have espoused a belief in a firm wall between church and state, "a hermetic separation of the two is an impossibility [the Court] has never required." *Roemer, III v. Board of Pub. Works of Maryland*, 426 U.S. 736, 746, 96 S.Ct. 2337, 2344 (1976). The Supreme Court has "recognize[d] that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to

the secular without providing direct aid to the sectarian." *Community for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 775, 93 S.Ct. 2955, 2967 (1973). It is now clearly established that not every law which confers a benefit on a religious institution violates the Constitution. Some which confer only "indirect," "remote" or "incidental benefits" have been found to be constitutional. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1, 67 S.Ct. 504 (1947). While line drawing has been difficult in actual cases, a brief examination of some of the Supreme Court's Establishment Clause decisions provides a useful background for assessing the constitutionality of the Voucher Program.

The court has approved tax deductions for the costs of bus transportation by students, regardless of whether they attended public or private school, including parochial schools. *Id.* it also has approved the provision of textbooks at parochial schools when textbooks were not provided to students on the basis of whether they attended public or private school. *Board of Educ. v. Allen*, 392 U.S. 236, 88 S.Ct. 1923 (1968). Until recently, the Court held that public employees could not provide instruction in secular subjects, such as giving remedial and accelerated instruction on the premises of religious institutions. *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997); *School Dist. Of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997); *Meek v. Pittinger*, 421 U.S. 349, 95 S.Ct. 1753 (1975). However, the Court reversed itself on this issue in *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997).

The Court has generally held that a government cannot provide scholarship assistance to students which supports religious instruction or indoctrination. *Nyquist*, 413

U.S. 756, 93 S.Ct. 2955. However, it has approved of scholarship assistance where the aid to students is provided as part of a program made generally available without regard to the public-nonpublic or sectarian-nonsectarian nature of the schools to be benefited. In such circumstances, aid ultimately supports the educational program of a religious institution only as the result of the private choice of the aid recipient. Consequently, there is no religious indoctrination attributable to the government. The Court has also found that the eligibility criteria under this type of program are not such as to influence the recipient's choice of whether to attend a sectarian or nonsectarian institution. *Witters v. Washington Dep't of Servs. For the Blind*, 474 U.S. 481, 106 S.Ct. 748 (1986); *Agostini*, 521 U.S. 203, 117 S.Ct. 1997.

B. *The Applicable Standard in Establishment Clause Cases*

Before reaching the merits of the parties' respective claims, it is necessary to identify the standard under which these claims are properly analyzed. The applicable test used to analyze Establishment Clause challenges is grounded in the principles set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2125 (1971). In *Lemon*, the Supreme Court established the following three-part test:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion.

Id. at 612-13, 91 S.Ct. at 2111 (citations omitted). If the challenged legislation fails to meet any part of this test, it violates the Establishment Clause. While the *Lemon* test is generally accepted as the cornerstone of Establishment

Clause analysis, limits on its effectiveness in analyzing the myriad of factual scenarios that arise in this area of the law have been recognized. *See Hunt v. McNair*, 413 U.S. 734, 741, 93 S.Ct. 2868, 2873 (1973) (reasoning that the *Lemon* test provides "no more than [a] helpful signpost" in analyzing Establishment Clause challenges.) Despite its perceived limitations, the Supreme Court has consistently applied this test in Establishment Clause challenges. *See Mueller*, 403 U.S. at 394, 103 S.Ct. at 3066; *Witters*, 474 U.S. at 485, 106 S.Ct. at 748.

Indeed, in *Agostini*, 521 U.S. 203, 117 S.Ct. 1997, the Supreme Court recently reaffirmed the importance of the *Lemon* test in Establishment Clause cases. It confirmed the need to ascertain whether a law has a secular purpose and whether it has the effect of advancing religion, but altered the test's analytical structure by concluding that the "entanglement" prong should be considered as an aspect of the "effects" inquiry.

In collapsing the *Lemon* test from a three-prong to a two-prong inquiry, the *Agostini* Court also divided the second prong of the *Lemon* test into three specific sub-parts. According to *Agostini*, challenged governmental aid passes constitutional muster if it does not: "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234, 117 S.Ct. at 2016. As discussed *infra*, in clarifying the "effects" prong of the *Lemon* test, the Court did not substantially alter the analysis to be applied in Establishment Clause challenges to programs in which the government provides funding that directly aids the educational function of religious schools. The analysis in those cases under the first and second prongs of the test is still grounded in the principles set forth in *Lemon* and in cases applying the *Lemon* test.

Plaintiffs contend that the Voucher Program is unconstitutional under *Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, because it is factually indistinguishable form the tuition reimbursement program struck down in that case. They argue that the Voucher Program has the impermissible effect of advancing religion, as did the program at issue in *Nyquist*.[6] Defendants, on the other hand, argue that the Voucher Program is factually dissimilar from the program at issue in *Nyquist* and that this case should be governed by more recent Supreme Court cases in which the Court has found programs challenged under the Establishment Clause to be constitutional. In Section V, the court will review *Nyquist* and assess whether that case serves as precedent for this one and if so, whether the Voucher Program violates the Establishment Clause, as did the program in *Nyquist*. In Section VI, it will address Defendants' arguments that cases subsequent to *Nyquist* suggest there are meaningful distinctions between that case and this one.

V. THE VOUCHER PROGRAM UNDER *NYQUIST*

A. *Nyquist*

In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955 (1973), the Supreme Court found unconstitutional a New York State program intended to provide assistance, in several different forms, to nonpublic elementary and secondary schools. *Id.* The program contained three sections, only the second of which is directly relevant to the instant case. The first established direct money grants form the State to nonpublic, nonprofit elementary or secondary schools serving a high concentration of pupils from low-income families and was to be used for

[6] At the outset, it is important to note that Plaintiffs do not challenge the secular purpose of the Voucher Program.

the maintenance and repair of school facilities. *Id.* at 762, 93 S.Ct. at 2960. The second section was a tuition grant program, which provided for partial tuition reimbursements to low-income parents whose children attended elementary or secondary nonpublic schools. *Id.* at 764, 93 S.Ct. at 2961. The last section gave some limited state income tax relief to parents who did not qualify for reimbursement grants. *Id.*

The tuition reimbursement program in *Nyquist* applied to parents of children who attended all private schools, not just private, sectarian schools. The reimbursement grants were limited to $50 for each grade school child and $100 for each high school child. *Id.* Only parents with an annual taxable income of less than $5,000 qualified for reimbursement. *Id.* In order to receive payment, a parent was required to submit a verified statement to the Commissioner of Education containing a receipted tuition bill. Reimbursements by the State could not exceed 50% of the tuition paid by the parents. *Id.*

Nearly 20% of New York State's elementary and secondary population attended over 2, 000 nonpublic schools, and approximately 85% of these schools were church-affiliated.[7] *Id.* at 768, 93 S.Ct. at 2963. While no detailed factual record was developed in the underlying cases, the *Nyquist* Court noted that several pertinent generalizations could be made about the benefited schools. The qualifying institutions could incorporate a number of religious characteristics, including:

[7] It appears that the religious nature of a school was in part ascertained by reviewing New York State Education Department records and determining whether such records identified a given school as church-affiliated. *See Nyquist*, 413 U.S. at 768 n.23, 93 S.Ct. at 2963 n.23.

> (a) impos[ition of] religious restrictions on admissions; (b) requir[ing] attendance of pupils at religious activites; (c) requir[ing] obedience by students to the doctrines and dogmas of a particular faith; (d) requir[ing] pupils to attend instruction in the theology or doctrine of a particular faith; (e) [that the school is an] integral part of the religious mission of the church sponsoring it; (f) [that the school] ha[s] a substantial purpose the inculcation of religious values; (g) impos[ition of] religious restrictions on faculty appointments; and (h) impos[tion of] religious restrictions on what or how the faculty may teach.

Id. at 768, 93 S.Ct. at 2963 (quoting *Committee for Pub. Educ. And Religious Liberty v. Nyquist*, 350 F. Supp. 655, 663 (S.D.N.Y. 1972)). However, the Court made clear that "the characteristics of individual schools [could] vary widely from [this] profile." *Id.*

Applying the *Lemon* test, the Court first found that the tuition grant program easily passed the secular purpose test. The articulated purposes of the program were to promote pluralism and diversity among New York's public and nonpublic schools and to alleviate the concern that the State's overburdened public school system would suffer significant harm if a large portion of children who had been attending nonpublic schools decided to return to the public schools.

Under the "effects" prong of the *Lemon* test, the Supreme Court found the tuition reimbursement program, "designed to allow direct, unrestricted grants of $50 to $100 per child ... as reimbursement to parents in low-income

brackets who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation," violated the Establishment Clause of the First Amendment. *Id.* at 780, 93 S.Ct. at 2969. There was no doubt, held the Supreme Court, that such grants "could not, consistently with the Establishment Clause, be given directly to sectarian schools...." *Id.* The defendants argued that the program should be saved because the aid was delivered to the parents and was not given directly to the benefited schools. *Id.* at 781, 93 S.Ct. at 2969. As support, they maintained that New York's tuition reimbursement program was similar to programs upheld by the Court in *Everson v. Board of Educ.*, 330 U.S. 1, 67 S.Ct. 504 (1947), and *Board of Educ. V. Allen*, 392 U.S. 236, 88 S.Ct. 1923 (1968). In *Everson*, the Court upheld tax deductions for parents who expended bus fare for children who attended religious schools. The *Allen* Court upheld the furnishing of text books for children who attended parochial schools. In both cases, grants went directly to parents, and not to schools.

The *Nyquist* Court rejected the notion that the tuition deduction program was consistent with the Establishment Clause simply because aid went to the parents and not directly to the schools. As the Court explained, whether aid goes through parents or is given directly to schools is only one of many factors to be considered in determining whether or not a given program is unconstitutional. To clarify, the Court detailed the reasons why the programs upheld in *Everson* and *Allen* were significantly different from the nature of the tuition grants involved in *Nyquist:*

> In *Everson*, the Court found the bus fare program analogues to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. Such services, provided in

> common to all citizens, are 'so separate and so indisputably marked off from the religious function,' that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses.

Id. at 781-82, 93 S.Ct. at 2970 (citations omitted).

Contrary to the grants at issue in *Everson* and *Allen*, the tuition grants in *Nyquist* were not restricted to supporting only secular aspects of a school's educational program. *Id.* at 783, 93 S.Ct. at 2971. There was no attempt to separate secular from religious educational functions and to ensure that the monies provided by the State supported only the former. Concluding that the program had the impermissible effect of advancing religion, the Court stated:

> Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is

> unmistakably to provide desired financial support for nonpublic, sectarian institutions.

Id.

Because the Court found that the tuition grant program at issue in *Nyquist* had the primary effect of advancing religion, it did not address the third prong of the *Lemon* test, whether the program fostered excessive entanglement between church and state.

Before analyzing the Voucher Program under *Nyquist*, it is important to note that the *Nyquist* Court found it significant that:

> [b]ecause of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the 'G.I. Bill' impermissibly advances religion in violation of the Establishment Clause.

Id. at 782 n.38, 93 S.Ct. at 2970 n.38 (citations omitted). This language has been often-quoted in post-*Nyquist* Establishment Clause cases in which the Court has concluded that the challenged programs were constitutional. As discussed below, Defendants argue that this case should be

governed by these post-*Nyquist* cases because the Voucher Program is the type of program contemplated by the Court in footnote 38.

B. *The Voucher Program*

1. The Purpose of the Program

As in *Nyquist*, there is no question that the Voucher Program passes the secular purpose of the *Lemon* test. Indeed, as previously noted, Plaintiffs do not challenge the secular purpose of the legislation. Similar to *Nyquist*, the Program seeks to provide nonpublic school alternatives primarily to low-income students for acceptable reasons. Nevertheless, "the propriety of a legislature's purposes may not immunize from further scrutiny a law which . . . has the primary effect that advances religion." *Id.* at 774, 93 S.Ct. at 2966. Thus, the next inquiry is whether the Voucher Program has the effect of advancing religion.

2. The Effect of the Program

The Voucher Program is clearly similar to the tuition reimbursement program in *Nyquist* in two respects. First, while both public and private schools are eligible, only private schools have chosen to participate in the Program, and the vast majority of them are parochial. Like *Nyquist*, where 85% of the benefitted schools were parochial, over 82% of the schools participating in the Voucher Program are religiously affiliated. Thus, as in *Nyquist*, the "bulk of" the aid under the Voucher Program flows to schools which are "sectarian in orientation." *Id.* at 780, 93 S.Ct. at 2969. Second, as in *Nyquist*, the Voucher Program provides unrestricted tuition grants to parents whose children are eligible for the Program and who attend qualifying schools. Like the program in *Nyquist*, there "'has been no endeavor to

guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.'" *Id.* at 783, 93 S.Ct. 2971-72 (quoting *Lemon*, 403 U.S. at 613, 93 S.Ct. at 2111).

Defendants however, argue that the programs are dissimilar in several ways which would require that the Voucher Program be upheld whereas the *Nyquist* program was struck down. First, the Intervening Defendants argue that even if the large majority of schools participating in the Voucher Program is sectarian, the Program is constitutional because the primary focus of the schools is secular education. They maintain that Voucher schools actually educate their students better than do public schools, asserting that "[i]f ... Scholarship children receive a superior secular education and become better citizens because of their parent's school choice, the primary effect of the Program is secular rather than religious."[8] Def. Hanna Perkins Motion at 4-12.[9]

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[8] Along the same lines, the State spends nearly one-third of its brief explaining how the primary effect of the Voucher Program is to provide experimental data on whether the availability of such a program will improve educational opportunities for disadvantaged students. According to the State, if a private school adequately teaches core secular subjects, "then the mere fact that ... [the] school also teaches religion to its students cannot mean that the private school now suddenly serves the State's secular goals less well than if it did not add religion to its teaching." Def. State Motion at 30.

[9] As cited herein, the various briefs in support of the parties' respective positions are abbreviated as follows:

(1) briefs in support of motion for summary judgment are cited as "motion";
(2) briefs in opposition to motions for summary judgment are cited as "opp.";
(3) reply briefs are cited as "reply".

The *Nyquist* Court squarely addressed this argument. Focusing on the term "primary," defendants there asserted that the Court had to decide whether the New York law had the "primary effect" of subsidizing religion or promoting the secular objectives the Court found to be legitimate. In holding that a finding of the former did not necessarily preclude a finding of the latter, the Court said: "We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it Also has the direct and immediate effect of advancing religion." *Id.* at 283 n.39, 93 S.Ct. at 2971 n.39. Thus, even if it could be demonstrated that students participating in the Voucher Program receive a superior education to children in the Cleveland Public Schools, this fact does not obviate this court's duty to further question whether the Program also has the direct and immediate effect of advancing religion.

Second, citing to only several of the most religiously restrictive characteristics in the "profile" developed by the *Nyquist* Court, Defendants seek to distinguish that case by arguing that the schools participating in the Voucher Program do not exhibit each and every characteristic set forth in the *Nyquist* profile. Specifically, they argue that whereas the benefitted schools in *Nyquist* placed religious restrictions on admission, over sixty percent of the students in the Voucher Program are not of the same faith as their school's sponsor.

There is nothing in the *Nyquist* opinion to suggest that a program of this type runs afoul of the Establishment Clause only when the schools have the exact profile as in that case. The Court made clear that no each of the schools fit the profile, explicitly stating that "the characteristics of individual schools may vary widely from [the] profile." *Id.*

at 768, 93 S.Ct. at 2963. More importantly, the *Nyquist* Court clearly did not rely on the fact that the schools in *Nyquist* were "extremely," as opposed to only "moderately" or "mildly" religious in reaching its conclusion. The relevant inquiry was whether schools were sectarian or nonsectarian. The *Nyquist* Court made this determination in part by reviewing the New York State Education Department records to identify whether such records listed a given school as church-affiliated. *Id.* at 768 n.23, 93 S.Ct. at 2963 n.23. The Court's conclusion that the vast majority of benefitted schools were sectarian was central to its finding that the program in *Nyquist* had the impermissible effect of advancing religion.

Finally, Defendants contend that because of the religious restrictions on admission, public school pupils could not enroll in the sectarian schools at issue in *Nyquist*. They maintain that this meant the sectarian schools in *Nyquist* received more money to educate their existing pupils in the same manner, thus acquiring extra funds to spend on religious icons, clergy salaries and the like. On the other hand, they argue, Voucher schools receive no such extra money because they must accept new, financially deprived children who are below grade level and need significant remedial assistance. According to Defendants, educating students with such needs costs the schools more than the payment they receive under the Voucher Program. *See, e.g.*, Def. Hanna Perkins Reply at 3; Def. Hanna Perkins Motion at 17. Furthermore, Defendants assert that the group who receives any "extra" money is parents, who are likely to spend it on "essential food, utilities or clothing." Def. Hanna Perkins Reply at 3-4.

Defendants' argument is not well-taken. The *Nyquist* program did not increase the amount of tuition received by the schools; it merely changed the source form which the

tuition originated. That is, the State relieved the parents of their existing tuition bills. Moreover, Defendants' argument incorrectly assumes that the money the Voucher schools receive as a result of the tuition grants will be used only for secular purposes. However, the tuition grants under the Voucher Program, like those in *Nyquist*, are unrestricted and can be used for any purpose a school finds necessary. That the grants do not fully compensate the schools for the cost of educating the children they accept under the Program does not alter this fact. Additionally, it is irrelevant that the funds in this case will benefit the parents of Voucher students. Parents clearly benefitted under the *Nyquist* program, as they do here. Nevertheless, as in *Nyquist*, the court must evaluate whether the Program *also* benefits the participating schools in such a way as to impermissibly foster religion.

Taken together, the fact that the Voucher Program overwhelmingly benefits sectarian schools and that the grants provided under the Program are not restricted to supporting only secular functions of a participating schools' educational program make it indistinguishable for the Establishment Clause purposes from the tuition reimbursement program in *Nyquist*. As in *Nyquist*, the funds provided under the Voucher Program directly aid the religious function of participating schools. In fact, the state aid under the Voucher Program provides an even more direct benefit to religious schools than did the aid in *Nyquist*. Even though parents must endorse their checks to the schools, the aid is given directly to participating schools. It can fairly be said that because the Program does not make aid available generally without regard to the nature of the institution benefitted, the Voucher Program results in government-sponsored religious indoctrination. Indeed, the Court's ultimate analysis of the *Nyquist* program under the "effects" test can be applied in this case by merely substituting "Ohio" for "New York": "[I]t is precisely the function of [Ohio's] law to provide

assistance to private schools, the great majority of which are sectarian.... [T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783, 93 S.Ct. at 2971.

C. *Nyquist Has Not Been Overruled*

To the extent that Defendants argue implicitly in their motions for summary judgment, as they argued explicitly in their oppositions to Plaintiffs' motions for a preliminary injunction, that *Nyquist* has been "undermined" by a series of subsequent Supreme Court cases and should not be followed, the court must reject the argument. Since the court finds that *Nyquist* is directly relevant precedent, it is "constrained to follow it." *Simmons-Harris v. Zelman*, 54 F. Supp.2d 725, 735 (1999). In deciding to overrule one of its own precedents, the Supreme Court recently stated in *Agostini*:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent to this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, *the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.*

Agostini, 521 U.S. at 237, 117 S.Ct. 2017 (quoting *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22 (1989) (emphasis added). Thus, it is not within the power of this court to declare that a case decided by the United States Supreme Court should be overruled.

VI. ESTABLISHMENT CLAUSE JURISPRUDENCE SINCE *NYQUIST*

As previously discussed, the *Nyquist* Court did not have before it the type of case contemplated in footnote 38, wherein funds are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782 n.38, 93 S.Ct. at 2970 n.38. However, the Court was later confronted with just such a scenario in several cases following *Nyquist*. The dispute in the instant matter revolves around Defendants' contention that the Voucher Program fits within footnote 38 and cases following *Nyquist*. Accordingly, the court turns to a discussion of whether recent cases suggest there is a meaningful distinction between the program struck down in *Nyquist* and that which is being challenged in this case.

A. *Mueller*

In *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062 (1983), the U.S. Supreme Court upheld the constitutionality of a Minnesota statute which allowed state taxpayers to deduct, when computing their state income tax, certain tuition, transportation and educational expenses actually incurred in sending their children to elementary or secondary schools. It found that the program complies with each of the three parts of the *Lemon* test. The court determined that the program had a secular legislative purpose, stating:

> A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a

> state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well educated. Similarly, Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers.

Id. at 395, 103 S.Ct. at 3067.

The Court also concluded that the program did not have the primary effect of advancing religion. First, it explained that the tax deduction was one of many provided under the Minnesota tax laws and that its:

> decisions consistently have recognized that traditionally '[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,' in part because the 'familiarity with the local conditions' enjoyed by the legislators especially enables them to 'achieve an equitable distribution of the tax burden.' Under our prior decisions, the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference.

Id. at 396, 103 S.Ct. at 3067-68 (citations omitted).

According to the Court, it was especially significant that the deduction was available for education expenses incurred by all parents, whether their children attended public schools, nonsectarian private schools or sectarian private schools. *Id.* at 397, 103 S.Ct. at 3068. The Court found this aspect of the statute, as well as others, to be "vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Id.* at 398, 103 S.Ct. at 3068. The Court found the tax deduction involved to be more like the type of program contemplated in footnote 38 of *Nyquist*, wherein the Court "intimated that 'public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,' might not offend the Establishment Clause." *Id.* (citation omitted).

While acknowledging that "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children," central to the Court's reasoning was the fact that the assistance to parochial schools was channeled through parents rather than directly provided to the schools. *Id.* at 399, 103 S.Ct. at 3069. In *Mueller*, the nature of the program at issue necessarily incorporated several significant steps between the aid provided by Minnesota and the benefit religious schools might indirectly receive from such aid. Although the Court did not explicitly delineate these steps, some of them are apparent. At the outset, parents had to decide whether to send their child to public or private, tuition-charging schools. Next, they had to determine whether their child should attend a sectarian or nonsectarian private school. Once their child was enrolled in a private school, the tuition bill was due from parents up-front. Before being able to reap its benefits, it was necessary that parents

become aware of the tuition deduction. Finally, it was not certain that because their child attended a private school, parents would automatically take the deduction; rather, parents had to make the choice to take advantage of it. As the Court explained, "[t]he historic purposes of the [Establishment] [C]lause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400, 103 S.Ct. at 3070.

Because the Court found that the program in *Mueller* "neutrally provide[d] state assistance to a broad spectrum of citizens" and because "under Minnesota's arrangement public funds be[came] available only as a result of numerous, private choices of individual parents of school-age children," it concluded that the program did not have the primary effect of advancing religion. *Id.* at 398-99, 103 S.Ct. at 3069.

Defendants argue that because the Court in *Mueller* indicated it would not base the constitutionality of a program on the consideration of yearly statistical evidence reflecting the extent to which nonsectarian schools might benefit from the tax deduction,[10] this court should not consider statistical

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[10] Defendants base this argument on the following language from the *Mueller* opinion:

> We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the

evidence indicating the number of parochial schools involved in the Program. Defendants also contend that the Voucher Program complies with the dictates of *Mueller* and footnote 38 of *Nyquist* because it is a facially neutral program. Defendants assert that, because the Program is facially neutral, the challenged aid is made generally available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted. Therefore, they argue, any benefit received by a sectarian institution is received as a result of the private choice of the individual parents.

Contrary to Defendants' assertions, *Mueller* cannot fairly be read as repudiating the obligation of the courts in the first instance to see whether the state program is indeed genuinely neutral. The *Mueller* Court's refusal to consider annual reports reciting the number of parents who availed themselves of the tax deduction at issue must be evaluated in the entire context of its decision. Over the dissent of Justices Marshall, Brennan, Blackmun and Stevens, the Court found, on analysis, that the tax deduction was "made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution[s] benefitted" and that it benefitted religious institutions "only as a result of numerous private choices of individual parents of school-age children." 463 U.S. 399, 103 S.Ct. 3069. These two facts meant that the link between state aid and the religious schools was sufficiently attenuated such that the receipt of the tax deduction by private citizens did not offend the Establishment Clause. *See id.* ("Where, as here, aid to

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> tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Mueller, 463 U.S. at 401, 103 S.Ct. at 3070.

parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval,' can be deemed to have been conferred on any particular religion, or on religion generally." (Citation omitted)). In light of this conclusion, it follows that a statistical analysis indicating how may private citizens took advantage of the tax deduction could not weigh into the Court's analysis of the challenged statute's constitutionality. Whether 5% or 100% of students taking advantage of the deductions attended religious schools was of no constitutional consequence in the face of a determination by the Court that the options were neutral and that any aid benefitting religious institutions was the result of private choice.

Consideration of the number and percentage of sectarian schools participating in the Voucher Program is not forbidden by *Mueller*. Assessing the choices available to students in the Program by determining the number of participating religious schools versus the number of participating nonreligious schools is very different than annually taking account of the number of students who have availed themselves of a particular option. In other words, determining whether an aid recipient has neutral options available under a program is not the same as probing how the recipient has chosen to exercise those options. Indeed, the Court has employed a prospective analysis in post-*Mueller* Establishment Clause challenges in an effort to determine the availability of neutral options under a program. *See e.g., Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488, 106 S.Ct. 748, 752 (1986) (finding it significant that "the full benefits of the program [were not] limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients ha[d] full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a

huge variety of possible careers, of which only a small handful are sectarian.").

Defendants' reliance on *Mueller* for the proposition that the court should consider only the face of the relevant statute is also misplaced. On numerous occasions, the Supreme Court has held that, by itself, facial neutrality is insufficient to clear the effects test. For example, in *Bowen v. Kendrick*, 487 U.S. 589, 609-10, 108 S.Ct. 2562, 2574 (1988), the Court concluded:

> Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are "pervasively sectarian."

In *Roemer, III v. Maryland Pub. Works Bd.*, 426 U.S. 736, 747, 96 S.Ct. 2337, 2345 (1976), the Court held:

> Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied. The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and

> even though it makes its aid available to secular and religious institutions alike.

See also Rosenberger v. Rector and Visitors of the Univ. of Virginia et al., 515 U.S. at 846, 115 S.Ct. at 2525 (1995) (O'Conner, J., concurring) ("Neutrality, in both form and effect, is one hallmark of the Establishment Clause.").

Mueller itself adheres to this principle. The Court explicitly followed each step of the *Lemon* test—once it determined the program at issue had a secular purpose, it "turn[ed] ... to the more difficult but related question whether the Minnesota statute ha[d] 'the primary effect of advancing the sectarian aims of the nonpublic schools.'" *Id.* at 396, 103 S.Ct. at 3067 (quoting *Committee for Pub. Educ. V. Regan*, 444 U.S. 646, 662, 100 S.Ct. 840, 851 (1980) and *Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111). The Court determined that the program, *in addition* to being facially neutral, was also neutral in application because aid was provided without regard to the nature of the institutions benefitted and because aid only flowed to religious institutions as a result of the independent choices of parents. Accordingly, the program did not have the primary effect of advancing religion.[11]

On analysis of the Voucher Program's form and effect, the court finds it distinguishable from *Mueller* in at least two pertinent respects. First, under the Voucher Program, parents and their children do not have significant choice between parochial and nonparochial schools. The

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[11] Although Defendants also argue that the Tutorial Program contributes to the facial neutrality of the Voucher Program, they fail to assert how it contributes to the Voucher Program's neutrality in application. Accordingly, inasmuch as the court has concluded that facial neutrality is insufficient to satisfy the "effects" test, Defendants' argument relative to the Tutorial Program is not well-taken.

Program is structured such that eligible schools become registered schools only if they chose to accept the government's invitation to participate. Although the Voucher Program lists several adjacent school districts as eligible schools, none have registered for the Program. Because analysis of the Program's constitutionality requires consideration of where the challenged aid actually flows, the court is obligated to consider only registered schools, not eligible schools. Among registered schools, parochial schools overwhelmingly predominate. Therefore, this Program is unlike the tax program in *Mueller* where parents and children could make an independent choice between public and private schools, including religious schools, and where parents received a tax deduction for expenses associated with attendance at either.[12] Second, because parents of children in the Voucher Program do not have a significant choice between parochial and nonparochial schools, the nature of that choice is not sufficient to break the nexus between the government and the religious institution. Thus, parental choice under the Voucher Program is unlike that in *Mueller*, where the aid was found to be neutral and made available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted.

B. *Witters*

The Supreme Court, in *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 106 S.Ct. 748 (1986), upheld the constitutionality of a State of Washington program extending vocational rehabilitation assistance to a

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[12] Citing with approval to the factual findings of the lower courts in that case, the Court in *Mueller* detailed "a range of educational expense" for which parents of public school children may claim the tax deduction. *See Mueller*, 463 U.S. at 391 n.2, 103 S.Ct. at 3064 n.2. This appeared central to the Court's conclusion that the program was neutral.

blind person attending a Christian college to become a pastor, missionary or youth director. The program at issue authorized the Washington Commission for the Blind to "[p]rovide for special education and/or training in the professions, business or trades so as to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." *Id.* at 483, 106 S.Ct. at 749 (citation omitted). The plaintiff in *Witters* wished to apply his grant to defray his tuition costs at the Inland Empire School of the Bible, the private Christian college where he was studying.

The Court had no trouble determining that the program satisfied the first part of the *Lemon* test. As the court explained, the purpose of the Washington program was "unmistakably secular [in that it] ... was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services." *Id.* at 485, 106 S.Ct. at 751. Further, the Court specifically noted that "no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education." *Id.* at 486, 106 S.Ct. at 751.

In addressing the effects prong of the test, the Court stated:

> The question presented is whether, on the facts as they appear in the record before us, extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer similar to the [constitutionally permissible] hypothetical salary donation [by a public employee to a religious institution], or is an impermissible "direct subsidy."

Id. at 488, 106 S.Ct. at 751. Unlike the *Nyquist* program, the vocational assistance program at issue did not amount to a direct subsidy because "any id provided under Washington's program that ultimately flow[ed] to religious institutions d[id] so only as a result of the genuinely independent and private choices of aid recipients." *Id.*

In reaching the conclusion that the link between the religious institution and the State was sufficiently attenuated, the Court found several aspects of the program pertinent. First, the vocational assistance was paid directly to the student, who could expend his or her education grant on wholly secular education if he or she wished. The program did not create a financial incentive for students to attend sectarian institutions because it did not provide any greater or broader benefits to students who chose to apply their aid to religious education. It was significant that:

> the full benefits of the program [were not] limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients ha[d] full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian.... Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education.

Id.

Upon analysis, the Court found that Washington's program fit within footnote 38 of *Nyquist* because "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.' *Committee for Pub. Educ. & Liberty v. Nyquist*, 413 U.S. at 782-83 n.38, 93 S.Ct. at 2970 n.38, and is in no way skewed toward religion . . . ." *Id.* As the Court determined, "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion." *Mueller*, 474 U.S. at 489, 106 S.Ct. at 752.

Defendants point to *Witters* as support for essentially the same arguments they raise in connection with *Mueller*. As the Senel-Taylor Intervenors/Defendants state, *Witters* "stands for the proposition that a facially neutral program that offers benefits to a class defined without reference to religion does not have a primary effect of advancing religion where any aid to religion results from the private choices of individual beneficiaries, even where a very high proportion of the beneficiaries are using their benefits to pursue a religious option." Def. Taylor Opp. At 14. The court does not disagree with this statement. Nevertheless, it does not agree that *Witters* should change the outcome of this case.

The court first incorporates its discussion regarding *Mueller* herein as much of it directly relates to Defendants' contentions with regard to *Witters*. Next, it will briefly explain why *Witters* is perhaps even easier to distinguish from the instant case than *Mueller*. First, in *Witters*, the student had a genuine choice between attending sectarian or nonsectarian and public or nonpublic institutions. Indeed, he had a choice between pursuing religious and nonreligious vocations, and as a practical matter, had a great many more nonreligious options. Because he could utilize the aid

however he chose, the provision of the scholarship would have no effect on his choice of an institution. Benefits would not accrue "in large part or in whole" to students at sectarian institutions. In fact, under the program, only a "minuscule" amount of aid would ever flow to religious institutions, and the program was not in any way skewed toward religion. Though religious institutions might ultimately benefit, it would be only as a direct result of the choice of recipients, not as the result of the State directly providing a benefit.

To the contrary, students in the Voucher Program have no meaningful choice between attending sectarian or nonsectarian schools. That choice is essentially made for them as a function of the fact that almost all participating schools are religious in nature. Unlike in *Witters*, nearly all state aid under the Voucher Program will flow to religious institutions. It cannot be said that this aid flows to those institutions as a result of the choice of the Program beneficiaries since nearly all the schools participating are religious. Accordingly, it is not true, as it was in *Witters*, that the Voucher Program "is in no way skewed toward religion;" in fact, just the opposite is true here. Thus, *Witters* does not apply to this case because it is not true under the Voucher Program that "aid to religion results from the private choices of individual beneficiaries."

C. *Zobrest*

In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S.Ct. 2462 (1993), the Supreme Court held that providing the services of an interpreter to a deaf student attending a Catholic high school pursuant to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1407 *et seq.*, and its Arizona counterpart did not violate the Establishment Clause. The student had previously attended public school where he was furnished such an interpreter.

Holding that the reasoning of *Mueller* and *Witters* applied to the program at issue, the Court found that the effect of the government program was not to promote religion. *Id.* at 10, 113 S.Ct. at 2467. Rather, the services at issue were part of a general program that "distribute[d] benefits neutrally to any child qualifying as 'disabled' under IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attend[ed]." *Id.* The Court reasoned:

> [b]y according parents freedom to select a school of their choice, the statute insures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking.
>
> * * *
>
> When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed toward religion,' it follows under our prior decisions that provision of that service does not offend the Establishment Clause.

Id. (citations omitted). Indeed, the Court found the case to be easier than *Mueller* and *Witters* because no state monies that were traceable to the government ever went to religious institutions. *Id.*

It was also significant that the IDEA did not relieve the school at which the student wished to utilize the services of his interpreter of an expense it otherwise would have assumed in educating its students. *Id.* at 12-13, 113 S.Ct. at 2468-69. In other words, the Court intimated that even programs in which money does not directly flow to the coffers of a religious institution can still violate the Establishment Clause if aid is provided in such a way as to free up institution funds that would otherwise have been expended on essential, religious or nonreligious, functions. However, because the IDEA neither gave money directly to schools nor relieved them of expenses they would otherwise have borne, it did not amount to an impermissible direct subsidy to sectarian institutions. As the Court explained, because aid only went to religious institutions as a result of the genuinely independent choices of recipients, "[d]isable[d] children, not sectarian schools, [were] the primary beneficiaries of the IDEA; to the extent sectarian schools benefit[ted] at all from the IDEA, they [were] only incidental beneficiaries. Thus, the function of the IDEA [was] hardly to provide desired financial support for nonpublic, sectarian institution." *Id.* at 13, 113 S.Ct. at 2469 (citation omitted).

Finally, the Court reasoned that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Id.* It would not assume that the sign-language interpreter would do anything more than "accurately interpret whatever material [was] presented to the class as a whole." *Id.* As the Court stated, "ethical guidelines require interpreters to 'transmit everything that is said in exactly the same way it was intended." *Id.*

Any argument by Defendants that the Voucher Program is constitutional under *Zobrest* is not well-taken. As discussed above, the Voucher Program is not neutral because it does not make aid available generally without regard to the

nature of the institutions benefitted. Since more than 82% of the schools participating in the Program are sectarian in nature, it also cannot be said that aid only flows to sectarian institutions as a result of the genuine and independent choice of aid recipients. Furthermore, unlike the IDEA, the Program does directly subsidize sectarian institutions. Because all monies under the Program flow directly to the coffers of religious schools, it is unnecessary to take the next step as the Court did in *Zobrest* and determine whether the Program relieves the schools of expenses they otherwise would have had to bear. Moreover, as the funds are unrestricted, there are no safeguards in the Voucher Program to ensure that they will be used only for secular instruction. Finally, it is important that *Zobrest* is factually dissimilar from this case. Central to the Court's decision was a rejection of the notion that the presence of a public employee in a sectarian school automatically violates the Establishment Clause, especially in the case of a sign language interpreter, who could neither add to nor subtract from the learning environment. On the other hand, where a school receives direct, unrestricted funds for its educational program, it hardly can be said that such aid does not result in indoctrination.

D. *Agostini*

The most recent case to hold that a governmental program which provided benefits to religious schools withstood an Establishment Clause challenge is *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997). In that case, the Supreme Court overruled its prior decisions in *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997); and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400, 105 S.Ct. 3216, 3248 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997). In *Aguilar*, the Court had held that the Establishment Clause barred New York City

from sending public school teachers into parochial schools to provide remedial education to disadvantaged children under a congressionally mandated program, Title I of the Elementary and Secondary Education Act of 1965. In *Ball*, the Court found unconstitutional a program implemented by the City of Grand Rapids, Michigan, under which nonpublic school students were taught supplemental courses by public school teachers during the regular school day on the premises of nonpublic schools. *Agostini*, 521 U.S. 218-22, 117 S.Ct. at 2008-10.

In overruling *Aguilar* and *Ball*, the Court affirmed that the basic principles of Establishment Clause jurisprudence had not changed. However, it announced a restructuring of the *Lemon* test. It concluded that the test should be viewed as having two prongs instead of three. The first would continue to be the secular purpose prong and the second would continue to be the effects prong. According to the Court, consideration of whether a program fosters excessive entanglement between church and state, formerly the third prong of the *Lemon* test, should more properly be considered "as an aspect of the inquiry into a statute's effect." *Id.* at 233, 117 S.Ct. at 2015. The Court also clarified the criteria used to determine whether government aid has the effect of advancing religion, indicating that the Court currently employs three criteria: whether the challenged governmental aid (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement. *Id.*

In analyzing its post-*Aguilar* and *Ball* decisions, the Supreme Court concluded that the approach used to assess religious indoctrination had changed in "two significant respects." *Id.* at 223, 117 S.Ct. at 2010. First, citing primarily to *Zobrest*, the Court explained that it had rejected the two principle presumptions upon which *Ball* and *Meek v.*

Pittinger, 421 U.S. 349, 95 S.Ct. 1753 (1975), had rested. The first of these discarded presumptions was "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.* The Court stated: "There is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures." *Id.* at 226, 117 S.Ct. 2012. The second abandoned presumption was that "the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion." *Id.* at 224, 117 S.Ct. at 2011. According to the Court, there is no "perceptible ... difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside." *Id.* at 227, 117 S.Ct. 2012.

Second, citing *Witters*, the Court indicated that it had departed from the rule "that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225, 117 S.Ct. at 2011. The Court went on to explain that departure is warranted in programs that are in conformity with the requirements discussed in footnote 38 of *Nyquist*, such as *Witters*. According to the Court, direct aid programs in which grants are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" are constitutional. *Id.* at 225, 117 S.Ct. at 201 (quotations omitted). The Court also reiterated that programs like those in *Witters* and *Zobrest*, where money ultimately goes to religious institutions "only as a result of

the genuinely independent and private choices of" individuals, satisfy footnote 38's criteria. *Id.* at 226, 117 S.Ct. at 2012. In such cases, religious indoctrination could not be attributed to the state.

It was also significant that under current law, the Court could not conclude that placing public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. *Id.* at 228, 117 S.Ct. at 2012. First, aid under Title I was provided to students regardless of the school they chose to attend. Second, relying on the reasoning in *Zobrest*, the Court found it important that, by law, Title I services were supplemental to the schools' regular curricula. *Id.*, 117 S.Ct. at 2013. As the Court stated:

> These services do not, therefore, 'reliev[e] sectarian schools of costs they otherwise would have borne in educating their students.' *Zobrest*, 509 U.S., at 12, 113 S.Ct., at 2468.... Title I services are [not necessarily] distributed ... 'directly to the religious schools'.... In fact, they are not. No Title I funds ever reach the coffers of religious schools, compare *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 657-659, 100 S.Ct. 840, 848-849 (1979) (involving a program giving 'direct cash reimbursement' to religious schools for performing certain state mandated tasks).

Id. See also Peck v. Lansing Sch. Dist., 148 F.3d 619 (1998) (finding that federally funded program providing services on parochial school campuses does not run afoul of the Establishment Clause as long as instruction is supplemental to regularly provided services, award of funding is based on

neutral criteria, and program imposes adequate safeguards to ensure that instruction provided is secular).

The Court stated in regard to the second effects criteria, that the program not "define its recipients by reference to religion":

> A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf. Witters, supra, at 488, 106 S.Ct., at 752 (upholding neutrally available program because it did not "create a financial incentive for students to undertake sectarian education"); Zobrest, supra, at 10, 113 S.Ct., 2467 (upholding neutrally available IDEA aid because it "creates no financial incentive for parents to choose a sectarian school").

Id. at 230-32, 117 S.Ct. at 2014. The above-cited quote makes it clear that if a program is found not to involve state indoctrination, it may still run afoul of the Establishment Clause based on the ground that the criteria for participation in the program provides an incentive to pursue religious indoctrination. Applying this principle to the program in *Agostini*, the Court found that no such incentive to pursue indoctrination was present. As it stated: "Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. The services are available to all children who meet the Act's eligibility requirements, no matter what

their religious beliefs or where they go to school."[13] *Id.* at 232, 117 S.Ct. at 2014 (citations omitted).

The court does not find that *Agostini* undermines the vitality of *Nyquist* or otherwise supports Defendants' argument that the Voucher Program does not violate the Establishment Clause, made clear that the circumstances where such aid is permissible are in the context of cases like *Witters*, a class of cases different that that in *Nyquist*. In reversing its prior decision in *Aguilar* so that Title I services could be provided to students on the grounds of religious institutions, *Agostini* simply allowed students attending parochial schools to obtain remedial educational benefits which were made generally available to qualifying students without regard to the nature of the institution attended. Indeed, in *Agostini*, no monies ever went into the coffers of the religious institution and there clearly was no direct support for such institutions. The provision of services also would have no effect on a student's choice of what school to attend because the services could be utilized at any school. In one sense, such a program is similar to providing textbooks in math or science to all students regardless of the school they attend.

An analysis of the Voucher Program under the *Agostini* framework makes it clear that it runs afoul of both the indoctrination prong and the financial incentives prong of the effects test. First, this is not a program made neutrally available without regard to the religious-nonreligious, public-nonpublic nature of the institutions to be benefitted. Since there are very few nonreligious options for eligible students, one also cannot say that the decision to attend a religious

[13] The Court ultimately found the Title I program constitutional because it also did not violate the third prong of the "effects" test as it did not create excessive entanglements between church and state.

school under the Voucher Program was made as a result of the genuinely independent choice of aid recipients. As discussed above in connection with *Zobrest*, it is unnecessary to determine whether the Voucher Program "reliev[es] sectarian schools of costs they otherwise would have borne in educating their students" because funds go directly to the coffers of religious schools. Again, there are no limitations on how the funds are to be used; thus, there are no adequate safeguards to ensure that instruction provided is secular. Accordingly, this is not the type of case in which the Court would find it warranted to depart form the rule that government aid that directly aids the educational function of a religious institution is invalid.

Second, program criteria create incentives for students to attend religious schools. Contrary to *Agostini*, students in the Voucher Program may not use their vouchers at any school they wish. Rather, they must attend a school that has chosen to participate in the Voucher Program, and the overwhelming majority of such schools are sectarian in nature. Accordingly, the provision of the services under the Voucher Program directly impacts whether a recipient chooses a religious institution.

Thus, the court concludes that the Voucher Program violates the Establishment Clause under *Agostini* because it results in prohibited governmental indoctrination and because it defines its recipients by reference to religion.

E. *Rosenberger*

The State relies upon *Rosenberger v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819, 115 S.Ct. 2510 (1995), for the contention that it would be unconstitutional to exclude religious private schools from the Voucher Program, as such exclusion based solely on religion

would be content-based discrimination in violation of the Free Speech Clause and would deprive religious schools and families of their equal right to pursue religious study.[14] Def. Memo in Supp. Of Motion to Dismiss at 1. In *Rosenberger*, the University of Virginia had established a Student Activities Fund ("SAF") to which student groups could submit disbursement requests for certain extracurricular activities, including the printing of student publications. The SAF received its money from a mandatory fee assessed per semester to each full-time University student. "Religious activities," those activities which "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality," were excluded from SAF support. *Id.* at 824-825, 115 S.Ct. at 2514-15.

When one student group published a magazine entitled "Wide Awake: A Christian Perspective at the University of Virginia," the Student Council Appropriations Committee refused to authorize payment of the magazine's printing costs on the ground that it was a "religious activity." The student group filed suit, alleging that the University's refusal to authorize payment solely on the basis of the publication's religious editorial viewpoint violated its rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law. *Id.* at 837, 115 S.Ct. at 2520.

The State's argument is premised on the erroneous assumption that the present situation, like *Rosenberger*, offers only two alternatives. In *Rosenberger* there were two clear alternatives—the University could either provide funding, or refuse funding, of the student publication. The State urges that if the court finds the Voucher Program

[14] The State primarily raised this argument in its motion to dismiss, but incorporated it by reference into their motion for summary judgment.

unconstitutional, there is only one alternative left: to exclude all sectarian schools from any such program, based solely on their religious affiliation. Essentially, Defendants invite this court to render an advisory opinion on the constitutionality of such an alternative. The court declines Defendants' invitation. It simply holds that a program which provides no meaningful choice to scholarship recipients other than to attend sectarian schools violates the Establishment Clause.

F. *Revelance of Non-Program Options*

Defendants argue that, when the entire universe of educational alternatives offered by the State of Ohio is considered, the Voucher Program is but one "choice" among many, primarily nonsectarian, educational options. They include community schools and magnet schools among the options the court should consider alongside the Voucher Program.[15] The maintain that "the Scholarship Program, as part of the State's experimentation with various forms of school choice, is a genuinely neutral form of 'public assistance'—like the G.I. Bill—that satisfies the standard the Supreme Court articulated in the well-known footnote 38 of its *Nyquist* decision." Def. State Motion at 14. For the

[15] Community schools are state-funded, nonreligious institutions that are independently operated by self-elected governing boards. Students are admitted to these schools on the basis of lottery. Magnet Schools are "for elementary students focused on the arts, foreign language, computers and science, or other distinctive curricular approach, and may provide Montessori methods and programs emphasizing basic skills." State Defendants' Motion for Summary Judgment at 15-16. Students are accepted into magnet schools by application only; however, assignments are based on lottery when the number of eligible applicants exceeds the number of slots at a particular school. *Id.*

reasons discussed below, the Defendants' position is not well-taken.[16]

The Supreme Court has generally grounded its decisions upholding the programs which provide some type of aid to educational institutions against Establishment Clause challenges on two related principles. The first, that programs which are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" do not offend the Establishment Clause, comes directly from *Nyquist's* footnote 38. *See Nyquist*, 413 U.S. at 783 n.38, 93 S.Ct. at 2970 n.38. The second, that a program does not violate the Establishment Clause if aid inures to the benefit of a religious institution "only as a result of the independent and private choices of aid recipients," is essentially footnote 38 in application. *Witters*, 474 U.S. at 488, 106 S.Ct. at 752. Both principles, if they are to mean anything, must be applied within the context of the challenged program. The relevant inquiry in any

[16] Defendants' proposed analysis of the educational choices available to students eligible for the Voucher Program is similar to that applied by the Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). In *Jackson*, the court considered the Milwaukee Parental Choice Program ("MPCP"), a program in which the State provided money for up to 15% of the student membership of the Milwaukee Public Schools to attend private sectarian or nonsectarian schools. In analyzing the constitutionality of the MPCP, the court considered the program in the context of "pre-existing educational choices available to MPS children." *Id.* at 614 n.9. Ultimately, the court concluded that the MPCP is neutral and is in no way skewed toward religion. *Id.*

Although the *Jackson* court considered the MPCP in the entire context of educational alternatives available to students, its analysis fails to fully explain its reasoning for doing so. Specifically, the court does not indicate why the funds challenged in that case should be considered in conjunction with funds that were not challenged. As will be discussed herein, under existing Supreme Court precedent, this court cannot adopt the analysis employed by the *Jackson* court.

Establishment Clause challenge is whether the choices available under the program at issue are broad enough so as not to influence recipients to choose a religious alternative, not whether the entire universe of options available, both within and outside the program, are sufficient to ensure that a recipient's decision to choose a religious alternative can be considered independent of state influence. In other words, the concern of the Clause is not whether a party has choices beyond those provided by a state aid program, but whether, when one chooses a state program—perhaps over other choices—he can exercise his options within that program without being steered toward a religious institution.[17]

There are two points at which parents must make decisions with regard to sending a child to a Voucher school. First, they must decide whether to enroll their child in the Program. Second, upon deciding to do so, parents must select a school. The court's analysis must necessarily take into account the alternatives available under the latter choice as opposed to the former because it is the Voucher Program that has been challenged. Conducting this analysis reveals that the alternatives available under the Program are so narrow that a recipient's decision to attend a religious school cannot reasonably be said to have been made "only as a result of [his or her] independent and private choices."

Accepting Defendants' argument that the constitutionality of the Voucher Program should be analyzed at the point at which parents first decide whether to enroll their children in the Voucher Program as against all other available options would stand Establishment Clause jurisprudence on its head. In almost any program that could

[17] To the extent that Defendants argue that the Tutorial Program should be considered an educational option, based upon the reasons articulated in this section, such argument is not well-taken.

come under attack under the Clause, there are likely a myriad of alternatives a recipient must choose between from ever deciding whether to take advantage of the program's benefits. If courts were to take into account such alternatives, which in many instances would arguably not be comparable to those offered under the challenged program, it would be a rare case in which a program providing aid to a religious institution would even come close to violating the Establishment Clause.

A review of the relevant cases reveals that the Supreme Court has always assessed the question of "choice" within the context of the challenged program and that the court has never gone so far as to undertake an analysis like the one Defendants argue this court should adopt.[18] In *Witters*, for example, the Court looked to the options available to blind students to utilize monies available to them under the State of Washington's vocational rehabilitation assistance program. It found that there was sufficient options regarding the institutions at which the assistance might be

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[18] The Defendants argue that *Mueller* supports their position because the Court there took into account the fact that the tax deduction at issue was one of many provided under the Minnesota tax laws. This argument disregards the fact that a significant basis for the Court's opinion was that, unlike the Voucher Program, the tax deduction benefitted children attending public schools; private, nonsectarian schools and private sectarian schools alike. In other words, the "choice" question in *Mueller* was, in fact, whether the challenged program applied to all students equally.

Moreover, a reading of the Court's opinion reveals that it considered the tax deduction at issue as part of the State's entire tax scheme because "[l]egislatures have broad latitude in creating classifications and distinctions in tax statues ... [and therefore,] the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes [was] entitled to substantial deference." *Mueller*, 463 U.S. 396, 103 S.Ct. at 3068 (citations omitted).

utilized such that the Court could conclude that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent private choices of aid recipients." *Id.* at 488, 106 S.Ct. at 752. In reaching its decision, the Court did not concern itself with the full range of possible options that a blind student might have apart from funds received from the program to achieve his or her educational and vocational goals. The Court in no way suggests that it would be appropriate to look at these other options in an effort to determine whether any money which flows to a religious institution under a challenged program is a result of the genuine private choice of the individual.

Defendants seek to distinguish this case from *Nyquist* by arguing, in essence, that the state of the art in education did not include magnet schools and community schools at the time of that decision. Whether or not that proposition is true as a matter of fact, there is nothing in the Court's opinion to suggest that it would have considered such information had it been available. The concern of the Court was with the fact that one wishing to utilize tuition grants under the program had very few nonreligious as compared to religious options. Thus, as under the Voucher Program, there was an incentive for persons to utilize state funds under the program to attend religious institutions. Like the instant case, one could not say that the choices made by parents under the *Nyquist* program were the result of the genuine private choices of participating individuals.

The "choices" available to a Voucher student are more analogous to those offered in *Nyquist* than those in cases like *Witters*, *Mueller* and *Zobrest*. In *Witters*, the student applying for vocational rehabilitation assistance under the Washington statute could take the assistance he had been awarded and put it to use at any college within the State

of Washington. In *Mueller*, parents of children attending any elementary or secondary school in the State of Minnesota, whether public or private, sectarian or nonsectarian, could take advantage of the tax deduction for school expenses. In *Zobrest*, the deaf student who required an interpreter under the IDEA could utilize the skills of his interpreter at any high school in the United States. In stark contrast to *Witters*, *Mueller* and *Zobrest*, a student who receives a voucher under the Program may apply the voucher ***only*** at one of the schools participating in the Voucher Program. Because a Voucher student must apply his or her voucher at one of only fifty-six participating schools, over 82% of which are sectarian, a Voucher student has no meaningful choice at all. Unlike the funds in *Witters*, *Mueller* and *Zobrest*, funds under the Voucher Program flow to religious institutions, not as a result of the "genuinely independent private choices of aid recipients," but rather as a result of the very nature of the Program.

VII. CONCLUSION

The separation of church and state was of prime importance to some of the most influential founders and framers of the United States Constitution. Yet it has long been recognized that it is probably not possible or desirable to erect a complete wall between the two. "[A] scrupulous neutrality by the state, as among religions and also as between religious and other activities ... is what is required." *Roemer, III v. Board of Pub. Works of Maryland*, 426 U.S. 736, 745-46, 96 S.Ct. 2337, 2344 (1976). As a result, some types of governmental aid to religious institutions do not implicate the concerns which underlie the Establishment Clause or run afoul of its requirements, while other types do. Remote, incidental or indirect aid that flows to religious educational institutions does not violate the Clause. On the other hand, aid which is provided to directly support the

educational program of such an institution, especially religious instruction and indoctrination, is normally prohibited.

The Supreme Court has carved out an exception to this general rule. Where a program is found to have a permissible secular purpose and does not foster an excessive entanglement between church and state, it will be upheld against an Establishment Clause challenge as long as two principles are satisfied. First, a program must not result in government-sponsored religious indoctrination. Where aid is provided under a neutral program and only flows to religious schools as a result of the genuine and independent choices of beneficiaries, a challenged program will not be found to result in government inculcation of religious beliefs. Second, program criteria must not create incentives for students to attend religious schools.

The Voucher Program has a valid secular purpose and there has been no challenge that it creates an excessive entanglement between church and state. Accordingly, the question in this case is whether the Program has the impermissible effect of advancing religion by resulting in government indoctrination of religious beliefs or creating an incentive to attend religious schools. After thoroughly reviewing the submissions of the parties, the court concludes that there are no genuine issues of material fact and that the Voucher Program violates the Establishment Clause as a matter of law because it violates both of these principles.

In all pertinent respects, the Voucher Program is factually indistinguishable from the tuition reimbursement program struck down in *Community for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955 (1973). Like *Nyquist*, only private schools receive any funds under the Program. As in *Nyquist* the vast majority of

schools participating in the Voucher Program are sectarian. Of the fifty-six schools which are authorized participants, forty-six, or over 82%, are religiously-affiliated. Moreover, similar to *Nyquist*, the tuition grants provided under the Program are unrestricted. There has been no attempt to guarantee that state aid only supports secular, as opposed to religious, educational functions of participating schools. Indeed, some recent Supreme Court cases have suggested that even programs in which money does not directly flow to the coffers of a religious institution can still violate the Establishment Clause if aid is provided in such a way as to free up institution funds that would otherwise have been expended on essential, religious or nonreligious, functions.

The court is not persuaded by Defendants' arguments that post-*Nyquist* cases suggest there are meaningful distinctions between this case and *Nyquist*. It is significant that every case cited by Defendants in which the Supreme Court sustained programs providing aid to religious educational institutions against Establishment Clause challenges explicitly discusses and distinguishes itself from *Nyquist*. Each of these cases dealt with programs in which aid was "made available generally without regard to the sectarian, nonsectarian or public, nonpublic nature of the institutions benefited," a type of program the *Nyquist* Court expressly acknowledged it did not have before it. *See id.* at 782-783 n.38; 93 S.Ct. at 2970 n.38. Moreover, under every program, religious schools were merely incidental or indirect beneficiaries because aid benefitted them "only as a result of the genuinely independent private choices of aid recipients." *Witters v. Washington Dep't of Sevs. For the Blind*, 474 U.S. 481, 106 S.Ct. 748 (1986). *See also Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062 (1983). Additionally, none of the programs at issue in post-*Nyquist* cases incorporated eligibility criteria which impermissibly created incentives to

attend religious institutions. None of them allocated aid on the basis of criteria that either favored or disfavored religion.

This case is unlike any case in which the Supreme Court has upheld programs providing aid to religious educational institutions. Because the vast majority of schools participating in the Voucher Program are sectarian in nature, the Program does not make aid available without regard to the nature of the institutions benefitted. Likewise, recipients do not have available to them the kind of "choice" contemplated by post-*Nyquist* cases. By the very nature of the Program, parents do not have a genuine choice between sending their children to sectarian or nonsectarian schools because sectarian schools overwhelmingly predominate. Unlike cases decided after *Nyquist*, the aid provided under the Voucher Program directly benefits the religious functions of participating sectarian institutions because it cannot be said that aid only flows to religious institutions as a result of the independent and private choices of recipients. Thus, the Program has the effect of advancing religion through government-supported religious indoctrination.

The Voucher Program is also unlike post-*Nyquist* cases in that program criteria create incentives for students to attend religious schools. Voucher students may only redeem their vouchers at schools which have registered and are authorized to participate in the Program, not at any school of their choice. Because the vast majority of participating schools are sectarian in nature, the Program directly influences whether a recipient chooses to attend a religious institution.

It is important to note that this court does not rest any portion of its decision on an inquiry into, or a determination of, the number of students actually attending religious institutions under the Voucher Program. While it is

impermissible to determine the constitutionality of a genuinely neutral program on a year-to-year assessment of the extent to which beneficiaries pursue religious versus nonreligious options, it is incumbent on a court to determine whether a challenged program contains genuine nonreligious options. Undertaking this determination, this court concludes that the Voucher Program is not neutral. Because of the overwhelmingly large number of religious versus nonreligious schools participating in the Voucher Program, beneficiaries cannot make a genuine, independent choice of what school to attend. A program that is so skewed toward religion necessarily results in indoctrination attributable to the government and provides financial incentives to attend religious schools. For both of these reasons, the court finds the Program to be in violation of the Establishment Clause.

Accordingly, the court grants the Motions for Summary Judgment of Plaintiffs Doris Simmons-Harris, *et al.* and Plaintiffs Sue Gatton, *et al.* (Doc. Nos. 83 and 97, respectively), and hereby denies the Motions for Summary Judgment of Intervening Defendants Senel Taylor, *et al.* and the State Defendants, *et al.* (Doc. Nos. 82 and 92, respectively). The State Defendants are permanently enjoined from administering the Voucher Program.

Because counsel for all Plaintiffs have consented to a stay of this court's Order pending Sixth Circuit review, this court hereby stays said Order in its entirety pending such review. *See* Order of December 8, 1999 (Doc. No. 127).

IT IS SO ORDERED.

SOLOMON OLIVER, JR.
United States District Judge

Appendix D

Friday, November 5, 1999

ORDER IN PENDING CASE

99A320

ZELMAN, SUPT. OF PUBLIC INSTRUCTION, ET AL., V. SIMMONS-HARRIS, DORIS, ET AL.

Treating the application as a request for a stay of the preliminary injunction, the application for stay presented to Justice Stevens and by him referred to the Court is granted. The preliminary injunction entered by the United States District Court for the Northern District of Ohio, case No. 99 CV 1740, on August 24, 1999, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Sixth Circuit.

Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer would deny the application for a stay.

Appendix E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al.,	)	Case No.: 1:99CV1740
Plaintiffs	)	JUDGE SOLOMON OLIVER, JR.
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO,	)	
Defendant	)	
SUE GATTON, et al.,	)	Case No.: 1:99CV1818
Plaintiffs	)	
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, et al.,	)	[Filed: August 27, 1999]
Defendants	)	ORDER

Currently pending before the court, pursuant to Fed. R. Civ. P. 62(c), is the State Defendants' Motion to Stay the court's August 24, 1999, order granting Plaintiff's Motion for Preliminary Injunction. Both sets of Plaintiffs have filed a Joint Brief in Opposition to the Motion to Stay. For the reasons set forth below, the State Defendants' Motion to Stay (Doc. No. 49 in Case No. 1:99CV1740; Doc. No. 25 in Case No. 1:99CV1818) is granted in part and denied in part.

On June 29, 1999, Ohio Amended Substitute House Bill No. 282 ("Education Budget Bill") was passed by the Ohio State Legislature, instructing the Ohio State Superintendent of Public Instruction to establish the Pilot Project Scholarship Program ("Program"). Twenty-one days later, on July 20, 1999, a group of plaintiffs filed Case No.: 1:99CV1740, challenging the constitutionality of the Program. On July 29, 1999, a separate set of plaintiffs filed a second action, Case No.: 1:99CV1818, challenging the constitutionality of the Program. These cases have been consolidated. On August 2, 1999, the court scheduled a preliminary injunction hearing for August 13, 1999, and an August 4, 1999, telephonic conference with counsel was scheduled for the purpose of setting the format and procedure of the preliminary injunction hearing. As a result of the August 4, telephonic conference, counsel for all parties agreed to shorten the normal period for filing responsive briefs. On August 13, 1999, a preliminary injunction hearing was conducted in which the court entertained oral argument from counsel representing the parties in both cases as well as two sets of proposed interveners. After considering all submissions on behalf of all the parties and the arguments of counsel, this court issued its twenty-eight page order on August 24, 1999, granting Plaintiffs' Motion for a Preliminary Injunction.

In the court's preliminary injunction order, it concluded that Plaintiffs were likely to succeed on the merits in this case because the Cleveland Pilot Scholarship Program was sufficiently similar to the New York Program in *Committee for Public Education and Liberty v. Nyquist*, 413 U.S. 756 (1973), that the Supreme Court found to be in violation of the Establishment Clause of the First Amendment to the U.S. Constitution. Specifically, this court concluded "that Plaintiffs have a very substantial chance of succeeding on the merits. The Cleveland Program does not make aid available without regard to the nature of the schools to be benefitted. The participating schools are overwhelmingly sectarian. This means that parents cannot make an educational choice without regard to whether the school is parochial or not. Therefore, the Cleveland Program has the primary effect of advancing religion." The court further found, after consideration and balancing of all the pertinent factors, that the strength of Plaintiffs' case caused the balance to tip in favor of granting the injunction. The court reiterates that ruling, in all aspects, herein.

However, the court has decided to grant a limited stay in this action because of the timing of the events leading up to the issuance of the court's order on August 24, 1999. It should not be surprising that Plaintiffs' challenge came near the end of July or that the court's ruling came on August 24, 1999. A ruling close to the beginning of school or after school started was inevitable in light of the late date on which the bill authorizing the 1999 Pilot Program was passed. This timing caused disruption to the children previously enrolled in the Program beyond that normally associated with a student's transferring from one school to another. To make as little incursion as is possible on the existing preliminary injunction, the court will expedite the process for the hearing on the permanent injunction in this matter. The court finds that it is also in the interest of the parties and the children in

the Program to have a speedy, final resolution of the matters rather than a piecemeal resolution involving several possible stages at which the children's education might be disrupted. Therefore, the court grants the State Defendants' Motion to Stay with the following modifications:

(1) The stay is applicable to only those students who were enrolled in the Pilot Program under the 1995 Act during the last academic year; it is not applicable to students who are new enrollees;

(2) The stay shall extend only for one semester or until the court renders a final decision on permanent injunctive relief, whichever is sooner; and

(3) Therefore, the court sets the following schedule for trial of this action:

(a) Counsel shall confer and work out a discovery schedule regarding any pertinent issues, including those which specifically bear on whether or not the Program involved has a primary effect of advancing religion and whether it avoids excessive entanglements under applicable Supreme Court precedents, by September 6, 1999. The proposed schedule shall ensure completion of all discovery by October 29, 1999;

(b) The court will hold a telephonic conference with counsel on September 7, 1999, at 1:00 p.m., to discuss the discovery schedule;

(c) Any dispositive motions must be filed by November 15, 1999; responses are due by November 29, 1999. Replies are due by December 8, 1999; and

(d) Trial of this action shall commence on December 13, 1999, at 9:00 a.m.

IT IS SO ORDERED.

SOLOMON OLIVER, JR.
United States District Judge

Appendix F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al.,	)	Case No.: 1:99CV1740
Plaintiffs	)	JUDGE SOLOMON OLIVER, JR.
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO,	)	
Defendant	)	
SUE GATTON, et al.,	)	Case No.: 1:99CV1818
Plaintiffs	)	
v.	)	
DR. SUSAN TAVE ZELMAN, SUPER-INTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, et al.,	)	[Filed: August 24, 1999]
Defendants	)	ORDER

I. *INTRODUCTION*

Currently pending before this court in consolidated actions are motions seeking to preliminarily enjoin the Ohio Pilot Scholarship Program on the ground that it violates the Establishment Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment to the U.S. Constitution. The Court held a hearing on such motion on August 13, 1999. No testimony was taken. The parties stipulated that the Court should consider the affidavits submitted by each party in support of their position.

Case No. 1:99CV1740 was filed on July 20, 1999, by Plaintiffs Doris Simmons-Harris, the parent of a minor child who will be a pupil in the Cleveland City School District in the 1999-2000 school year; Marla Franklin, a teacher in the Lorain City School District; and Steven Behr, pastor of Our Savior/Nuestro Salvador Church in Lorain, Ohio against Defendant Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education.

Case No: 1:99CV1818 was filed on July 29, 1999, by Plaintiffs Sue Gatton, chairperson of Citizens Against Vouchers; Mary Murphy, a teacher in the Cleveland City School District; Michael Debose, a pastor in Cuyahoga County, Ohio; Cheryl Debose and Glenn Altschuld, Ohio taxpayers; and Deidra Pearson, the parent of a child enrolled in the Cleveland City School District against Defendants Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education; the State of Ohio, through its General Assembly, Governor and other agents; and Sandra Berry, in her official capacity as Program Administrator for the Ohio Pilot Scholarship Program.

There are two groups seeking intervention in both cases. The first group consists of parents of students who have been enrolled, or seek to enroll, in private schools under the program. That group includes Senel Taylor, parent of a ten-year old child who has attended private school under the program for the last two years; Johnnietta McGrady, parent of two children who seek to attend a private school under the program; Christine Suma, parent of three children who have attended private school under the program and one child who is on a waiting list to attend private school under the program; Arkela Winston, parent of two children who have attended private school under the program; and Amy Hudock, parent of a child who has attended private school under the program for the past three years.

The second group of interveners includes nonpublic schools and parents of students who wish to participate in the program. That group includes Hanna Perkins School, Ivy Chambers, Carol Lambert, Delories Jones, Our Lady of Peace School, Westpark Lutheran School and Lutheran Memorial Association of Cleveland.

The Scholarship Program challenged in this action was enacted by the Ohio Legislature on June 29, 1999, as part of the Education Budget Bill. *See* Ohio Revised Code § 3313.974-3313.979. It is in all respects pertinent to this litigation, the same as the original Pilot Scholarship Program enacted by the Legislature in 1995, which was operative for three successive school years. The 1995 Program was stricken down by the Ohio Supreme Court in *Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). The Court held that the Program was enacted in violation of Section 15(D), Article II, of the Ohio Constitution in "that creation of a substantive program in a general appropriations bill violates the one-subject rule" found in that provision. *Id* at 216. The

Ohio Supreme Court also addressed the federal constitutional issue raised in that case, whether the Pilot Program violated the Establishment Clause of the First Amendment. It concluded, contrary to the Ohio Court of Appeals, that it did not.

The 1995 Pilot Program was enacted by the Ohio Legislature to address an educational crisis in the public schools in Cleveland in the wake of a U.S. District Court-ordered takeover by the State of the administration of the Cleveland City School District. The 1999 Program is, as was the 1995 Program, applicable to students residing in the District. The Program has two components, a scholarship program to enable students to attend "alternative schools" ("Scholarship Program" or "Voucher Program") and a tutorial program for children attending the Cleveland Public Schools ("Tutorial Program").

Private schools within the geographic boundaries of the City of Cleveland School District and public schools adjacent to the District are eligible to participate in the Scholarship Program as "alternative schools." In order to do so, private schools must register with the State Superintendent. Recipients are chosen by lot and receive a fixed percentage of the tuition charged the alternative school of their choice up to $2,500. Students whose family income is not more than 200% of the federally-established poverty level receive 90% of their school tuition; other scholarship recipients whose family income is above this threshold receive 75% of their tuition. Participating students may first enroll in the program as early as when the enter kindergarten and must do so by third grade. Once admitted to the program, they are eligible for scholarships through eighth grade. Disbursement of scholarship money to a private school is accomplished by the State sending a check to the chosen school made payable to the parents of the recipient;

thereafter, the parents must endorse the check to the school. The State places no restriction on how the private school may utilize the money. In the event that an adjacent public school is involved, the State would issue a check made payable to the school district.

In the three years prior to the Ohio Supreme Court's holding the Voucher Programs unconstitutional, no public schools registered for the program. None have registered since the enactment of the Program in 1999. For the 1999-2000 school year, 3,801 students will be enrolled in the Program should an injunction not issue. Sixty percent of these students are from families at or below the poverty level. Fifty-six schools are registered to participate in the Program. The record in the prior litigation revealed that 80% of the schools participating in the 1995 program were sectarian and enrolled 85% of the students receiving scholarships. Some of the schools appear to have a pervasive religious orientation. One schools' informational literature contains the statement that "total religious instruction is the major focus of the educational program.... Lessons learned in formal religious classes are purposefully carried over into all subject areas." *See* Complaint in Case No. 1:99CV1740, Attachment B. Another provides in its Parent Handbook: "a child needs to hear and learn the word of God constantly, and [t]his can be done only when the entire curriculum and the life of the school is grounded in the word of God and dedicated to the purpose of showing the love of the Savior to a world which without Him, would be lost forever." *Id.*

Tutorial grants may be used to obtain tutorial services for students enrolled in the Cleveland Public Schools. The same number of scholarship and tutorial grants must be awarded in a given year. The eligibility criteria for the scholarship and the tutorial grants are the same. The maximum allowable tutorial grant is $500.

The Plaintiffs in these cases maintain that the Ohio Pilot Program is not distinguishable in any pertinent respect from a New York State assistance program struck down by the United States Supreme Court in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Defendants contend that because the Ohio Supreme Court previously addressed the issue of the constitutionality of the statute finding it did not violate the Establishment Clause, the doctrine of *res judicata* precludes the Plaintiffs from relitigating this issue. Moreover, they maintain that even if *res judicata* is not appropriate, this Court should defer in its ruling to the Ohio Supreme Court determination of the issue. They also argue that *Nyquist* does not require the enjoining of the Ohio Program because it differs in significant respects from the Program stricken down in *Nyquist*. Alternatively, Defendants argue that this Court should not follow *Nyquist* even if it were to be found controlling because subsequent Supreme Court cases interpreting the Establishment Clause have undermined its vitality.

For the reasons stated herein, Plaintiff's Motion for a Preliminary Injunction is granted.

II. *PRELIMINARY INJUNCTION CRITERIA*

The following four factors must be considered and balanced in deciding whether to issue a preliminary injunction: (1) whether the moving party is likely to succeed on the merits; (2) whether the moving party would suffer an irreparable injury if the preliminary injunction is not granted; (3) whether a preliminary injunction would cause substantial harm to others; and (4) whether a preliminary injunction would be in the public interest. *G&V Lounge, Inc. v.*

Michigan Liquor Control Com'n, 23 F.3d 1071, 1076 (6th Cir. 1994).

The violation of a First Amendment right constitutes irreparable injury. *Id.* at 1078-79. Furthermore, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 1079. While harm to others is also an important criteria, the weight to be given this factor turns not only on the gravity of the harm but on how the issue of likelihood of success is resolved. The greater the likelihood of success on the merits by Plaintiffs, the less weight should be given this factor. On the other hand, the lesser Plaintiffs' likelihood of success on the merits, the more weight should be given this factor. The Court shall discuss each of the four factors in turn and appropriately balance them to determine whether a preliminary injunction should issue.

A. *Do Plaintiffs Have a Likelihood of Success on the Merits?*

1. *Does Res Judicata Preclude the Relitigation of This Constitutional Challenge to the Voucher Program?*

Defendants argue that Plaintiffs are not likely to succeed on the merits in this case because they are precluded on *res judicata* grounds from litigating the constitutionality of the 1999 Scholarship Program by the decision of the Ohio Supreme Court in *Simmons v. Goff*, 711 N.E.2d 203 (Ohio 1999), finding that the 1995 Program was not in violation of the Establishment Clause. They also argue in the alternative that even if *res judicata* does not apply, the Ohio Supreme Court opinion is well reasoned, entitled to some deference by this Court, and demonstrates that Plaintiffs are not likely to succeed on the merits in this case. Plaintiffs concede that

they would be precluded by the doctrine of collateral estoppel if the decision of the constitutional issue by the Ohio Supreme Court in *Simmons v. Goff* had been necessary to the Court's decision in that case. They argue such decision was not necessary as the Court struck down the statute on state law grounds, finding the 1995 Program in violation of the one-subject bill. Plaintiffs content that the Court's decision regarding the First Amendment was dicta, and thus not essential to its holding. Consequently, because the Court's decision rested on an adequate and independent state ground, *see Lambrix v. Singletary*, 520 U.S. 518, 522-24 (1997), Plaintiffs were precluded from seeking an appeal pursuant to 28 U.S.C. § 1257 on the constitutional issue before the Ohio Supreme Court.

In *Migra v. Warren City School Dist. Board*, 465 U.S. 75, 78 (1984), the Supreme Court held that ordinarily a state court judgment would have the same preclusive effect in federal court as that judgment would have in state courts. This result is required by 28 U.S.C. § 1738 which provides that judgments of a state court "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in such state ... from which they are taken." The Court also clarified the terminology of preclusion, stating:

> The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." (Citations omitted). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion."

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, *supra*, § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. See *id.*, Introductory Note before § 24. *Id.* at 77, footnote 1.

The Court further stated that claim preclusion is sometimes simply referred to as *res judicata*, which can be confusing when the "doctrine" of *res judicata* is viewed as encompassing both issue and claim preclusion. In this discussion herein, collateral estoppel will be used to mean issue preclusion and *res judicata* will be used to mean claim preclusion.

Defendants use claim issue and claim preclusion in the alternative. Based on the information before the Court at this time, issue preclusion or collateral estoppel is most applicable. Defendants maintain that this issue was already decided by the Ohio Supreme Court and cannot be relitigated. Under the holding in *Migra*, the Court must determine this issue under the Ohio law of preclusion. Under Ohio law, a "prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 985 (Ohio 1983). This is consistent with the Restatement (Second) of Judgments § 27, which states:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Comment (h) to that Section further explains:

> [i]f issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

Applying the applicable principles of issue preclusion, this Court finds that doctrine is not likely to serve as a bar to Plaintiffs pursuing their Establishment Clause claims on the merits.

The Court assumes, as the Plaintiffs have conceded, that for purposes of this motion, they were parties to the prior litigation and would be bound, assuming all other conditions of the doctrine of collateral estoppel have been met. The Court finds that not all of the other conditions have been met. While the Court finds that Defendants had a full and fair opportunity to litigate the Establishment Clause issue before the Ohio Supreme Court, having briefed and argued this issue

there as well as before the Ohio Court of Appeals, the determination of the Establishment Clause issue was not essential to the judgment in *Simmons*. Plaintiffs' argument is well taken that the judgment of the Ohio Supreme Court could be fully supported by the state law ground on which the Ohio Supreme Court relied—that the Legislature passed the law in violation of the one-subject bill. This argument is made more compelling by the fact that Plaintiffs could not seek appeal to the U.S. Supreme Court on the federal constitutional issue. The Supreme Court does not entertain appeals from final judgments which rest on federal and state grounds where the state law ground alone is sufficient to uphold the judgment. Since its decision could have no effect on the judgment, it would be meaningless for the Court to hear such an appeal. For these reasons, the Court finds that collateral estoppel does not serve to preclude Plaintiffs from relitigating their Establishment Clause claim here

The Court will consider the Ohio Supreme Court's opinion and the extent to which it may serve as persuasive authority for this Court on the Establishment Clause issue in the context of discussing the Establishment Clause issue itself.

2. *Does the Voucher Program Violate the Establishment Clause?*

The separation of church and state was of prime importance to some of the most influential founders and framers of the U.S. Constitution. This perhaps is the reason why the very First Amendment to the U.S. Constitution addresses freedom of religion. It states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." The concerns of the founders and framers were born out of both personal conviction regarding the evils which could attend state-

sponsored religion or government interference with religion and also out of their personal experiences. *See Everson v. Board of Education*, 330 U.S. 1 (1947); *id.* at 28 (Rutledge, J. dissenting); *see also Nyquist*, 413 U.S. at 760; *Strout v. Albanese*, 178 F.3d 57, 61 (1999) and sources cited therein. Ultimately, this provision was made applicable to the states through the Fourteenth Amendment to the U.S. Constitution. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

As the Supreme Court said in *Committee for Public Education and Liberty v. Nyquist*, 413 U.S. 756 (1973), "cases arising under these clauses [the free exercise and establishment clauses] have presented some of the most perplexing questions to come before this Court." However, as the Court said, "[i]t has never been possible or desirable to enforce a regime of total separation..." *Id.* at 775. The Supreme Court has "recognize[d] that sectarian schools perform secular, educational functions as well as religious functions, and that forms of aid may be channeled to the secular without providing direct aid to the sectarian." *Nyquist*, 413 U.S. at 775. It is now clearly established that not every law which confers a benefit on a religious institution violates the Constitution. Some which confer only "indirect," "remote" or "incidental benefits" have been found to be constitutional. *See, e.g., Everson*, 330 U.S. 1. Nevertheless, line drawing in actual cases has been difficult.

The Court has approved tax deductions for the costs of bus transportation by students, regardless of whether they attended public or private school, including parochial schools. *Everson*, 330 U.S. 1. The Court has approved the provision of textbooks at parochial schools when textbooks were not provided to students on the basis of whether they attended public or private school. *Board of Education v. Allen*, 392 U.S. 236 (1968). Until recently, the Court held that public employees could not provide instruction in secular

subjects, such as giving remedial and accelerated instruction on the premises of religious institutions. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Meek v. Pittinger*, 421 U.S. 349 (1975). However, the Court has recently reversed itself on this issue. *Agostini v. Felton*, 521 U.S. 203 (1997).

The Court has generally held that a government cannot provide for scholarship assistance to students which supports religious instruction or indoctrination. *Nyquist*, 413 U.S. 756. However, it has approved of scholarship assistance where the aid to students is provided as part of a program made generally available without regard to the public-nonpublic or sectarian-nonsectarian nature of the schools to be benefitted. According to the Court, in such instances, the choice of the scholarship recipient of what school to attend is not affected by the aid given. *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986).

In order for legislation providing aid to a religious institution to pass constitutional muster, it must meet a three-part test employed by the Court: (1) it must reflect a secular legislative purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive entanglements with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The question to be determined in this case is whether the aid provided under the Cleveland Pilot Scholarship Program, which is not limited to financing secular instruction, is constitutional under *Lemon* and the applicable Supreme Court precedents.

a. *Nyquist*

The Court will now examine *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), in an effort to determine whether it should serve as precedent for this case.

In *Nyquist*, New York created a two-part program to partially defray costs to educating low-income students who attended private schools. *Id.* at 762-67. The first part of the program provided partial tuition reimbursement grants to the low-income parents whose children attended private schools, including religious schools. The second part gave some limited state income tax relief to parents who did not qualify for reimbursement grants. *Id.* at 764.

In *Nyquist*, the State of New York established a tuition reimbursement program for parents of children attending elementary or secondary nonpublic schools. The reimbursement was limited to $50 for each grade school child and $100 for each high school child. To qualify for reimbursement for this program, a parent had to have an annual taxable income of less than $5,000. In order to receive payment, a parent was required to submit a verified statement to the Commissioner of Education containing a receipted tuition bill. State reimbursements could not exceed 50% of that amount. *Id.* at 764.

Approximately 85% of the 2,000 nonpublic schools in New York State were church affiliated. Some of the institutions which could qualify for the program imposed religious restrictions of various types, such as requiring students to attend religious activities and to receive instruction in and obey the theology of the school imposing the restrictions. *Id.* at 767-768.

The Supreme Court found that the tuition reimbursement program, "designed to allow direct, unrestricted grants of $50 to $100 per child ... as reimbursement to parents in low-income brackets who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation," to be violative of the Establishment Clause of the First Amendment. *Id.* at 780. The Court noted that there was no doubt that such grants could not "be given directly to sectarian schools..." *Id.* The Court further stated "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral and non-ideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.*

The Defendants in *Nyquist* argued that the State of New York's tuition reimbursement program was similar to programs upheld by the Court in *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 382 U.S. 236 (1968). In *Everson*, the Court upheld tax deductions for parents who expended bus fare for children who attended religious schools. The *Allen* Court upheld the furnishing of text books directly to children who attended parochial schools. The Court rejected Defendants' argument that the *Nyquist* program should be upheld because, like *Everson* and *Allen*, the grants in *Nyquist* went to parents and not to the schools. The Court indicated that this was only one of many factors to be considered in determining whether or not the Establishment Clause was violated. Further, it explained that the programs upheld in *Everson* and *Allen* were significantly different from the nature of the tuition grants involved in the *Nyquist* case.

> In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection,

> sewage disposal, highways, and sidewalks for parochial schools. 330 U.S., at 17-18, 67 S.Ct., at 512-513. Such services, *782 provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' *id.*, at 18, 67 S.Ct., at 513 that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principal. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. *Id.* at 781-782.

The Court found that the tuition grants involved in *Nyquist* were not restricted to supporting secular educational functions. *Id.* at 783. The Court indicated that "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783. The Court went on to further state that "if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions." *Id.* at 786. It then included the following in a footnote, the language of which has been often quoted in subsequent Establishment Clause cases decided by the Court:

> Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally

> without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See *Wolman v. Essex*, 342 F.Supp. 399, 412-413 (SD Ohio), aff'd, 409 U.S. 808, 93 S.Ct. 61, 34 L.Ed.2d 69 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the 'G.I. Bill,' 38 U.S.C. § 1651, impermissibly advances religion in violation of the Establishment Clause. See also n. 32, supra.

Defendants assert that the Program in this case can be distinguished from the program struck down in *Nyquist* because the purpose of the 1999 Voucher Program is to give low-income students in a severely distressed school district the option to attend private schools at taxpayer expense, whereas the program struck down in *Nyquist* was designed to provide a special benefit to sectarian schools.

A review of the purposes of the two programs reveals that any differences which exist between them are not sufficient to distinguish them on constitutional grounds. The articulated legislative purpose in *Nyquist* for the tuition reimbursement program was to ensure a pluralistic society, promote competitive and diverse alternatives to public education and ensure low-income students not be denied those opportunities, and to make sure there was no precipitous decline in nonpublic school enrollment which would aggravate an existing crisis in public education, thereby jeopardizing education for all children. *Nyquist*, 413 U.S. at 765. In order to qualify for the grants, a parent had to have an annual taxable income of less than $5,000 and grants were limited to the modest amount of $50 for each grade school child and $100 for each high school child. The court in *Nyquist* found the stated reasons for the program sufficient

to meet the secular purpose test of *Lemon*. There is no question in this case that the articulated purpose of the Cleveland Pilot Program meets this test as well. Similar to *Nyquist*, the Program seeks to provide nonpublic school alternatives primarily to low-income students for acceptable reasons.

Thus, the question in each case is, "Does the program under review have the effect of advancing religion?" The Court in *Nyquist* found the program at issue in that case had this effect because the program provided unrestricted grants to parents as tuition reimbursement for their children to attend "nonpublic schools, the bulk of which is concededly sectarian in orientation." *Nyquist*, 413 U.S. at 780. The Court reached this conclusion even in the face of a statute that made grants available to attend private schools, not just sectarian schools. A similar circumstance exists in the instant case; the grants are available by statute to attend registered private schools, including religious schools, as well as any participating adjacent public schools. Since *Nyquist* took account of the reality that an overwhelming majority of the schools at which students can utilize their grants were sectarian, it would seem appropriate that the Court should assess the reality of the opportunities available to students in this case.

In this case, Defendants concede that the overwhelming majority of schools from which a student may choose are sectarian and that no adjacent public school has chosen to participate in the Program. Also, as in *Nyquist*, the funds received by a school are not restricted to use for secular educational purposes. In all pertinent respects, the Program looks like *Nyquist* and would appear to be controlled by the precedent.

Nyquist has not been overruled. If *Nyquist* is precedent which is directly on point, this Court is constrained to follow it. As the Supreme Court recently stated in *Agostini v. Felton*, 521 U.S. 203 (1997), in deciding to overrule one of its own precedents:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent to this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 237 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Nevertheless, the Court will explore whether or not *Nyquist* has been undermined by subsequent Supreme Court cases and/or whether recent cases suggest there is a meaningful distinction between the program stricken down in *Nyquist* and that which is being challenged in this case. Defendants cite several cases in support of their position that *Nyquist* has been undermined and should not be followed and that the Cleveland Pilot Program can be meaningfully distinguished, most notably by *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Washington Dept. of Serv. For the Blind*, 474 U.S. 481 (1986), *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) and *Agostini v. Felton*, 521 U.S. 203 (1997). The Court will discuss each of those cases in turn.

b. Post-Nyquist Cases

(i) *Mueller.*

In *Mueller v. Allen*, 463 U.S. 388 (1983), the U.S. Supreme Court upheld the constitutionality of a Minnesota statute which allowed state taxpayers to deduct, when computing their state income tax, certain tuition, transportation and educational expenses actually incurred in sending their children to elementary or secondary schools. It found that the program complied with each of the three parts of the *Lemon* test. The court determined that the program had a secular legislative purpose, stating:

> A State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. Similarly, Minnesota, like other States, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian. By educating a substantial number of students such school relieve public schools of a correspondingly great burden—to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies. *Id.* at 395.

The Court also concluded the program did not have the primary effect of advancing religion. The Court noted that the tax deduction was one of many provided under the Minnesota tax laws and that their "decisions consistently have recognized that traditionally '[l]egislatures have broad latitude in creating classifications and distinctions in tax statutes,' *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547 (1983)...." *Id.* at 396.

The Court found it especially significant that the deduction was available for education expenses incurred by all parents, whether their children attended public schools, nonsectarian private schools or sectarian private schools. *Id.* at 397. The Court found this aspect of the statute, as well as others, to be "vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Id.* at 398. The Court recounted that in striking down the New York statute, it had noted the difference between that statute and those involved in *Everson*, providing a tax deduction to the parents for the bus fare of all children who attended school, whether public or private and *Allen*, which provided textbooks for secular subjects to all children, regardless of whether they attended public or private school. *Id.* The Court found the tax deduction involved to be more like the type of program discussed in footnote 38 of *Nyquist*, wherein the Court "intimated that 'public assistance (e.g., scholarships) made available generally without regard to the sectarian, nonsectarian, or public, nonpublic nature of the institution benefited,' (citation omitted) might not offend the Establishment Clause." *Id.*

While acknowledging that "financial assistance provided to parents ultimately has an economic effect comparable to aid given directly to the schools attended by

their children," the Court found it important that the assistance to parochial schools was channeled through parents rather than directly provided to parochial schools. *Id.* at 399. "[U]nder Minnesota's arrangement, public funds become available only as a result of numerous private choices of individual parents of school-age children." *Id.*

As discussed above, the Supreme Court in *Mueller* clearly did not see itself as undermining *Nyquist*; it took pains to distinguish it. Defendants argue that they, nevertheless, comply with the dictates of *Mueller* and footnote 38 of *Nyquist*. They maintain they have devised a neutral program made generally available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted. They further argue that any benefit received by a sectarian institution is received as a result of the private choice of the individual parents. The Defendants also argue that this Court should not consider the number of parochial schools involved in the Program as evidence of an Establishment clause violation because the Court in *Mueller* indicated it would not consider the extent to which nonsectarian schools might benefit by the tax deduction provided there by comparison to other institutions.

On analysis, the Court finds the Program at issue distinguishable in at least two pertinent respects from *Mueller*. First, under the Cleveland Pilot Program, parents and their children do not have a significant choice between public and private school. No adjacent public school participates in the Program. Parents and their children do not have a significant choice between parochial and non-parochial schools; among registered schools, parochial schools overwhelmingly predominate. This Program is unlike the tax program in *Mueller* where parents and children could make an independent choice between public and private schools, including religious schools, and where

parents received a tax deduction for expenses associated with attendance at either. Second, while it is pertinent to consider the extent to which the money flowing to a sectarian institution is as a result of the private choice of parents, the nature of the parental choice is not sufficient here to break the nexus between the state and the religious institution. As stated earlier, under the Program, the overwhelmingly majority of participating schools are religious in nature. The choice is unlike that in *Mueller* where the program was found to be neutral and made available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted. Furthermore, any aid received by a religious institution as the result of a tax benefit claimed by parents is by its very nature more attenuated than the benefits conferred under the Cleveland Plan, where benefits are conferred to specifically pay tuition.

Moreover, contrary to Defendants' assertions, *Mueller* cannot be fairly read as repudiating the obligation of the Courts in the first instance to see whether the state program is indeed genuinely neutral and made available without regard to the parochial, non-parochial or private, non-private nature of its beneficiaries. *Mueller* holds that if a court finds that the above requirements have been met, it will not find that the Establishment Clause has been violated on statistical evidence that citizens have exercised their private choices in ways that benefit sectarian institutions more than nonsectarian institutions. Over the dissent of Justices Marshall, Brennan, Blackmun and Stevens, the Court found, on analysis, that the program met these criteria. Having reached this conclusion, it indicated it would not bottom constitutionality on a determination of the extent to which sectarian or nonsectarian schools were the actual beneficiaries. *Id.* at 409.

(i) *Witters.*

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Supreme Court upheld the constitutionality of a State of Washington program extending vocational rehabilitation assistance to a blind person to attend a Christian college to become a pastor, missionary or youth director. In regard to the first part of the *Lemon* test, whether the program served a secular purpose, the court stated:

> Our analysis relating to the first prong of that test is simple: all parties concede the unmistakably secular purpose of the Washington program. That program was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services, and no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education. *Id.* at 485-486.

In addressing the effects program of the test, the Court cited *Nyquist* as a case where the effect of the aid given resulted in an impermissible direct subsidy by the state to the religious school, even though it was in the form of aid to the students or their parents. *Id.* at 487. It found, however, that the vocational assistance program at issue did not amount to a direct subsidy. *Id.* at 488. The Court concluded:

> that "the vocational assistance provided ... is paid directly to the student, who transmits it to the educational institution of his or her choice." Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result

> of the genuinely independent and private choices of aid recipients." *Id.*

To clearly distinguish this case from the program involved in *Nyquist*, the Court cited to footnote 38 of *Nyquist* stating, "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted.' *Committee for Public Education & Liberty v. Nyquist*, 413 U.S. at 782-783, n. 38...." *Id.* at 488. It noted that it neither gives greater benefits to those who attend religious institutions, "nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions." *Id.* Students could expend their education grants on wholly secular education if they wished to and could choose from "a huge variety of possible careers, of which only a small handful are sectarian." *Id.* Furthermore, the Court found that "[a] program, providing vocational assistance to the visually handicapped, does not seem well suited to serve as the vehicle for such a subsidy." *Id.* For these reasons and others discussed by the Court, it found the link between state and the religious institution to be attenuated. *Id.*

A review of *Witters* demonstrates that it did not view itself as departing from *Nyquist* or undermining it, but rather as approving of the type of scholarship which the *Nyquist* Court said in footnote 38 of its opinion it had no occasion to consider. Indeed, the *Witters* Court distinguished the program at issue in that case from the one in *Nyquist*.

While the program did make scholarship aid available to a student which could be directly applied to pursue a religious career at a religious institution, critical differences exist between that case and this one. In *Witters*, the Court found, unlike the situation in *Nyquist*, the student had a genuine choice between sectarian and nonsectarian and

between public and nonpublic institutions. Indeed, he had a choice between pursuing religious and non-religious vocations. Because he could utilize the aid however he chose, the provision of the scholarship would have no effect on his choice of an institution. Though a religious institution might benefit, it would be only as a direct result of the choice of the student, not as the result of the state providing a benefit to religious institutions. Contrarily, under the Cleveland Scholarship Program, clearly the provision of the scholarship has an effect on parental and student choice because the overwhelming majority of participating schools are religious in nature.

(ii) *Zobrest.*

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Supreme Court held that providing the services of an interpreter to a deaf student attending a Catholic high school pursuant to the Individual With Disabilities Education Act (IDEA), 20 U.S.C. § 1407 *et seq.*, and its Arizona counterpart did not violate the Establishment Clause. The student had previously attended public school where he was furnished such an interpreter. Relying heavily on *Mueller*, *Witters* and footnote 38 of the *Nyquist* opinion, the Court found that the effect of the government program was not to promote religion. *Id.* at 10.

> By awarding parents freedom to select a school of their choice, the statute insures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state

> decisionmaking.... When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed toward religion; *Witters*, *supra*, at 488, ... it follows under our prior decisions that provision of that service does not offend the Establishment Clause. *Id.*

The Court found the case to be easier than *Mueller* and *Witters* because no state monies that were traceable to the government went to religious institutions. *Id.* In reaching its decision, the Court rejected the argument that because the provision of services provided by the state took place on the premises of the religious institution, the program had the primary effect of supporting religion. The Court distinguished this case from *Meek v. Pittinger*, 421 U.S. 349 (1975), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). In *Zobrest*, the Court described the statute struck down in *Meek* as providing "'massive aid' to private schools—more than 75% of which were church related—through a direct loan of teaching material and equipment (citation omitted)." *Id.* at 11. The program also provided for the use of state personnel to provide 'auxiliary services', including counseling and remedial and accelerated instruction. *Id.* The program involved in *Ball* also included the provision of services on the premises of the private school, the teaching of classes in buildings at the institution.

The Court found the program in *Zobrest* to be distinguishable from those in *Meek* and *Ball* in two important respects. First, the direct grants of aid by the government in those two cases "relieved sectarian schools of costs they would otherwise have borne in educating their students." *Id.* (citation omitted). The Court determined the result in *Zobrest* to be otherwise, concluding that the school in that case would not be relieved of any such expenses; any benefit

it received was attenuated and was the result of the private choice of parents. *Id.*

Second, the Court found "the task of a sign interpreter [to be]—quite different from that of a teacher or guidance counsel," *id.* at 13, and concluded that there was nothing to suggest that the interpreter could other than interpret the materials being presented to the class. *Id.*

There is nothing in the *Zobrest* opinion which can be read as undermining *Nyquist*. The furnishing of a sign interpreter did not place any money in the coffers of a religious institution. This was also a program made available to students without regard to where they attended school. It was in no way skewed toward religion. Therefore, it could not be said that the provision of service had an effect on the parent's choice of an educational institution. Any incidental benefit received by the school occurred only as the result of parental choice. Furthermore, the sign interpreter would not be introducing religious content into the school but would have the responsibility for neutrally interpreting regular classes at school. For all of these reasons, the Cleveland Program is distinguishable from that in *Zobrest*.

(iii) *Agostini*.

The most recent case which sheds some light on the question involved herein is *Agostini v. Felton*, 521 U.S. 203 (1997). In that case, the Supreme Court overruled its prior decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), that the Establishment Clause barred New York City from sending public school teachers into parochial schools to provide remedial education to disadvantaged children under a congressionally mandated program, Title I of the Elementary and Secondary Education Act of 1965. As a result of the Court's ruling in *Aguilar*, New York was required to spend

an average of $15 million in additional costs to provide the necessary services to eligible students attending private schools, including costs for leasing a site, mobile instructional units and for transportation costs to get the students to and from the site. *Agostini*, 521 U.S. at 213.

In addressing whether the Title I program violated the Establishment Clause, the Court reviewed its reasoning in *Aguilar* and its companion case *Ball*, which involved programs implemented by the City of Grand Rapids, Michigan, where nonpublic school students were taught supplemental courses by public school teachers during the regular school day on the premises of the nonpublic school. *Id.* at 218-222. The Court then concluded that the assumptions on which *Aguilar* and *Ball* had relied had been undermined by more recent Supreme Court cases. *Id.* The Court indicated, however, that the basic principles of Establishment Clause jurisprudence had not changed. The Court then explained its current approach.

In evaluating whether the Establishment Clause is violated, it is still pertinent to inquire whether the program has a secular purpose and the inquiry to reach this determination has not changed. It is also still pertinent to inquire whether the aid has the effect of advancing religion. The Court stated "[w]hat has changed ... is our underestimating of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. This understanding had changed in two significant ways. First, the Court found that in cases decided subsequent to *Meek* and *Ball*, such as *Zobrest*, it had rejected the presumption in those cases "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.* It concluded that just as it saw no reason to presume that the language

interpreted in *Zobrest* would use that position to inculcate religion, it saw no reason to assume that other employees would do so. *Id.* at 225.

Second, citing *Witters*, the Court indicated that it had departed from the rule "that all government aid which directly aids the educational future of religious schools is invalid." *Id.* The cases where departure is warranted are those in conformity with the requirements discussed in footnote 38 of *Nyquist*, as demonstrated by *Witters*: grants which are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Id.* at 225. As the court stated in *Witters*, money goes to religious institutions as a result of a "'genuinely independent and private choice of individuals.'" *Id.* at 226 (citation omitted).

The Court does not find that the *Agostini* case undermines the vitality of *Nyquist* either. Even while reversing its prior decision in *Aguilar* so that Title I services could be provided to students on the grounds of religious institutions, it simply allowed students attending parochial schools to obtain remedial educational benefits which were made generally available to qualifying students without regard to the nature of the institution attended. The provision of services would have no effect on a student's choice of what school to attend. In one sense, it is like providing textbooks in math or science to all students regardless of the school they attend. Indeed, no monies went into the coffers of the religious institution and there clearly was no direct support for religious institutions. The *Agostini* Court, while acknowledging that it no longer applied an absolute rule that all direct aid which supports religious institutions was barred by the Establishment Clause, noted that the circumstances where such aid had been found permissible was in the context of cases like *Witters*, a class of cases which *Nyquist* did not address. On comparison of the Scholarship Program in this case with the program involved in *Agostini*, the Court concludes that the cases are significantly different. In this case, unlike in *Agostini*, monies would go directly to support the regular educational program of a religious institution including, in some cases, religious instruction. Moreover, as stated earlier, the provision of the services under the Cleveland Program would impact whether a person chose a religious institution, whereas they did not in *Agostini*.

For the reasons stated above, the Court does not find the Supreme Court of Ohio's opinion persuasive on the Establishment Clause issue.

B. *Will Plaintiffs Suffer Irreparable Harm?*

Because the Court concludes that Plaintiffs have a strong likelihood of success on the merits, it finds also that there is a substantial likelihood that they will suffer irreparable harm.

C. *Will Others Suffer Substantial Harm?*

The parties stipulated that testimony might be presented by way of affidavits including a large number submitted by the Defendants and Intervenors attesting to the harm which the children and others might suffer if the Program is enjoined. Among the affidavits were those of children, parents, principals and administrators of registered schools and a panel of psychiatrists who interviewed selected school children and their families to assess the harm which might be caused to them. Affidavits of professors of psychology, education and public administration were supplied, including an affidavit from Robert Coles, M.D., a professor of psychiatry in medical humanities at Harvard Medical School.

In some of the affidavits, the professionals spell out the various types of harm which children may suffer when their lives are disrupted. They lose friendships and sometimes a sense of continuity of purpose. Students might suffer a sense of loss of security and stability, depending on their family circumstances. Also, their emotional, social and personal development could be severely disrupted. The parents, principals and administrators, teachers and students attest to the positive role that the alternative schools have played in their lives.

The Court credits the testimony regarding potential harm to the students caused by disruption of the Program, but finds that it is insufficient to overcome the fact that Plaintiffs' likelihood of success on the merits is great.

D. *Is the Granting of an Injunction in the Public Interest?*

Because the Court finds that Plaintiffs have a substantial likelihood of success on the merits, it finds that it is substantially in the public interest to grant an injunction.

III. *CONCLUSION*

On thoroughly reviewing and balancing all of the necessary factors, the court concludes that the Cleveland Pilot Scholarship Program should be enjoined. Though Defendants have amassed substantial support regarding the harm the children who will not be able to pursue the Program and others will suffer, that harm cannot be dispositive where the Court concludes that there is no substantial possibility that it will ultimately conclude in their favor. Indeed, the Court has concluded that Plaintiffs have a very substantial chance of succeeding on the merits. The Cleveland Program

does not make aid available without regard to the nature of the schools to be benefitted. The participating schools are overwhelmingly sectarian. This means that parents cannot make an educational choice without regard to whether the school is parochial or not. Therefore, the Cleveland Program has the primary effect of advancing religion. Failing to grant the injunction under such circumstances would not only be contrary to law, but could cause an even greater harm to the children by setting them up for greater disruption at a later time. Therefore, the injunction is granted and the Defendants are enjoined from instituting or continuing to administer this Program pending the outcome of a decision on the merits in this case.

IT IS SO ORDERED.

SOLOMON OLIVER, JR.
United States District Judge

Appendix G

00-3055/3060/3063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DORIS SIMMONS-HARRIS, ET AL.	)	
Plaintiffs-Appellees,	)	ORDER
v.	)	
SUSAN TAVE ZELMAN, SUPERINTENDANT OF PUBLIC INSTRUCTION, STATE OF OHIO, ET AL.,	)	[Filed: Feb. 28, 2001]
Defendants-Appellants (00-3055/3060),	)	
SENEL HERMAN TAYLOR, ET AL.,	)	
Intervenors-Defendants-Appellants (00-3055),	)	
HANNA PERKINS SCHOOL, ET AL.,	)	
Intervenors-Defendants-Appellants (00-3063).	)	

BEFORE: RYAN, SILER, and CLAY, Circuit Judges.

The court having received three petitions for rehearing with the suggestion for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active* judges of the court, and less than a majority of the judges having favored the suggestions, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Judge Moore recused herself from participation in this ruling.

Appendix H

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.974 (Anderson 1999)

§3313.974 Definitions.

As used in this section and in sections 3313.975 [3313.97.5] to 3313.979 [3313.97.9] of the Revised Code:

(A) "Individualized education program" and "handicapped child" have the same meanings as in section 3323.01 of the Revised Code.

(B) "Mainstreamed handicapped student" means a handicapped child who has an individualized education program providing for the student to spend more than half of each school day in a regular school setting with nonhandicapped students.

(C) "Separately educated handicapped student" means a handicapped child who has an individualized education program providing for the student to spend at least half of each school day in a class or setting separated from nonhandicapped students.

(D) "Low-income family" means a family whose income is below the level which the superintendent of public instruction shall establish.

(E) "Parent" has the same meaning as in section 3313.98 of the Revised Code.

(F) "Registered private school" means a school registered with the superintendent of public instruction pursuant to section 3313.976 [3313.97.6] of the Revised Code.

(G) "Alternative school" means a registered private school located in a school district or a public school located in an adjacent school district.

(H) "Tutorial assistance" means instructional services provided to a student outside of regular school hours approved by the commission on school choice pursuant to section 3313.976 [3313.97.6] of the Revised Code.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix I

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.975 (Anderson 1999)

§3313.975 Pilot project scholarship program established.

As used in this section and in sections 3313.975 [3313.97.5] to 3313.979 [3313.97.9] of the Revised Code, "the pilot project school district" or "the district" means any school district included in the pilot project scholarship program pursuant to this section.

(A) The superintendent of public instruction shall establish a pilot project scholarship program and shall include in such program any school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent. The program shall provide for a number of students residing in any such district to receive scholarships to attend alternative schools, and for an equal number of students to receive tutorial assistance grants while attending public school in any such district.

(B) The state superintendent shall establish an application process and deadline for accepting applications from students residing in the district to participate in the scholarship program. In the initial year of the program students may only use a scholarship to attend school in grades kindergarten through third.

The state superintendent shall award as many scholarships and tutorial assistance grants as can be funded given the amount appropriated for the program. In no case, however, shall more than fifty per cent of all scholarships awarded be used by students who were enrolled in a nonpublic school during the school year of application for a scholarship.

(C)(1) The pilot project program shall continue in effect each year that the general assembly has appropriated sufficient money to fund scholarships and tutorial assistance grants. In each year the program continues, no new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three. However, any student who has received a scholarship the preceding year may continue to receive one until the student has completed grade eight.

(2) If the general assembly discontinues the scholarship program, all students who are attending an alternative school under the pilot project shall be entitled to continued admittance to that specific school through all grades up to the eighth grade that are provided in such school, under the same conditions as when they were participating in the pilot project. The state superintendent shall continue to make scholarship payments in accordance with division (A) or (B) of section 3313.979 [3313.97.9] of the Revised Code for students who remain enrolled in an alternative school under this provision in any year that funds have been appropriated for this purpose.

If funds are not appropriated, the tuition charged to the parents of a student who remains enrolled in an alternative school under this provision shall not be increased beyond the amount equal to the amount of the scholarship plus any additional amount charged that student's parent in the most recent year of attendance as a participant in the pilot

project, except that tuition for all the students enrolled in such school may be increased by the same percentage.

(D) Notwithstanding sections 124.39, 3307.35, and 3319.17 of the Revised Code, if the pilot project school district experiences a decrease in enrollment due to participation in a state-sponsored scholarship program pursuant to sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code, the district board of education may enter into an agreement with any teacher it employs to provide to that teacher severance pay or early retirement incentives, or both, if the teacher agrees to terminate the employment contract with the district board, provided any collective bargaining agreement in force pursuant to Chapter 4117. of the Revised Code does not prohibit such an agreement for termination of a teacher's employment contract.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix J

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.976 (Anderson 1999)

§3313.976 Eligibility of private schools and public schools in adjacent districts; tutorial assistance.

(A) No private school may receive scholarship payments from parents pursuant to section 3313.979 [3313.97.9] of the Revised Code until the chief administrator of the private school registers the school with the superintendent of public instruction. The state superintendent shall register any school that meets the following requirements:

(1) The school is located within the boundaries of the pilot project school district;

(2) The school indicates in writing its commitment to follow all requirements for a state-sponsored scholarship program specified under sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code, including, but not limited to, the requirements for admitting students pursuant to section 3313.977 [3313.97.7] of the Revised Code;

(3) The school meets all state minimum standards for chartered nonpublic schools in effect on July 1, 1992, except that the state superintendent at the superintendent's discretion may register nonchartered nonpublic schools meeting the other requirements of this division;

(4) The school does not discriminate on the basis of race, religion, or ethnic background;

(5) The school enrolls a minimum of ten students per class or a sum of at least twenty-five students in all the classes offered;

(6) The school does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion;

(7) The school does not provide false or misleading information about the school to parents, students, or the general public;

(8) The school agrees not to charge any tuition to low-income families participating in the scholarship program in excess of ten per cent of the scholarship amount established pursuant to division (C)(1) of section 3313.978 [3313.97.8] of the Revised Code, excluding any increase described in division (C)(2) of that section. The school shall permit any such tuition, at the discretion of the parent, to be satisfied by the low-income family's provision of in-kind contributions or services.

(B) The state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any of the provisions of division (A) of this section.

(C) Any public school located in a school district adjacent to the pilot project district may receive scholarship payments on behalf of parents pursuant to section 3313.979 [3313.97.9] of the Revised Code if the superintendent of the district in which such public school is located notifies the state superintendent prior to the first day of March that the

district intends to admit students from the pilot project district for the ensuing school year pursuant to section 3327.06 of the Revised Code.

(D) Any parent wishing to purchase tutorial assistance from any person or governmental entity pursuant to the pilot project program under sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code shall apply to the state superintendent. The state superintendent shall approve providers who appear to possess the capability of furnishing the instructional services they are offering to provide.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix K

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.977 (Anderson 1999)

§3313.977 Admission of students to registered private school.

(A)(1) Each registered private school shall admit students to kindergarten and first, second, and third grades in accordance with the following priorities:

(a) Students who were enrolled in the school during the preceding year;

(b) Siblings of students enrolled in the school during the preceding year, at the discretion of the school;

(c) Children from low-income families attending school or residing in the school district in which the school is located until the number of such students in each grade equals the number that constituted twenty per cent of the total number of students enrolled in the school during the preceding year in such grade. Admission of such twenty per cent shall be by lot from among all low-income family applicants who apply prior to the fifteenth day of February prior to admission.

(d) All other applicants residing anywhere, provided that all remaining available spaces shall be filled from among such applicants by lot.

Children from low-income families not selected by lot under division (A)(1)(c) of this section shall be included in the lottery of all remaining applicants pursuant to division (A)(1)(d) of this section.

(2) Each registered private school shall first admit to grades four through eight students who were enrolled in the school during the preceding year. Any remaining spaces for students in these grades may be filled as determined by the school.

(B) Notwithstanding division (A) of this section, except where otherwise prohibited by federal law, a registered private school may elect to admit students of only one gender and may deny admission to any separately educated handicapped student.

(C) If a scholarship student who has been accepted in accordance with this section fails to enroll in the school for any reason or withdraws from the school during the school year for any reason, the school may elect to replace such student with another scholarship student only by first offering the admission to any low-income scholarship students who filed applications by the preceding fifteenth day of February and who were not accepted at that time due to space limitations.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix L

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.978 (Anderson 1999)

§3313.978 Implementation of program by state superintendent and school officials; scholarships and tutorial assistance grants.

(A) Annually by the first day of November, the superintendent of public instruction shall notify the pilot project school district of the number of initial scholarships that the state superintendent will be awarding in each of grades kindergarten through third.

The state superintendent shall provide information about the scholarship program to all students residing in the district, shall accept applications from any such students until such date as shall be established by the state superintendent as a deadline for applications, and shall establish criteria for the selection of students to receive scholarships from among all those applying prior to the deadline, which criteria shall give preference to students from low-income families. For each student selected, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the scholarship amount. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the scholarship amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of

the scholarship amount. The state superintendent shall notify students of their selection prior to the fifteenth day of January and whether they qualify for seventy-five or ninety per cent of the scholarship amount.

(1) A student receiving a pilot project scholarship may utilize it at an alternative public school by notifying the district superintendent, at any time before the beginning of the school year, of the name of the public school in an adjacent school district to which the student has been accepted pursuant to section 3327.06 of the Revised Code.

(2) A student may decide to utilize a pilot project scholarship at a registered private school in the district if all of the following conditions are met:

(a) By the fifteenth day of February of the preceding school year, or at any time prior to the start of the school year, the parent makes an application on behalf of the student to a registered private school.

(b) The registered private school notifies the parent and the state superintendent as follows that the student has been admitted:

(i) By the fifteenth day of March of the preceding school year if the student filed an application by the fifteen day of February and was admitted by the school pursuant to division (A) of section 3313.977 [3313.97.7] of the Revised Code;

(ii) Within one week of the decision to admit the student if the student is admitted pursuant to division (C) of section 3313.977 [3313.07.7] of the Revised Code.

(c) The student actually enrolls in the registered private school to which the student was first admitted or in another registered private school in the district or in a public school in an adjacent school district.

(B) The state superintendent shall also award in any school year tutorial assistance grants to a number of students equal to the number of students who receive scholarships under division (A) of this section. Tutorial assistance grants shall be awarded solely to students who are enrolled in the public schools of the district in a grade level covered by the pilot project. Tutorial assistance grants may be used solely to obtain tutorial assistance from a provider approved pursuant to division (D) of section 3313.976 [3313.97.6] of the Revised Code.

All students wishing to obtain tutorial assistance grants shall make application to the state superintendent by the first day of the school year in which the assistance will be used. The state superintendent shall award assistance grants in accordance with criteria the superintendent shall establish. For each student awarded a grant, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the grant amount and so notify the student. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the grant amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the grant amount.

(C)(1) In the case of basic scholarships, the scholarship amount shall not exceed the lesser of the tuition charges of the alternative school the scholarship recipient

attends or an amount established by the state superintendent not in excess of twenty-five hundred dollars.

(2) The state superintendent shall provide for an increase in the basic scholarship amount in the case of any student who is a mainstreamed handicapped student and shall further increase such amount in the case of any separately educated handicapped child. Such increases shall take into account the instruction, related services, and transportation costs of educating such students.

(3) In the case of tutorial assistance grants, the grant amount shall not exceed the lesser of the provider's actual charges for such assistance or a percentage established by the state superintendent, not to exceed twenty per cent, of the amount of the pilot project school district's average basic scholarship amount.

(4) No scholarship or tutorial assistance grant shall be awarded unless the state superintendent determines that twenty-five or ten per cent, as applicable, of the amount specified for such scholarship or grant pursuant to division (C)(1), (2), or (3) of this section will be furnished by a political subdivision, a private nonprofit or for profit entity, or another person. Only seventy-five or ninety per cent of such amounts, as applicable, shall be paid from state funds pursuant to section 3313.979 [3313.97.9] of the Revised Code.

(D)(1) Annually by the first day November, the state superintendent shall estimate the maximum per-pupil scholarship amounts for the ensuing school year. The state superintendent shall make this estimate available to the general public at the offices of the district board of education together with the forms required by division (D)(2) of this section.

(2) Annually by the fifteenth day of January, the chief administrator of each registered private school located in the pilot project district and the principal of each public school in such district shall complete a parental information form and forward it to the president of the board of education. The parental information form shall be prescribed by the department of education and shall provide information about the grade levels offered, the numbers of students, tuition amounts, proficiency examination results, and any sectarian or other organizational affiliations.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix M

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.979 (Anderson 1999)

§3313.979 Payment of scholarships and grants to parents or to school district; monthly reports by private school.

Each scholarship or grant to be used for payments to a registered private school or to an approved tutorial assistance provider is payable to the parents of the student entitled to the scholarship or grant. Each scholarship to be used for payments to a public school in an adjacent school district is payable to the school district of attendance by the superintendent of public instruction.

(A)(1) By the fifteenth day of each month of the school year that any scholarship students are enrolled in a registered private school, the chief administrator of that school shall notify the state superintendent of:

(a) The number of students who were reported to the school district as having been admitted by that private school pursuant to division (A)(2)(b) of section 3313.978 [3313.97.8] of the Revised Code and who were still enrolled in the private school as of the first day of such month, and the numbers of such students who qualify for seventy-five and ninety per cent of the scholarship amount;

(b) The number of students who were reported to the school district as having been admitted by another private school pursuant to division (A)(2)(b) of section 3313.978

[3313.97.8] of the Revised Code and since the date of admission have transferred to the school providing the notification under division (A)(1) of this section, and the numbers of such students who qualify for seventy-five and ninety per cent of the scholarship amount.

(2) From time to time, the state superintendent shall make a payment to the parent of each student entitled to a scholarship. Each payment shall include for each student reported under division (A)(1) of this section, a portion of seventy-five or ninety per cent, as applicable, of the scholarship amount specified in divisions (C)(1) and (2) of section 3313.978 [3313.97.8] of the Revised Code. This amount shall be proportionately reduced in the case of any such student who is not enrolled in a registered private school for the entire school year.

(3) The first payment under this division shall be made by the last day of November and shall equal one-third of seventy-five or ninety per cent, as applicable, of the estimated total amount that will be due to the parent for the school year pursuant to division (A)(2) of this section.

(B) The state superintendent, on behalf of the parents of a scholarship student enrolled in a public school in an adjacent school district pursuant to section 3327.06 of the Revised Code, shall make the tuition payments required by that section to the school district admitting the student, except that, notwithstanding sections 3323.13, 3323.14, and 3327.06 of the Revised Code, the total payments in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the scholarship amount provided in divisions (C)(1) and (2) of section 3313.978 [3313.97.8] of the Revised Code.

(C) Whenever an approved provider provides tutorial assistance to a student, the state superintendent shall pay the parent for such costs upon receipt of a statement from the parent specifying the services provided and the costs of the services, which statement shall be signed by the provider. The total payments to any parent under this division for all provider services to any individual student in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the grant amount provided in division (C)(3) of section 3313.978 [3313.97.8] of the Revised Code.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix N

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.01 (Anderson 1998)

§3314.01 Permission to become community school; status and general powers of community school.

(A)(1) A board of education may permit all or part of any of the schools under its control, upon request of a proposing person or group and provided the person or group meets the requirements of this chapter, to become a community school.

(2) Any person or group of individuals may propose the creation of a community school pursuant to the provisions of this chapter. No nonpublic chartered or nonchartered school in existence on January 1, 1997, is eligible to become a community school under this chapter.

(B) A community school created under this chapter is a public school, independent of any school district, and is part of the state's program of education. A community school may sue and be sued, acquire facilities as needed, contract for any services necessary for the operation of the school, and enter into contracts with a sponsor pursuant to this chapter. The governing authority of a community school may carry out any act and ensure the performance of any function that is in compliance with the Ohio Constitution, this chapter, other statutes applicable to community schools, and the contract entered into under this chapter establishing the school.

HISTORY: 147 v H 215 (Eff 6-30-97); 147 v S 55 Eff 7-1-98.

The effective date is set by section 6 of SB 55.

The provisions of §§ 50.39, 50.52, Subsection 2(B) paragraph 1 of HB 215 (147 v --) read as follows:

SECTION 50.39. By December 31, 2002, the Legislative Office of Education Oversight shall complete an evaluation of the assets and liabilities to the state's system of educational options that result from the establishment of community schools under this act. The evaluation shall at least include an assessment of any advantages to providing a greater number of educational choices to Ohio parents, any detrimental impacts on the state education system or on individual school districts, and the effects of attending community schools on the academic achievement of students.

* * *

SECTION 50.52. * * *
Subsection 2. * * *

(B) The General Assembly finds that the establishment of independent community schools throughout the state has potential desirable effects, including providing parents a choice of academic environments for their children and providing the education community with the opportunity to establish limited experimental educational programs in a deregulated setting. However, the potential effects of a statewide system of community schools could also generate some adverse results. Therefore, the General Assembly finds it advisable to establish a pilot project in the Lucas County area which will permit the operation of community schools in a limited area of the state in order to provide for the evaluation and measurement of the effects of these schools.

[Sec. 50.52.2 was amended in HB 770 (147 v --), however, division (B) was not changed.]

Appendix O

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.02 (Anderson 1999)

§3314.02 Proposal for converting public school to community school; new start-up school in challenged district; preliminary agreement; contract for each school.

(A) As used in this chapter:

(1) "Sponsor" means a public entity listed in division (C)(1) of this section with which the governing authority of the proposed community school enters into a contract pursuant to this section.

(2) "Pilot project area" means the school districts included in the territory of the former community school pilot project established by former Section 50.52 of Am. Sub. H.B. No. 215 of the 122nd general assembly.

(3) "Challenged school district" means any of the following:

(a) A school district that is part of the pilot project area;

(b) A school district that is in a state of academic emergency under section 3302.03 of the Revised Code;

(c) A big eight school district;

(d) An urban school district.

(4) "Big eight school district" means a school district that for fiscal year 1997 had both of the following:

(a) A percentage of children residing in the district and participating in the predecessor of Ohio works first greater than thirty per cent, as reported pursuant to section 3317.10 of the Revised Code;

(b) An average daily membership greater than twelve thousand, as reported pursuant to former division (A) of section 3317.03 of the Revised Code.

(5) "New start-up school" means a community school other than one created by converting all or part of an existing public school, as designated in the school's contract pursuant to division (A)(17) of section 3314.03 of the Revised Code.

(6) "Urban school district" means one of the state's twenty-one urban school districts as defined in division (O) of section 3317.02 of the Revised Code as that section existed prior to July 1, 1998.

(B) Any person or group of individuals may initially propose under this division the conversion of all or a portion of a public school to a community school. The proposal shall be made to the board of education of the city, local, or exempted village school district in which the public school is proposed to be converted. Upon receipt of a proposal, a board may enter into a preliminary agreement with the person or group proposing the conversion of the public school, indicating the intention of the board of education to support the conversion to a community school. A proposing person or group that has a preliminary agreement under this division may proceed to finalize plans for the school, establish a

governing authority for the school, and negotiate a contract with the board of education. Provided the proposing person or group adheres to the preliminary agreement and all provisions of this chapter, the board of education shall negotiate in good faith to enter into a contract in accordance with section 3314.03 of the Revised Code and division (C) of this section.

(C)(1) Any person or group of individuals may propose under this division the establishment of a new start-up school to be located in a challenged school district. The proposal may be made to any of the following public entities:

(a) the board of education of the district in which the school is proposed to be located;

(b) The board of education of any joint vocational school district with territory in the county in which is located the majority of the territory of the district in which the school is proposed to be located;

(c) The board of education of any city, local, or exempted village school district having territory in the same county where the district in which the school is proposed to be located has the major portion of its territory;

(d) The state board of education;

(e) If the school is proposed to be located in the pilot project area, the governing board of the educational service center serving the county containing the majority of the territory of the pilot project area;

(f) If the school is proposed to be located in the pilot project area, a sponsoring authority designated by the board

of trustees of a state university located in the pilot project area, or the board of trustees itself.

The public entity may enter into a preliminary agreement pursuant to division (C)(2) of this section with the proposing person or group.

(2) A preliminary agreement indicates the intention of a public entity described in division (C)(1) of this section to sponsor the community school. A proposing person or group that has such a preliminary agreement may proceed to finalize plans for the school, establish a governing authority for the school, and negotiate a contract with the public entity. Provided the proposing person or group adheres to the preliminary agreement and all provisions of this chapter, the public entity shall negotiate in good faith to enter into a contract in accordance with section 3314.03 of the Revised Code.

(3) A new start-up school that is established in a school district while that district is in a state of academic emergency under section 3302.03 of the Revised Code may continue in existence once the school district is no longer in a state of academic emergency, provided there is a valid contract between the school and a sponsor.

(D) A majority vote of a sponsoring school district board and a majority vote of the members of the governing authority of a community school shall be required to adopt a contract and convert the public school to a community school or establish the new start-up school. An unlimited number of community schools may be established in any school district provided that a contract is entered into for each community school pursuant to this chapter.

HISTORY: 147 v H 215 (Eff 6-30-97); 147 v S 55 (Eff 7-1-98); 147 v H 650 (Eff 7-1-98); 148 v H 282. Eff 9-28-99.

Appendix P

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.04 (Anderson 1997)

§3314.04 Exemption from state laws and rules.

Except as otherwise specified in this chapter and in the contract between a community school and a sponsor, such school is exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grant certain rights to parents.

HISTORY: 147 v H 215. Eff 6-30-97.

Appendix Q

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.06 (Anderson 1999)

§3314.06 Admission procedures.

The governing authority of each community school established under this chapter shall adopt admission procedures that specify the following:

(A) That except as otherwise provided in this section, admission to the school shall be open to any individual age five to twenty-two entitled to attend school pursuant to section 3313.64 or 3313.65 of the Revised Code in a school district in the state.

(B) That admission to the school may be limited to students who have attained a specific grade level or are within a specific age group; to students that meet a definition of "at-risk," as defined in the contract; or to residents of a specific geographic area within the district, as defined in the contract.

(C) Whether enrollment is limited to students who reside in the district in which the school is located or is open to residents of other districts, as provided in the policy adopted pursuant to the contract.

(D) That there will be no discrimination in the admission of students to the school on the basis of race, creed, color, handicapping condition, or sex; and that, upon

admission of any handicapped student, the community school will comply with all federal and state laws regarding the education of handicapped students.

(E) That the school may not limit admission to students on the basis of intellectual ability, measures of achievement or aptitude, or athletic ability.

(F) That the community school will admit the number of students that does not exceed the capacity of the school's programs, classes, grade levels, or facilities.

(G) That, except as otherwise provided under division (B) of this section, if the number of applicants exceeds the capacity restrictions of division (F) of this section, students shall be admitted by lot from all those submitting applications, except preference shall be given to students attending the school the previous year and to students who reside in the district in which the school is located. Preference may be given to siblings of students attending the school the previous year.

Notwithstanding divisions (A) through (G) of this section, in the event the facial composition of the enrollment of the community school is violative of a federal desegregation order, the community school shall take any and all corrective measure to comply with the desegregation order.

HISTORY: 147 v H 215 (Eff 6-30-97); 148 v H 282. Eff 6-29-99.

Appendix R

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.11 (Anderson 1999)

§3314.11 State office of school options.

The department of education shall establish the state office of school options to provide advice and services for the community schools program, established pursuant to Chapter 3314. of the Revised Code, and the pilot project scholarship program, established pursuant to sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code. The office shall provide services that facilitate the management of the community schools program and the pilot project scholarship program, including providing technical assistance and information to persons or groups considering proposing a community school, to governing authorities of community schools, and to public entities sponsoring or considering sponsoring a community school.

HISTORY: 147 v S 55 (Eff 7-1-98); 148 v H 282. Eff 6-29-99.

Appendix S

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.12 (Anderson 1999)

§3314.12 Annual composite report on community schools.

The legislative office of education oversight shall produce and issue an annual composite informational report on community schools established under this chapter to the speaker of the house of representatives, the president of the senate, and the governor. The report shall include the number of schools in operation, the size and characteristics of enrollment for the schools, the academic performance of the schools, the financial status of the schools, and any other pertinent information.

HISTORY: 147 v H 770 (Eff 7-1-98); 148 v H 282. Eff 6-29-99.

(5) (2) (2)

Nos. 00-1751, 00-1777 & 00-1779

Supreme Court, U.S.
FILED
JUN 21 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
Of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

HANNA PERKINS SCHOOL, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

SENEL TAYLOR, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS DORIS SIMMONS-HARRIS, *ET AL.*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
A. Statement of Facts	1
B. Proceedings Below	3
ARGUMENT	4
I. THE ESTABLISHMENT CLAUSE QUESTION PRESENTED BY ALL THREE PETITIONER GROUPS	4
II. THE COLLATERAL ESTOPPEL QUESTION PRESENTED ONLY BY THE SENEL TAYLOR, *ET AL.* PETITIONERS	23
CONCLUSION	24

TABLE OF AUTHORITIES

CASES	Page
Agostini v. Felton, 521 U.S. 203 (1997)	14, 15
Aguilar v. Felton, 473 U.S. 402 (1985)	14
Board of Education v. Allen, 392 U.S. 236 (1968)	6
Campbell v. Manchester Board of School Directors, 641 A.2d 352 (Vt. 1994)	23
Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	*passim*
Everson v. Board of Education, 330 U.S. 1 (1947)	6
Jackson v. Benson, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998)	4, 5, 21, 22
Khan v. State Oil Co., 93 F.3d 1358 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 3 (1997)	21
Kotterman v. Killian, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999)	23
Lemon v. Kurtzman, 403 U.S. 602 (1971)	4
Mitchell v. Helms, 530 U.S. 793 (2000)	3, 9, 15, 16
Mueller v. Allen, 463 U.S. 388 (1983)	9, 11
Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995)	12
Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999)	23, 24
Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000)	1
Walz v. Tax Commission, 397 U.S. 664 (1970)	9
Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986)	12, 13
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993)	14

Three petitions for *certiorari* have been filed seeking review of the Sixth Circuit's judgment and decision in *Simmons-Harris* v. *Zelman*, 234 F.3d 945 (6th Cir. 2000)—one by the State of Ohio defendants in this litigation ("State Pet.") (No. 00-1751); a second by Hanna Perkins School, *et al.*, a group of intervenors-defendants ("HP Pet.") (No. 00-1777); and a third by Senel Taylor, *et al.*, another group of intervenors-defendants ("ST Pet.") (No. 00-1779). This brief in opposition by plaintiffs Doris Simmons-Harris, *et al.*, responds to all three *certiorari* petitions.[1]

STATEMENT OF THE CASE

A. Statement of Facts

The Ohio Pilot Project Scholarship Program ("Ohio Voucher Program" or "Program") is a tuition voucher program, which, in basic outline, is structured as follows. The Program provides tuition vouchers "according to family income" to the parents of "children residing within the [Cleveland City School District] in grades kindergarten through eighth grade," to be used towards the payment of tuition at any private school within the District that (1) has registered to participate in the Program, and (2) has admitted the child to the school in accordance with a set of non-discriminatory "priority rules" established by the Program. State Pet. App. 4a-5a.[2] *See generally* State Pet. at 3-6. Beyond these basics, five factual points elided or obscured in the *certiorari* petitions bear emphasis:

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[1] Sue Gatton, *et al.*, another group of plaintiffs, are filing a separate brief in opposition also responding to all three *certiorari* petitions.

[2] Family income factors into the equation in the following manner: "The program requires participating private schools to cap tuition at $2500 per [voucher] student per year and pays 90% of whatever tuition the school actually charges for low-income families; for other families, the State pays 75% of the school's tuition up to a maximum of $1875." State Pet. App. 4a.

1. The Ohio Voucher Program "permits"—but does not require—the participation of certain out-of-district public schools. State Pet. at 6. In fact, "[n]o public schools have registered [to participate in] the [P]rogram since its enactment." State Pet. App. 5a.

2. Of the 56 private schools that did register to participate in the Program during the 1999-2000 school year, 46—or 82%—were sectarian. *Id.*

3. "[C]lose to 96% of the students enrolled in the [P]rogram for the 1999-2000 school year attended sectarian institutions." *Id.* 26a. That is because "many of the sectarian schools are larger and provide a greater number of places for children in the [V]oucher [P]rogram." *Id.*

4. The educational programs of the participating sectarian private schools are almost without exception designed to promote the school's particular theology:

> The [participating] schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects. The sectarian schools also follow religious guidelines, including instruction in religion and mandated participation in religious services. [*Id.* 6a.]

See also id. 64a ("[I]t can generally be said that a central part of each [participating sectarian] school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience.").

5. The public funds that flow to participating private schools under the Ohio Voucher Program are entirely unrestricted, and may be used by those schools for whatever purposes the schools deem necessary and appropriate—which in the case of sectarian private schools would include the payment of salaries and

> expenses of school administrators, teachers and other personnel (including members of religious orders) affiliated with the school's religious mission, the purchase of literature and other materials identified with the school's religious mission, the maintenance and construction of facilities used for religious purposes, and other expenditures that support or maintain religious education, worship, and indoctrination, and other religious activities.

B. Proceedings Below

On cross-motions for summary judgment, the District Court held that the Ohio Voucher Program violated the Establishment Clause of the First Amendment to the United States Constitution, finding that "[i]n all pertinent respects, the Voucher Program is factually indistinguishable from the tuition reimbursement program struck down [on Establishment Clause grounds] in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955 (1973)." State Pet. App. 123a. In so holding, the District Court rejected petitioners' reliance on a line of this Court's post-*Nyquist* Establishment Clause decisions—concluding that "[t]his case is unlike any case" in that line. *Id.* 125a; *see also id.* 94a-117a.

The Sixth Circuit affirmed the District Court's Establishment Clause ruling, over the dissent of Judge Ryan. The panel majority agreed with the district court that *Nyquist* "is on point with the matter at hand," *id.* 13a, and that the post-*Nyquist* Establishment Clause decisions put forward by petitioners are not, *id.* 27a-29a; *see also id.* 17a-23a.[3] Accordingly, the panel majority held that *Nyquist* "governs our result." *Id.* 24a. In dissenting, Judge Ryan took the

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[3] The Sixth Circuit's analysis of the post-*Nyquist* decisions encompassed *Mitchell v. Helms*, 530 U.S. 793 (2000), which was decided while this case was on appeal.

position that *Nyquist* is not on point, and thus does not dictate the result here. *Id.* 34a-36a; *see also id.* 56a-58a.

The Sixth Circuit denied *en banc* review.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE QUESTION PRESENTED BY ALL THREE PETITIONER GROUPS

In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court ruled on whether one particular type of school-aid program—a private school tuition payment program—passes muster under the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) Establishment Clause test. Since *Nyquist*, the Court has been called on in a series of cases to determine whether a succession of *other* types of school-aid programs comply with the Establishment Clause. In those decisions, the Court has recognized that the particular school-aid program at issue was qualitatively different from the *Nyquist* private school tuition payment program, and has proceeded in a manner that maintains *Nyquist* as the governing precedent in its stated area of application.

After correctly concluding that the Ohio Voucher Program is a *Nyquist*-type program, and explaining why none of this Court's post-*Nyquist* cases is on point, the Sixth Circuit applied the *Nyquist* holding. Accordingly, the decision below—which scrupulously and faithfully follows this Court's teachings—does not on its own terms warrant review. *Infra* pp. 5-21.

Nor is there a conflict of any substance between the decision below and the decision of the Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998). The *Jackson* court did not take issue with *Nyquist per se* or question the continued vitality of

Nyquist in its stated area of application. Rather, the *Jackson* court concluded that the Wisconsin tuition voucher program there at issue was factually distinguishable from the New York program struck down in *Nyquist*, and more akin to the types of school-aid programs sustained in this Court's post-*Nyquist* Establishment Clause cases. The distinctions between the Wisconsin and New York programs posited by the *Jackson* court are, to be sure, attenuated, but the *Jackson* court's grounding of its decision on those distinctions does not bespeak a disagreement on a question of Establishment Clause jurisprudence worthy of this Court's attention. *Infra* pp. 21-23.

The *certiorari* petitions therefore should be denied.

A. 1. *Nyquist* involved an Establishment Clause challenge to three separate school-aid programs adopted by New York in 1972, including a private elementary and secondary school tuition reimbursement program (hereinafter "New York program"). The *Nyquist* Court summed up the essence of the New York program as follows: "The state program is designed to allow direct, unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who send their children to nonpublic schools, the bulk of which [approximately 85%] is concededly sectarian in orientation." 413 U.S. at 780. *See also id.* at 768.

In considering whether the New York program ran afoul of the Establishment Clause, the *Nyquist* Court applied the three-prong test of *Lemon v. Kurtzman*, *supra*. *See* 413 U.S. at 772-73. Referring to "a series of legislative findings designed to explain the impetus for" the New York program, *id.* at 764, the Court had no difficulty in concluding that the program was adequately supported by legitimate secular purposes, and thus satisfied the first prong of the *Lemon* test. *Id.* at 773; *see also id.* at 788-89, 795. The Court emphasized, however, that "the propriety of a legislature's

purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State." *Id.* at 774.

The Court then turned to the "primary effect" *Lemon* prong, and concluded that the New York program fell short. *Id.* at 780-89. The Court began by noting that its prior Establishment Clause cases condemned all forms of direct governmental financial aid in support of religious activities or institutions "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." *Id.* at 780. Accordingly, the Court stated that "[t]he controlling question" was "whether the fact that the [tuition] grants are delivered to parents rather than the schools is of such significance as to compel a contrary result." *Id.* at 781. The Court concluded that it was not.

The Court recognized that it twice before had "upheld laws that provided benefits to children attending religious schools and to their parents: . . . in *Everson* [*v. Board of Education*, 330 U.S. 1 (1947),] parents were reimbursed for bus fares paid to send their children to parochial schools, and in [*Board of Education v.*] *Allen*[, 392 U.S. 236 (1968),] textbooks were loaned directly to the children." 413 U.S. at 781. But the Court found that *Everson* and *Allen* were distinguishable in two important respects.

First, because the state aid in the two earlier cases had been earmarked for purely secular services or supplies and could not be used for any other purpose, the aid did not have the impermissible effect of advancing religion. *Id.* at 781-82. Conversely,

> [t]he tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. [*Id.* at 783 (internal citation omitted).]

Second, in both *Everson* and *Allen* "the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools," whereas the same could not be said of the New York program's beneficiaries. *Id.* at 782 n.38 (emphasis in original). In this regard, the Court added the following caveat:

> Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the [New York program's] beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. [*Id.* at 782-83 n.38.]

The Court cited the "G.I. Bill" as a possible example of such a scholarship program, and in so doing provided a "See also" citation to footnote 32 of its opinion, *id.*, in which it had alluded to the "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.* at 777 n.32 (internal quotations and citations omitted).[4]

2. The Ohio Voucher Program pays substantially more money and defrays a substantially greater percentage of a participating private school's tuition than the New York program, and it offers that payment up-front rather than as a reimbursement. *Supra* p. 1 & n.2. But aside from these

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[4] Having concluded that the New York program had the impermissible primary effect of advancing religion, the *Nyquist* Court saw no need to decide whether the program also created an excessive entanglement between church and state. 413 U.S. at 794.

differences—neither of which possibly can be said to favor the Ohio Voucher Program's constitutionality—the two programs are identical for Establishment Clause purposes. As the Sixth Circuit put it:

> Factually, the [P]rogram at hand is a tuition grant program for low-income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*. Under both the New York statute in *Nyquist*, as well as the Ohio Statute at issue, parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same, and in both cases, the great majority of schools benefited by these tuition dollars are sectarian. . . . In both *Nyquist* and this case, there are no restrictions on the religious schools as to their use of the tuition funds—the funds may be used for religious instruction or materials as easily as for erasers and playground equipment. [State Pet. App. 24a-25a.][5]

In short, because the Ohio Voucher Program has the essential features that led the *Nyquist* Court to invalidate the New York program on Establishment Clause grounds, the courts below correctly concluded that the two programs are constitutionally indistinguishable.[6]

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[5] *See also* State Pet. App. 92a ("Taken together, the fact that the [Ohio] Voucher Program overwhelmingly benefits sectarian schools and that the grants provided under the Program are not restricted to supporting only secular functions of a participating school's educational program make it indistinguishable for Establishment Clause purposes from the tuition reimbursement program in *Nyquist*.").

[6] Indeed, the effect of certain other differences between this case and *Nyquist* is to make even clearer the Establishment Clause violation.

First, the Court decided *Nyquist* without a factual record concerning the "characteristics of individual schools" that qualified to participate in the New York program, resting its decision on the generalization that the bulk of those schools were "church affiliated," 413 U.S. at 768, or "sectarian in orientation," *id.* at 780. Here, there is abundant evidence in the summary judgment record—in the form of handbooks and mission

B. To be sure, petitioners continue to take the position that *Nyquist* is *not* on point, but none of their arguments in support of that position can withstand scrutiny.

1. Petitioners' principal argument is that the Ohio Voucher Program is a program under which school aid is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited"—*viz.*, a program of the type the *Nyquist* Court did not reach and that this Court has since upheld in a series of decisions beginning with *Mueller v. Allen*, 463 U.S. 388 (1983) and going through *Mitchell v. Helms*, 530 U.S. 793 (2000). *See* State Pet. at 18-25; ST Pet. at 10-11, 16-21; HP Pet. at 17-23, 29. Petitioners are wrong.

(a) Petitioners do not explain the basis for characterizing the Ohio Voucher Program as a program under which school aid is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of

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statements that the participating sectarian schools have prepared and disseminated to parents interested in sending a child to those schools—that the participating sectarian private schools, virtually without exception, integrate religious indoctrination and instruction into their educational programs. *Supra* p. 2.

Second, the New York program was permanently enjoined shortly after its enactment, *see* 350 F. Supp. 655, 673 (lower court opinion), precluding development of a factual record concerning the extent to which the tuition reimbursements provided thereunder were sufficient to enable lower-income parents to send their children to sectarian private schools. The Ohio Voucher Program has been in operation for five school years, and that experience conclusively demonstrates that the vouchers have had their intended effect of enabling thousands of children from lower-income families to attend sectarian private schools, thus swelling the ranks of those schools. This Court has recognized that "an affirmative if not dominant policy of church schools" is "to assure future adherents to a particular faith by having control of their total education at an early age." *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970). Unlike *Nyquist*, there is evidence here to confirm that the Ohio Voucher Program advances this policy.

the institution benefited." But the intimation is that such a characterization is appropriate because—unlike the New York program—the Ohio Voucher Program holds out the theoretical possibility that parents receiving a voucher on their child's behalf can use that voucher to send their child to *an out-of-district public school*.

The obvious flaw in this argument is that out-of-district public schools are not required to participate in the Ohio Voucher Program, and not a single such school ever has registered to do so. *Supra* p. 2. Accordingly, parents receiving a tuition voucher on their child's behalf under the Program cannot *in fact* use that voucher to send their child to an out-of-district public school.

From that perspective—which is the only perspective that possibly can matter in assessing the real-world "effect" of a school-aid program under the second prong of the *Lemon* test—the Ohio Voucher Program is no more a *Nyquist*-footnote-38-type program than the New York program itself. As the Sixth Circuit aptly put it, the Ohio Voucher Program "has the same effect" as the New York program "of benefiting only students in particular private, and mostly religious, schools, irrespective of the illusory choice provided on the face of the Ohio statute." State Pet. App. 32a.

Indeed, the State petitioners concede as much in setting forth their Question Presented. After correctly describing the Ohio Voucher Program as one in which "[p]arents of children in kindergarten through eighth grade may use the scholarships to pay tuition for th[eir] children *at the private schools of their choosing*, including religious schools," the State petitioners frame the Question Presented as "Whether the Establishment Clause prohibits Ohio's [P]rogram from authorizing parents to use the scholarships *at any private school*, whether religious or not." State Pet. at i (emphasis added). Given that the overwhelming majority of the private school choices available to Cleveland parents receiving

vouchers under the Ohio Voucher Program are *sectarian* private schools—*i.e.*, 82% of the participating private schools, and a considerably higher percentage of the available private school "slots"—that is precisely the question presented—and answered in the affirmative—in *Nyquist* with respect to the New York program.[7]

(b) The salient point of distinction between *Nyquist* and this case on the one hand and the post-*Nyquist* cases relied on by petitioners on the other is this: in contrast to *Nyquist*, each of the post-*Nyquist* cases involved a type of school-aid program that "made [the aid] available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited"—*viz.*, a type of school-aid program the *Nyquist* Court recognized to be qualitatively different in Establishment Clause terms from the New York program that was before it—and each of the cases treats with the constitutionality of the program at issue in a manner that preserves *Nyquist* as the governing precedent in its stated area of application.

• In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court rejected an Establishment Clause challenge to a Minnesota program that allowed parents to deduct from their state income taxes a wide range of educational expenses incurred

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[7] Petitioners' intimation that the Ohio Voucher Program can properly be characterized as a *Nyquist*-footnote-38-type program because it is part of a single legislative enactment providing "as many tutorial assistance grants to [Cleveland] public school students as it does scholarships to private school students," *e.g.*, State Pet. at 24, is equally without merit. The tutorial assistance program is a free-standing program that provides additional state dollars in aid of *public* schooling in Cleveland. *See* State Pet. App. 180a. It thus is of no greater relevance in assessing the Establishment Clause "effect" of a *private school* voucher program than any other legislative appropriation in favor of the Cleveland City School District. *See also infra* p. 19.

"for the 'tuition, textbooks and transportation' of dependents attending elementary or secondary schools." 463 U.S. at 391 & n.2.

The Court found that the Minnesota program was "*vitally different* from the [New York program] struck down in *Nyquist*," because tax deductions were available under the Minnesota program "for educational expenses incurred by *all* parents, including those whose children attend public schools," whereas in *Nyquist* "public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools." *Id.* at 397-98 (first emphasis added; second and third emphases in original). That point of distinction, the Court continued,

> had considerable bearing on our decision [in *Nyquist*] striking down the New York statute at issue; we explicitly distinguished both *Allen* and *Everson* on the grounds that "[i]n both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." 413 U.S., at 782-783, n. 38 (emphasis in original). Moreover, we intimated that "public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," *ibid.*, might not offend the Establishment Clause. We think the tax deduction adopted by Minnesota is more similar to this latter type of program than it is to the arrangement struck down in *Nyquist*. [463 U.S. at 398 (footnote omitted).]

• In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court held that the Establishment Clause does not prohibit the State of Washington from providing tuition assistance under a State vocational rehabilitation program to a blind person studying at a Christian college to become a pastor, missionary, or youth director.

Contrasting the situation at hand to that in *Nyquist*, the Court found that the Washington program was "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,'" was "in no way skewed towards religion," and "create[d] no financial incentive for students to undertake sectarian education." *Id.* at 487-88 (citing *Nyquist*, 782-83 n.38 & 785-86). It followed, said the *Witters* Court, that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 487. The Court elaborated as follows:

> [The Washington program] does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. *In this case*, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State. [*Id.* at 488 (emphasis added) (citations omitted).][8]

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[8] Justice Powell, joined by Chief Justice Burger and Justice Rehnquist (as he then was), filed a concurring opinion "to emphasize that *Mueller* strongly supports the result we reach today." 474 U.S. at 490. Justice O'Connor joined only Parts I and III of the Court's opinion and concurred in the judgment—finding Justice Powell's invocation of *Mueller* persuasive, and agreeing with the Court that "[t]he aid to religion at issue here is the result of petitioner's private choice." *Id.* at 493. Justice White, who had dissented in *Nyquist*, also filed a concurring opinion stating that he "agree[d] with most of Justice Powell's concurring opinion with respect to the relevance of *Mueller*." *Id.* at 490.

• In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court held that the Establishment Clause does not prohibit a school district from providing a sign-language interpreter to accompany a deaf student to a Roman Catholic high school, pursuant to the Individuals with Disabilities Act ("IDEA"). The Court held that this result followed ineluctably from *Mueller* and *Witters*, inasmuch as

> [t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. [*Id.* at 10.][9]

• In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), holding that the Establishment Clause does not prohibit New York City from sending public school teachers into sectarian private schools to provide remedial education to disadvantaged students, pursuant to Title I of the Elementary and Secondary Act of 1965 ("Title I"). In overruling *Aguilar*, the Court emphasized the point, not implicated here, that *Zobrest* had "abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." 521 U.S. at 223. *See also supra* p. 14 n. 9.

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[9] In a portion of its opinion not relevant here, the Court held that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." 509 U.S. at 13.

The *Agostini* Court also emphasized that Title I was a program of general applicability under which remedial assistance was provided "to *all* eligible children," without regard to whether they attended a public or private school. 521 U.S. at 209-10 (emphasis in original). For this reason, the Title I program was indistinguishable from the programs in *Witters* and *Zobrest* in two critical respects. First, the Title I program did not "have the effect of advancing religion through [state-sponsored] indoctrination," *id.* at 226, because any Title I aid provided to students attending sectarian schools reached those schools "'only as a result of the genuinely independent and private choices of' individuals." *Id.* (quoting *Witters*, 474 U.S. at 487, and noting that "[t]he same logic applied in *Zobrest*").[10] Second, the Title I program did not "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." 521 U.S. at 231.

• Finally, *Mitchell v. Helms*, 530 U.S. 793 (2000) holds—albeit through two separate opinions—that the Establishment Clause does not prohibit a Louisiana school district from lending educational materials and equipment to sectarian private schools, pursuant to Chapter 2 of the Education Consolidation and Improvement Act of 1981 ("Chapter 2").

Justice Thomas' opinion for four members of the Court found it decisive that the Chapter 2 program "makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof," 530 U.S. at 830—including "both public and private schools," *id.* at 802—analogizing the case in this respect to, *inter alia*, *Witters* and *Zobrest*, *id.* at 809-14.

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[10] In this first respect, the Court also found it significant that it had not been shown that Title I instructors had "attempted to inculcate religion in students," that Title I services were "by law supplemental to the regular curricula" of the benefited schools, and that "[n]o Title I funds ever reach the coffers of religious schools." 521 U.S. at 226-28.

Justice O'Connor, joined by Justice Breyer, concurred on the narrower ground that the Chapter 2 program "bears the same hallmarks of the New York City Title I program that we found important in *Agostini*," 530 U.S. at 848—including, but not limited to, the hallmark that "[t]he aid is available to assist students regardless of whether they attend public or private non-profit religious schools," *id.*

At the same time, Justice O'Connor disassociated herself from the plurality opinion's invocation of *Witters* and *Zobrest* as analogous cases, inasmuch as "we decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use," whereas the aid provided under the Chapter 2 program was distributed on a per-capita basis directly to the schools. *Id.* at 841.[11] In so doing, Justice O'Connor made it clear that where school aid does flow indirectly to sectarian schools through the private choice of aid recipients, that aid is consistent with the Establishment Clause *only* where the private choice of a sectarian school is a "'genuinely independent'" or "true" one, as those terms were given content in *Witters* and *Zobrest*. *Id.* at 841-43 (quoting *Witters*, 474 U.S. at 487).[12]

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[11] Justice O'Connor also disassociated herself from the plurality opinion's "near-absolute" position that "neutrality" standing alone is sufficient to sustain a school-aid program under the Establishment Clause. 530 U.S. at 838-40.

[12] Although *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), does not fall within this Court's post-*Nyquist* line of "school-aid" cases, the State petitioners and the Senel Taylor, *et al.* petitioners rely on *Rosenberger* as well. *See* State Pet. at 18; ST Pet. at 20-21. It is appropriate to point out, therefore, that *Rosenberger* is entirely consistent with that line of cases. As in *Mueller*, *Witters* and *Zobrest*, the fact that the government program at issue in *Rosenberger* was a generally-applicable one with a "broad," "diverse," "wide spectrum" of beneficiaries figured prominently in the Court's Establishment Clause analysis. *See* 515 U.S. at 839, 842 (analogizing the case in this respect to,

The reason why the Ohio Voucher Program is unlike the school-aid programs involved in these post-*Nyquist* Establishment Clause cases—and cannot properly be considered a program under which school aid is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited"—was succinctly summarized by the District Court as follows:

> Because the vast majority of schools participating in the Voucher Program are sectarian in nature, the Program does not make aid available without regard to the nature of the institutions benefited. Likewise, recipients do not have available to them the kind of "choice" contemplated by post-*Nyquist* cases. By the very nature of the Program, parents do not have a genuine choice between sending their children to sectarian or nonsectarian schools because sectarian schools overwhelmingly predominate. Unlike cases decided after *Nyquist*, the aid provided under the Voucher Program directly benefits the religious functions of participating sectarian institutions because it cannot be said that aid only flows to religious institutions as a result of the independent and private choices of recipients. Thus, the Program has the effect of advancing religion through government-supported religious indoctrination.
>
> The Voucher Program is also unlike post-*Nyquist* cases in that program criteria create incentives for students to attend religious schools. Voucher students may only redeem their vouchers at schools which have registered and are authorized to participate in the Program, not at any school of their choice. Because the

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e.g., *Mueller* and *Witters*); *see also id.* at 847-48 (O'Connor, J., concurring) (noting that the University had "established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes some 15 student publications with predictably divergent viewpoints," and analogizing the case in that respect to *Witters* and *Zobrest*).

> vast majority of participating schools are sectarian in nature, the Program directly influences whether a recipient chooses to attend a religious institution. [State Pet. App. 125a.]

And as the Court of Appeals added:

> We find that when, as here, the government has established a program which does not permit private citizens to direct government aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated. . . . There is no neutral aid when that aid principally flows to religious institutions; nor is there truly "private choice" when the available choices resulting from the program design are predominantly religious. [*Id.* 29a.]

In sum, all of the post-*Nyquist* school-aid cases dealt with school-aid programs that were different in the most basic Establishment Clause terms from the New York program struck down in *Nyquist*. These programs were "available generally," were "in no way skewed towards religion," and "creat[ed] no financial incentive to undertake sectarian education." The *Mueller-Mitchell* line of cases is thus consistent with *Nyquist* not just in the formal sense that these cases distinguish *Nyquist*, but in the more fundamental sense that the different results follow from the consistent application of the *Lemon v. Kurtzman* Establishment Clause analysis to the particular type of school-aid program in question.

2. Petitioners seek to buttress their principal argument—that the Ohio Voucher Program is not a school-aid program governed by *Nyquist*, but rather a program saved out of *Nyquist* in its footnote 38—by proffering four "distinctions" between the New York program and the Ohio Voucher Program. None of these distinctions has any substance.

(a) Petitioners make much of the fact that Cleveland parents can send their children to a public school—including a public charter or magnet school if their children are accepted in such a school—in lieu of sending them to a private school at public expense under the Ohio Voucher Program. *See* State Pet. at 16-17, 22; ST Pet. at 20-21; HP Pet. at 25. But that does not make this case different from *Nyquist*, inasmuch as parents eligible for private school tuition assistance under the New York program also could choose to send their children to public schools.

The *Nyquist* Court expressly noted that "[t]he grants to parents of private school children are given in addition to the right that they have to send their children to public schools 'totally at state expense.'" 413 U.S. at 782 n.38. That being so, the private school tuition grants under the New York program had to be considered on their own terms for Establishment Clause purposes; to do otherwise, the Court stated, would "provide a basis for approving through tuition grants the *complete subsidization* of all religious schools," a result "wholly at variance with the Establishment Clause." *Id.* (emphasis in original). *See also* State Pet. App. 23a-24a & 117a-122a.

(b) The State petitioners assert that "there can be no realistic contention that Ohio is fostering subtle social coercion of parents to withdraw from public schools and enroll their children in private, sectarian schools." State Pet. at 21. We disagree—but we do so as an aside inasmuch as the State's assertion affords no basis for distinguishing this case from *Nyquist*.[13] The defendants in *Nyquist* made a

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[13] Although there are arguments on both sides, it certainly is "realistic" to view Ohio's decision to spend on a private school voucher program more than $10 million per year that otherwise could be spent on improving the Cleveland public schools as pushing Cleveland parents in precisely that direction. The counter-argument is that a private school voucher program will itself bring about improvement in the public schools

similar assertion, and the Court responded that coercion is "not a necessary element of any claim under the Establishment Clause." 413 U.S. at 786.

(c) The Hanna Perkins, *et al.* petitioners take up—albeit rather obliquely, *see* HP Pet. at 17; *see also* State Pet. at 9-10—Judge Ryan's argument in dissent that *Nyquist* is distinguishable on the ground that the purpose of the New York program was to help "financially troubled *private* schools," whereas the purpose of the Ohio Voucher Program is to help "poverty-level students attending the *public schools* in Cleveland." State Pet. App. 37a (emphasis in original). That argument is doubly wrong.

First, the legislative findings supporting the New York program—*e.g.*, the need to promote a "competitive and diverse alternative to public education," and to enhance the educational opportunities available "to children of lower-income families," *Nyquist*, 413 U.S. at 764-65[14]—parallel the stated purposes of the Ohio Voucher Program.

Second, differences in the complex of purposes that actuated first New York and now Ohio—if any there be—cannot distinguish this case from *Nyquist*. The *Nyquist* Court's Establishment Clause holding did not turn on the particular social purposes of the New York program, but rather on the program's *effect*. *Supra* pp. 5-6.

(d) Finally, the Hanna Perkins, *et al.* petitioners seek to distinguish *Nyquist* on the ground—also embraced in Judge

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through increased "competition" from state-subsidized private schools. But to hear Cleveland parents (as represented by the Senel Taylor, *et al.* petitioners) tell it, the Ohio Voucher Program has done little if anything to bring about such improvement in the Cleveland public schools. *See* ST Pet. at 9 (outlining the "shocking" details of "a school system that, despite the State's intervention, continues to exhibit severe dysfunction").

[14] The Hanna Perkins petitioners cite not these legislative findings, but rather the findings in support of the maintenance-and-repair direct-grant program separately considered by the *Nyquist* Court.

Ryan's dissent—that the New York program did not prohibit qualifying private schools from engaging in religious discrimination in admissions, whereas the Ohio Voucher Program does. *See* HP Pet. at 28-29; *see also* State Pet. App. 38a. To be sure, the *Nyquist* Court mentioned in setting out the background of the case that qualifying private schools "could be ones" that, *inter alia*, "impose religious restrictions on admissions." 413 U.S. at 767. But the Court did not mention this fact in explicating the grounds for its decision, *see id.* at 780-89—much less hold that the New York program's constitutional infirmity lay in its failure to proscribe this or any other form of religious discrimination by qualifying private schools.[15] As Chief Judge Posner has observed, in an insight that fits aptly here, "[i]t is not cricket to distinguish a precedent by pointing to a fact mentioned by the court in the previous opinion but clearly given no weight by it. Otherwise no precedents would have any force, for no two cases are exactly alike." *Khan v. State Oil Co.*, 93 F.3d 1358, 1362 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 3 (1997).

C. Straining to find an alternative basis for a *certiorari* grant, the State petitioners argue that the decision below is in conflict with the decision of the Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998)—which rejected an Establishment Clause challenge to a Milwaukee, Wisconsin private school tuition voucher program. State Pet. at 12-17. There is no conflict of substance between the two decisions.

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[15] Nor do the Hanna Perkins, *et al.* petitioners explain why it is relevant for Establishment Clause purposes whether a government program that pays for children to attend predominately sectarian private schools allows or prohibits religious discrimination in admissions. In either event, public money is being used to indoctrinate the children who attend a sectarian private school in that school's particular theology.

The *Jackson* court did not disagree with the conclusion of the court below that school-aid programs of the type struck down as inconsistent with the Establishment Clause in *Nyquist* are unconstitutional. Rather, the *Jackson* court concluded that "there are significant distinctions" between the Milwaukee voucher program and the New York program at issue in *Nyquist*, and these distinctions, in that court's opinion, were sufficient to save the constitutionality of the Milwaukee program.[16]

The *Jackson* plaintiffs responded by filing a petition for *certiorari* with this Court, arguing that for Establishment Clause purposes the Milwaukee voucher program could not be distinguished from the New York program on the fact-specific grounds relied on by the *Jackson* court, and that *Jackson* therefore was in conflict with *Nyquist*. But their petition was denied.

Candor compels us to acknowledge that, in our view, the *Jackson* petitioners were right in questioning the *Jackson* court's distinctions of *Nyquist*, the denial of their petition

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[16] The *Jackson* court stated:

> We reject the Respondents' argument that this case is controlled by [*Nyquist*]. Although the tuition reimbursement program in *Nyquist* closely parallels the amended [Milwaukee program], there are significant distinctions. In *Nyquist*, each of the facets of the challenged program directed aid exclusively to private schools and their students. The [Milwaukee program,] by contrast, provides a neutral benefit to qualifying parents of school-age children in Milwaukee Public Schools. Unlike the program in *Nyquist*, the only financially-qualified Milwaukee students excluded from participation in the amended [Milwaukee program] are those in the fourth grade or higher who are already attending private schools. The amended [Milwaukee program], viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to [Milwaukee public school] children. This seminal fact takes the amended [Milwaukee program] out of the *Nyquist* construct and places it within the framework of neutral education assistance programs. [578 N.W.2d at 614 n.9.]

notwithstanding. Be that as it may, the decisions below—which faithfully apply *Nyquist* and do not essay any of the attenuated *Jackson* distinctions—give every reason to believe that *Jackson* will prove to be an aberration.[17]

II. THE COLLATERAL ESTOPPEL QUESTION PRESENTED BY ONLY THE SENEL TAYLOR, *ET AL.* PETITIONERS

The Sixth Circuit panel below unanimously affirmed the district court's ruling that the Establishment Clause *dicta* in *Goff*, *supra* p. 23 n. 17, did not collaterally estop plaintiffs' Establishment Clause claim in this case. That ruling, which rests on well-settled principles, is "eminently correct"—as Judge Ryan, who otherwise was in dissent, recognized. State Pet. App. 34a. As the Sixth Circuit concluded:

> In *Goff*, the Ohio Supreme Court held that the 1995 school voucher program was enacted in violation of the one-subject rule of the Ohio Constitution, and on that

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[17] The Senel Taylor, *et al.* petitioners—but not the State petitioners — argue that the decision below also is in conflict with *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999) ("*Goff*"); *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994); and *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999). ST Pet. at 11-13. The Hanna Perkins, *et al.* petitioners second that conflict argument with respect to *Goff* and *Campbell*, but not *Kotterman*. HP Pet. at 15-16. These conflict claims are even weaker than the State petitioners' claim invoking *Jackson*.

The *Goff* court's conclusion that the predecessor Ohio voucher program was consistent with the Establishment Clause was *dicta*, inasmuch as the court struck down that predecessor program on state law grounds. The *Campbell* court found *Mueller* and *Witters* controlling, rather than *Nyquist*, because the challenged voucher program was a generally-applicable *Nyquist*-footnote-38-type program open to both private and public schools. *Kotterman* involved a tax credit program, which—contrary to the claim of the Senel Taylor, *et al.* petitioners—was, under *Mueller*, subject to an Establishment Clause analysis quite different than that applicable to a tuition voucher program.

> basis, ordered the program in its entirety "stricken" from the Ohio statute books. 711 N.E.2d at 203. That ruling entitled the plaintiffs to the relief they requested, and therefore, any discussion of other grounds for striking or upholding the statute could be neither necessary nor essential to the holding. . . . Because Plaintiffs would not be able to obtain Supreme Court review of the Ohio Supreme Court's determination as to the Establishment Clause, such determinations cannot constitute collateral estoppel. [State Pet. App. 30a-31a.]

The Senel Taylor, *et al.* petitioners are unable to cite any case or to make any argument that puts the Sixth Circuit's conclusion into the least question.

CONCLUSION

For the reasons stated, the petitions for *certiorari* should be denied.

Respectfully submitted,

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Nos. 00-1751, 00-1777, 00-1779

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IN THE

Supreme Court of the United States

DR. SUSAN TAVE ZELMAN, *et al.*,

Petitioners,

—v.—

DORIS SIMMONS-HARRIS, *et al.*, and SUE GATTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS SUE GATTON, MARY MURPHY, REVEREND MICHAEL DEBOSE, CHERYL DEBOSE, GLENN ALTSCHULD, AND DEIDRA PEARSON IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Ohio Voucher Program under which tax monies are paid to private elementary schools in Cleveland, a preponderant majority of which are sectarian, violates the Establishment Clause of the First Amendment to the United States Constitution.

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF THE QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

PAGE

Agostini v. Felton,
521 U.S, 203 (1997) ..... 5, 11 & n.4

Bagley v. Raymond School Department,
728 A.2d 127 (Vt.),
cert. denied, 528 U.S. 947 (1999) 4

Board of Education v. Allen,
392 U.S. 236 (1968) 11 n.4

Campbell v. Manchester Board of School Directors,
641 A.2d 352 (Vt. 1994) 6

Chittenden Town School District v. Department of Education, 738 A.2d 539 (Vt.),
cert. denied sub. nom. Andrews v. Vermont Department of Education, 528 U.S. 1066 (1999) 6 n.2

Committee for Public Education & Religious Liberty v. Nyquist,
413 U.S. 756 (1973) ..... *passim*

DeRolph v. State,
677 N.E.2d 733, *clarified*,
699 N.E.2d 518 (Ohio 1997) 12

Everson v. Board of Education,
330 U.S. 1 (1947) ..... 11 & n.4

Freedom from Religion Foundation, Inc. v. Bugher,
249 F.3d 606 (7th Cir. 2001) 4, 11

Jackson v. Benson,
578 N.W.2d 602 (Wis. 1998)..... 6

Kotterman v. Killian,
972 P.2d 606 (Ariz.),
cert. denied, 528 U.S. 921 (1999)..... 8 n.3

Mitchell v. Helms,
530 U.S. 793 (2000)..... 4, 11 & n.4

Mueller v. Allen,
463 U.S. 388 (1983)..... 8

Rosenberger v. Rector & Visitors of University of Virginia,
515 U.S. 819 (1995)..... 4, 11 & n.4

Simmons-Harris v. Goff,
711 N.E.2d 203 (Ohio 1999) 5

Simmons-Harris v. Zelman,
234 F.3d 945 (6th Cir. 2000) 5

Strout v. Albanese,
178 F.3d 57 (1st Cir.),
cert. denied, 528 U.S. 931 (1999)..... 4

Witters v. Washington Department of Services for the Blind,
474 U.S. 481 (1986)..... 9

Zobrest v. Catalina Foothills School District,
509 U.S. 1 (1993)..... 9

COUNTER-STATEMENT OF THE CASE

The three petitions for certiorari — one by the defendants State Superintendent of Public Instruction, the State of Ohio, and Saundra Berry (collectively the "State") and two by groups of intervening defendants — arise from two actions in the United States District Court for the Northern District of Ohio attacking as unconstitutional Ohio's Pilot Project Scholarship Program (the "Voucher Program" as it has come to be known) (State Pet. App. 3a).[1] As reflected in the relative brevity of the fact statements in all three of the petitions, the facts are for the most part both undisputed and amply recounted in both the findings of the district court and the opinions in the court of appeals. Sparing this Court needless repetition, respondents recount the key facts only briefly.

The Voucher Program, funded from the Ohio treasury, uses public funds to award "scholarships," or vouchers, to Cleveland children to attend private schools located in the Cleveland City School District. Private schools affiliated with a religious group or institution that comply with the statutory requirements may participate in the Program. (State Pet. App. 63a). While the Program invites public school districts adjoining the Cleveland School District to participate, thus far none has chosen to do so. (State Pet. App. 63a). Thus, in the 1999-2000 school year the vast majority (over 82%) of participating schools were in fact sectarian, and over 96% of the participating students were enrolled at religiously affiliated schools. (State Pet. App. 63a-64a).

In a seemingly small but importantly misleading misstatement, the Senel Taylor petition says the State's checks are "made payable to the parents and *disbursed to*

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[1] The State parties' petition is referred to as "State Pet." The Appendix to that petition is referred to as "State Pet. App.," as in the reference here.

them at the schools they designate." (Senel Taylor Pet. 3; emphasis added). Actually the checks are not disbursed to the parents but are mailed directly to the participating schools and only presented to the parents for endorsement to the private, usually sectarian schools. (State Pet. App. 63a).

The district court, following a detailed statement of the facts and the issues, concluded that "[i]n all pertinent respects, the Voucher Program is factually indistinguishable from the tuition reimbursement program struck down in *Committee for Pub. Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756 . . . (1973)." (State Pet. App. 123a). Rejecting the contention that *Nyquist* had been divested of force by later decisions of this Court, the district court found the Ohio program unconstitutional and ordered it enjoined. (State Pet. App. 59a-126a). Pending appeal to the Sixth Circuit, this Court (5-4) stayed the injunction. (State Pet. App. 127a).

On December 11, 2000, the Sixth Circuit affirmed the district court, also concluding that the Voucher Program was in all material respects identical to the tuition program struck down in *Nyquist*. (State Pet. App. 1a-33a). On February 28, 2001, the Sixth Circuit denied petitions for rehearing (State Pet. App. 166a-67a), and on March 8, 2001, stayed its mandate pending the filing of petitions for certiorari.

REASONS FOR DENYING THE WRIT

The three disparate petitions for certiorari present varying positions on a subject that may warrant review by this Court at some point, but that presents a dubious and ambiguous occasion for review at this time. The petitioners themselves diverge in their identification of the issue or issues warranting review, as reflected in their differing identification of "conflicts" in lower court decisions. One (the Hanna Perkins petition) incorrectly finds a conflict with the highest courts of three states; a second (the State) finds a conflict only with a 4-2 decision of the Wisconsin Supreme

Court, and is correct in this but then goes on erroneously to find conflicts with decisions of this Court. The Senel Taylor petition adds asserted conflicts with three state courts, mistakenly in at least two instances, and devotes many pages to an extraordinary contention that the district court and the court of appeals were precluded by Ohio Supreme Court dicta from even reaching the Establishment Clause issues the petitions propose to present. None, however, properly recognizes that the Sixth Circuit simply adhered to a principle at the core of this Court's Establishment Clause jurisprudence, namely, that absent any indicia of true private choice, direct public funding of religious activities is unconstitutional. In that light — and given both the divergences among, and errors of law in, the petitions — the three applications comprise a case unsuitable for review.

1. Both the district court and the court of appeals found that this case was squarely controlled by this Court's decision in *Nyquist*. As the Sixth Circuit put it:

> Under both the New York statute in *Nyquist*, as well as the Ohio statute at issue . . . the great majority of schools benefited by these tuition dollars are sectarian. . . . As in *Nyquist*, the Ohio program contains no "effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes.". . . In both *Nyquist* and this case, there are no restrictions on the religious schools as to their use of the tuition funds — the funds may be used for religious instruction or materials as easily as for erasers and playground equipment.

(State Pet. App. 25a; internal citations omitted). The court of appeals specifically rejected petitioners' claim that the Voucher Program is a neutral "private choice" program: "When, as here, the government has established a program which does not permit private citizens to direct government

aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated." (State Pet. App. 29a). In so ruling, the Sixth Circuit reaffirmed that the Establishment Clause prohibits using taxpayer money to fund religious activity. "To approve this program," the Sixth Circuit explained, "would approve the actual diversion of government aid to religious institutions in endorsement of religious education, something 'in tension' with the precedents of the Supreme Court." (State Pet. App. 29a) (citing *Mitchell v. Helms*, 530 U.S. 793, 837-38 (2000) (O'Connor, J., concurring)).

Far from presenting a "direct and irreconcilable conflict" with other lower court decisions (Senel Taylor Pet. 12), the Sixth Circuit's holding follows a central tenet of Establishment Clause jurisprudence that has recently been reaffirmed by several lower courts. In *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999), the First Circuit followed *Nyquist*, and, noting that "neutrality is but one 'hallmark of the Establishment Clause,'" held that Maine's exclusion of sectarian schools from its private school financing scheme was justified on the ground that funding such schools would violate the Establishment Clause. *Id.* at 63 (quoting *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 846, 852 (1995) (O'Connor, J., concurring)). The Maine Supreme Court, also following *Nyquist*, had reached the same conclusion in *Bagley v. Raymond School Department*, 728 A.2d 127, 144 (Me.), *cert. denied*, 528 U.S. 947 (1999) (although "the school is chosen by parents, not the State," the court found that "[n]one of the Supreme Court's decisions to date have ever intimated that such direct subsidies of religious schools could survive an Establishment Clause challenge"). More recently, in *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606 (7th Cir. 2001), the Seventh Circuit invalidated unrestricted cash grants to sectarian schools given for the purpose of reducing the net cost of the schools' data

lines and video links to the Internet. *Id.* at 613 (although grants were given to religious and nonreligious, public and nonpublic, schools alike, "in both *Nyquist* and this case, there are no real restrictions on the use of the grant money by the religious schools") (citing *Nyquist*, 413 U.S. at 774; *Simmons-Harris v. Zelman*, 234 F.3d 945, 959 (6th Cir. 2000)).

2. Against this consistent line of decisions following *Nyquist*, the petitions erroneously assert conflicts with decisions of state supreme courts or treat state court dictum as if it could create such a conflict under the rules governing certiorari. Most notably misconceived is the treatment in two of the petitions of dicta of the Ohio Supreme Court in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999) ("*Goff*"), as if such expressions could add plausible grounds for this Court's issuance of the writ of certiorari. In *Goff*, the Supreme Court of Ohio actually held that Ohio's voucher statute was invalid because it violated the single-subject limitation of the *Ohio State Constitution*. *Id.* at 216. Having reached that dispositive and totally adequate state ground for holding the statute unconstitutional, the Ohio Supreme Court saw fit to write out at length its view that the "*Nyquist* holding has been undermined," *id.* at 208, and that, except for an easily correctable defect, the Ohio statute "does not violate the Establishment Clause," *id.* at 207. It should be patent on elementary principles, however, that these pronouncements on the Establishment Clause, when the state court had nullified the state law under the State Constitution, were dicta of the most classically obiter variety. Not only were these dicta unappealable by the plaintiffs, but in acting upon its view that *Nyquist* had been undermined, the Ohio Supreme Court ran afoul of this Court's admonition that lower courts should not "conclude [this Court's] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). There is, in a word, nothing in the Ohio Supreme Court's decision that supports the granting of certiorari in this case.

The Hanna Perkins and the Senel Taylor intervenors, notably not joined by the State petitioners, also assert a conflict between the Sixth Circuit's decision and the 1994 decision of the Vermont Supreme Court in *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994). As the State's petition implicitly recognizes (State Pet. at 12-13, n.1), that case, too, does not conflict directly with the decision below. Finding the "very limited" factual record "unfortunate," the Vermont Supreme Court distinguished the school funding at issue there from the tuition program struck down in *Nyquist*. *See* 641 A.2d at 358-59. Among the distinguishing facts were several that also distinguish the Vermont program from the Voucher Program here, including: (i) that Manchester did not "both maintain[ ] an appropriate school and allow[ ] some students to go elsewhere by paying tuition for them," *id.* at 359; and (ii) that "unlike *Nyquist*, there is no indication that the result of [Vermont's] policy will be to send any substantial number of children to sectarian schools," *id.*[2]

Thus, as only the State's petition acknowledges, the Wisconsin Supreme Court's decision in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), presents this Court with the only conflict of any vitality. That conflict is a narrow one, however; the Wisconsin Supreme Court, unlike the Sixth Circuit, found very limited grounds to distinguish the Milwaukee voucher program from the tuition reimbursement

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[2] In 1999, the Vermont Supreme Court held that reimbursing students for tuition paid at sectarian schools violated the compelled support clause of the Vermont Constitution, thereby divesting of any practical force its earlier opinion addressing the propriety of such reimbursement under the Establishment Clause. *See Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt.), *cert. denied sub. nom. Andrews v. Vermont Dep't of Educ.*, 528 U.S. 1066 (1999).

scheme invalidated in *Nyquist*, and thus from the Cleveland scheme here in issue. This limited conflict is also very possibly temporary.

The Wisconsin Supreme Court concluded that Milwaukee's voucher program was in no way "skewed towards religion" only because it chose to consider the Milwaukee program "in conjunction with existing state educational programs." 578 N.W.2d at 617-18. In distinguishing *Nyquist*, the Wisconsin Court deemed it relevant to consider what choices Milwaukee public school students had under totally different educational programs, noting that public school students may choose from "Milwaukee public district schools, magnet schools, charter schools, suburban public schools, trade schools, [and] schools developed for students with exceptional needs." *Id.* at 618 n.16.

But as the district court explained in the present case, this Court has never analyzed the constitutionality of a school aid program by reference to the options available to students under different and entirely separate programs. (State Pet. App. 118-122a). Among other examples, the district court pointed to *Witters*, where "the Court did not concern itself with the full range of possible options that a blind student might have apart from funds received from the program to achieve his or her educational and vocational goals." (State Pet. App. 121a). In *Nyquist* itself, this Court found no occasion to weigh the far larger number of New York public school children (80%) against those (20%) attending private schools and thus eligible to participate in the tuition reimbursement program there in question.

Both in following *Nyquist* and as a matter of principle, the instant decision is in our submission plainly correct. More importantly, it leaves the earlier Wisconsin decision standing quite alone in too broadly defining the scope of the available "choices" open to parents and their children for purposes of judging Establishment Clause challenges to government

support for sectarian schools. Given the chronology and the limited nature of the conflict between the two decisions, and bearing in mind the errors tendered by the petitions, the Court could well conclude that this is a conflict that should await maturation, possible disappearance, and more sharply defined contentions before deciding whether or on what terms certiorari may be warranted.[3]

3. Petitioners also argue that the Sixth Circuit's decision conflicts with prior decisions of this Court. (State Pet. 18-25; Senel Taylor Pet. 16-22; Hanna Perkins Pet. 17-30). Petitioners can advance this claim only on the premise that the Sixth Circuit was incorrect when it held that "[t]his is not the type of case which would fall into the exception to the *Nyquist* rules." (State Pet. App. 27a). The State claims that the Voucher Program is a "public and private 'scholarship' program" within the ambit of *Nyquist*'s footnote 38, 413 U.S. at 782-83 n.38, because it extends "as many tutorial assistance grants to public school students as it does scholarships to private school students," and "permits all suburban Cleveland public schools to participate." (State Pet. 24). The Senel Taylor group also offers as a ground for distinction the fact that under the Voucher Program public schools are invited to participate, but it avoids reference to the supposed benefit of tutorial assistance grants. (Senel Taylor Pet. 16, 19). Finally, the Hanna Perkins intervenors are on their own in asserting that the characteristics of the

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[3] The Senel Taylor intervenors alone assert that the decision here conflicts with *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999). (Senel Taylor Pet. 12-13). *Kotterman* involved tax credits for donations of up to $500 to non-profit school tuition organizations. The Arizona Supreme Court distinguished *Nyquist*, concluding that the Arizona credits were in line with the tax deductions at issue in *Mueller v. Allen*, 463 U.S. 388 (1983). 972 P.2d at 612-16.

participating sectarian schools are sufficient to distinguish this case from *Nyquist*. (Hanna Perkins Pet. 28-29). None of these contentions has merit.

The argument from the tutorial assistance program is patently empty. Nobody questions the validity of this $500-maximum grant for tutorial assistance to public school students. Nor do any of the petitions indicate how this separate statutory provision could validate $2,500-maximum grants to sectarian schools. It is not necessary to say that the separate tutorial assistance provision is a facade, though it is tempting to suggest this in light of the futility of the argument mounted upon it. The ostensible invitation to suburban schools is similarly weightless. Not a single suburban school has participated during the five years of the Program. It is difficult to imagine that the Ohio legislature could not have predicted this.

Whatever might have prompted these legislative embellishments, however, they do not begin either to evade or to answer the Establishment Clause issues created by the Voucher Program. As found by the two lower courts, far from coming within the hypothetical *Nyquist* exception, the case here is one in which the schools offered for "choice" by Cleveland parents are in fact 82% sectarian, and over 96% of voucher-supported seats are in sectarian schools. (*See* State Pet. App. 64a). This is a Hobson's choice in pure form.

Unlike *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), here the State is inextricably involved in limiting the pool of choices available; under the Voucher Program, the only schools eligible to participate are virtually all sectarian schools within the city of Cleveland. By contrast, in *Witters* and *Zobrest* the wide choices open were preponderantly nonsectarian. *See Witters*, 474 U.S. at 488 ("[a]id recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian"); *Zobrest*, 509 U.S. at 10 ("By

according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school *only* as a result of the individual parents' private decisions.") (Emphasis added). That is plainly not the case here, where the aid program limits the pool of choices available. As the court of appeals found, in these circumstances, whatever "choice" parents have is constitutionally meaningless: "The idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation of the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program." (State Pet. App. 28a).

Unlike the others, the Hanna Perkins petition purports to distinguish *Nyquist* by describing conditions that *could have* existed in some of the New York private sectarian schools, as if in *Nyquist* those characteristics actually did exist. (*Compare* Hanna Perkins Pet. 28 *with Nyquist*, 413 U.S. at 767-68: "Qualifying institutions. . . *could be ones* that . . . ." (emphasis added)). While the district court in *Nyquist* adopted a profile of sectarian nonpublic schools that could benefit from the tuition program, this Court noted that the "characteristics of individual schools may vary widely from that profile." 413 U.S. at 767-68. Here, as both the district court and the court of appeals found, the vast majority of the voucher schools are sectarian. The district court concluded that although "[r]eligious characteristics vary from school to school . . . it can generally be said that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience." (State Pet. App. 64a). The court of appeals affirmed these findings: while "[t]he sectarian schools vary in their religious affiliation and approaches . . . the handbooks and mission statements of these schools reflect that most believe in

interweaving religious beliefs with secular subjects." (State Pet. App. 6a).

It is noteworthy that as shown by some of the very cases petitioners cite[4] for their claims of conflicts, this Court has never departed from the bedrock proposition (affirmed in *Nyquist*, among other decisions) that where, as here, there is no true private choice, grants of public money to religious institutions, with no restrictions upon the uses of such money by the religious recipients, violate the Establishment Clause. In following that basic rule, as did the Seventh Circuit more recently in *Freedom from Religion Foundation v. Bugher, supra*, the Sixth Circuit was simply recalling that there is "no precedent for the use of public funds to finance religious activities." *Rosenberger*, 515 U.S. at 847 (O'Connor J., concurring). In light of this Court's most recent affirmations of that proposition, the State's attempt to characterize the Voucher Program's cash assistance to religious schools as a "non-religious category of benefit," (State Pet. 25) or a "neutral, secular benefit" (State Pet. 19) is unavailing. *See Mitchell*, 530 U.S. at 840 ("we have long been concerned that secular government aid not be diverted to the advancement of religion") (O'Connor, J., concurring). *Cf. Agostini*, 521 U.S. at 228 ("No Title I funds ever reach the coffers of religious schools."). The rule against direct unrestricted cash grants to religious institutions remains the controlling law. *See Mitchell*, 530 U.S. at 837-38 ("the actual diversion of government aid to religious indoctrination is in tension with our precedents") (O'Connor, J., concurring); *Everson*, 330 U.S. at 16 ("[The State] cannot consistently with the 'establishment of religion' clause of the First Amendment

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[4] *Mitchell v. Helms*, 530 U.S 793 (2000) (plurality); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.").

4. Presumably to show the public importance of the questions they present, all three petitions dwell upon the wretched condition of Cleveland's public schools as an argument for using public money to support private, preponderantly sectarian schools. It is notable, therefore, that not a syllable is expended by any petitioner on the recent decision of Ohio's Supreme Court holding unlawful under the State's Constitution the "vast wealth-based disparities" that have been allowed to exist in Ohio between wealthy and poor districts like Cleveland's. *DeRolph v. State*, 677 N.E.2d 733, 737, *clarified*, 699 N.E. 2d 518 (Ohio 1997). The State itself comes here seeking support of both sectarian and nonsectarian private schools in the face of its own Supreme Court's ruling that it has failed in its

> duty to provide a system which allows its citizens to fully develop their human potential. In such a system, rich and poor people alike are given the opportunity to become educated so they may flourish and our society may progress.

Id. at 741. As against that ideal embodied in their own State Constitution, Ohio's Attorney General and education officials press upon this Court a program of support for private schools in the face of a situation in which, at least as of 1990, "Ohio ranked forty-eighth out of the fifty states in the extent of disparity of revenue and expenditure per pupil." *Id.* at 759 (Douglas, J., concurring).

5. Finally, the petition of Senel Taylor, *et al.*, carries the Ohio Supreme Court's dictum to a lengthy and frivolous extreme. This petition (p. 22, *et seq.*) makes the surprising argument that both the district court and the court of appeals in this case were guilty of "an untenable usurpation" no less when they reached and decided respondents' claim that the Ohio Voucher Program violates the Establishment Clause. It

is said that the Sixth Circuit "disregarded not only the dictates of the Full Faith and Credit Act, but also this Court's admonition that '[f]ederal courts may not employ their own rules . . . in determining the effect of state judgments, but must accept the rules chosen by the State from which the judgment is taken.'" (Senel Taylor Pet 23; internal quotation marks and citations omitted). But as both the district court and the court of appeals properly held, there is no basis under Ohio law to conclude that respondents should have been precluded by dictum in the Ohio Supreme Court's decision that, because of its nonbinding nature, could not be appealed. (State Pet. App. 30a-31a, 139a-143a).

CONCLUSION

The petitions for certiorari should be denied.

Dated: June 21, 2001

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13

Supreme Court, U.S.
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No. 00-1751

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 9

TABLE OF AUTHORITIES

Pages

Cases

Agostini v. Felton,
521 U.S. 203 (1997)..... 5

Committee for Pub. Educ. and Religious Liberty v. Nyquist,
413 U.S. 756 (1973)..... 4, 5

Everson v. Board of Educ.,
330 U.S. 1 (1947)..... 7

Good News Club v. Milford Central School,
121 S.Ct. 2093,
2001 U.S. Lexis 4312 (June 11, 2001) 5, 6

Jackson v. Benson,
578 N.W.2d 602 (Wisc. 1998)..... 1, 2, 3, 4

Jackson v. Benson,
Case No. 98-376 (Aug. 31, 1998)..... 1

Lynch v. Donnelly,
465 U.S. 668 (1984)..... 4

Mitchell v. Helms,
530 U.S. 793 (2000)..... 5

Mueller v. Allen,
463 U.S. 388 (1983)..... 5

Pages

Rosenberger v. Rector & Visitors,
515 U.S. 819 (1995)..... 6

Santa Fe Indep. School Dist. v. Doe,
530 U.S. 290 (2000)..... 4

Simmons-Harris v. Zelman,
234 F.3d 945 (6th Cir. 2000) 6

Wallace v. Jaffree,
472 U.S. 38 (1985)..... 7

Respondents do not take issue with petitioners' fundamental proposition that this case presents a question of profound significance—a question the United States characterizes as one of "vital national importance," United States *Amicus* Brief at 11. Nor do they gainsay that resolution of this recurring issue is essential, as the *Amici* States argue, if States and local school boards are "to meet educational challenges with innovative and meaningful solutions," States *Amicus* Brief at 4.

To the contrary, the Simmons-Harris respondents remain silent on the importance of the issue of school choice, and the Gatton respondents state only that the subject "may warrant review by this Court at some point," Gatton Opp. Brief at 2. Their silence and ambivalence put in bold relief the fact that the issue of school choice is the subject of fierce national debate, having been the subject of voter initiatives in at least five States, School Board Ass'ns *Amicus* Brief at 7, court battles in at least seven States, Claremont Institute *Amicus* Brief at 15, and numerous ongoing educational studies, American Civil Rights Union *Amicus* Brief at 5-6.

In fact, just three years ago, several of the entities that have been most active in representing respondents here (American Civil Liberties Union Foundation, People for the American Way Foundation, and Americans United for Separation of Church and State) petitioned this Court to review the Wisconsin Supreme Court's decision in *Jackson v. Benson*, 578 N.W.2d 602 (Wisc. 1998). Prompt resolution of the issue of school choice, they argued then, was "central both to the development of this Court's Establishment Clause jurisprudence and to the formulation of this nation's education policy, and it therefore warrants the attention of this Court." *Jackson v. Benson*, Case No. 98-376, Pet. for Cert. at 9 (Aug. 31, 1998). They were right then, and their ambivalence rings all the more hollow now. As the *Amici*

States emphasize, continued confusion in this arena not only "undermines the educational stability" of the children enrolled in school choice programs across the country, but also "further exacerbates the problems the programs were enacted to solve." States *Amicus* Brief at 4. This Court's review now is both needed and appropriate.

1. Respondents do not seriously dispute that a direct conflict exists between the decision of the Sixth Circuit below, and the decision of the Wisconsin Supreme Court in *Jackson v. Benson*. In fact, the Gatton respondents candidly admit that petitioners are correct in identifying this conflict. Gatton Opp. Brief at 2-3. The Simmons-Harris respondents assert that there is "no conflict of substance" between the two decisions, Simmons-Harris Opp. Brief at 21, but later contend that the petitioners in *Jackson v. Benson* (the Wisconsin case) were correct in their fundamental analysis. Simmons-Harris Opp. Brief at 22-23. This contention is telling because the *Jackson* petitioners acknowledged then that the Ohio program at issue here "parallels" the Wisconsin program, *Jackson* Pet. at 22, n.19, indicating that the divergent results reached below and by the Wisconsin Supreme Court do, indeed, create a conflict requiring this Court's resolution.

Although the Gatton respondents contend that the conflict with the Wisconsin decision is a "narrow" one, Gatton Opp. Brief at 6, they acknowledge that the two decisions diverge in the consideration they give to alternatives available to parents participating in scholarship programs. *Id.* at 7-8. Unlike the Sixth Circuit, the Wisconsin Supreme Court examined the Milwaukee scholarship program in light of other educational options available to Milwaukee's children. These options included, in addition to schools participating in the scholarship program, neighborhood public schools, other general public schools

within the district, and specialized public schools. *Jackson*, 578 N.W.2d at 618.

a. The educational options available in Cleveland include conventional public schools, magnet schools, community schools, and Scholarship Program schools. Affidavit of Caroline M. Hoxby, Morris Kahn Associate Professor of Economics, Harvard University, ¶5a (R. 95 at 4, Court of Appeals Appendix ("C.A. App.") at 600). The State of Ohio presented unrebutted evidence that scholarship parents in Cleveland consider all these options before enrolling their children in the program. *See* Affidavit of Leigh-Anne Ford (R. 96 at 1041, C.A. App. at 1639); Affidavit of Dayna Hunter (R. 96 at 1050, C.A. App. at 1648). Other parents have rejected the Scholarship Program in favor of another non-traditional alternative. *See* Affidavit of Juanita Ellis (R. 96 at 1038, C.A. App. at 1636); Affidavit of Kathleen A. Bondzio (R. 96 at 1032, C.A. App. at 1630). Some parents return to the Scholarship Program after trying other alternatives. *See* Affidavit of Steven and Lisa Pass (R. 96 at 1063, C.A. App. at 1661).

In view of this variety of choices, Cleveland families seeking a non-religious, independent alternative to the schools operated by the local district will feel no financial pressure from the Scholarship Program to send their children to a religious school instead. Hoxby Aff. at ¶¶4h, 5-6 (R. 95 at 4-6, C.A. App. at 600-02). This unrebutted evidence confirms that scholarship families, far from being limited to religious schools, enjoy a genuine choice of educational options for their children.

b. This Court has described an Establishment Clause inquiry as "in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . Every government practice must be judged in its unique

circumstances. . . ." *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 315 (2000), quoting *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring). The Wisconsin Supreme Court in *Jackson v. Benson* considered all of the relevant circumstances in evaluating the constitutionality of the Milwaukee school choice program. However, the Sixth Circuit—bowing to what it discerned as *Nyquist*-imposed restraints—looked narrowly at the choices available within the Scholarship Program itself, dismissing the other options available to parents as irrelevant. This sharp contrast in analysis, like the divergence in outcomes, presents a clear conflict for this Court's guidance and resolution.

2. Respondents do not dispute petitioners' fundamental point that where a non-religious category of benefit is conferred on a neutrally defined class in circumstances of true private choice, this Court has uniformly held that no Establishment Clause violation exists. Their quarrel lies, rather, in whether the Ohio program offers "true private choice" because 82% of the participating schools are religious and 96% of the participating students are enrolled in religious schools. They rest entirely on the argument that this Court's holding in *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), controls the outcome here.

a. *Nyquist* is not controlling for the fundamental reason that the Ohio program differs from the New York program at issue in that case, and respondents' attempts to recast the Ohio program are unavailing. *See* State Pet. at 24; United States *Amicus* Brief at 14; States *Amicus* Brief at 8. Nor does respondents' narrow focus on the question whether the Ohio program falls within the school aid programs identified in footnote 38 of *Nyquist* respond in any way to petitioners' "principal argument" for granting *certiorari*. *See* Simmons-

Harris Opp. Brief at 9. To be sure, footnote 38 reserves judgment on "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," *Nyquist*, 413 U.S. at 782, n.38, and we believe that the Ohio program falls within that reserved case. But *Nyquist* in no way limits the universe of constitutionally permissible school aid programs to those specifically enumerated in footnote 38, nor have the Court's post-*Nyquist* decisions created such a limitation. To the contrary, the Court's decisions provide a roadmap for determining whether a school aid program is constitutional, and the Ohio program fits well within those signposts.

b. Respondents are also misguided as to the importance of the *Nyquist* distinctions at this advanced stage in the development of this Court's Establishment Clause jurisprudence. Even if this case were not distinguishable from *Nyquist*, the continued vitality of the *Nyquist* analysis is very much in dispute, as reflected in this Court's post-*Nyquist* teachings. The importance of this ongoing dispute is captured in Justice O'Connor's concurring opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), where she recognized that "the specific criteria used to determine whether government aid has an impermissible effect have changed." *Id.* at 845 (O'Connor, J., concurring), citing *Agostini v. Felton*, 521 U.S. 203, 223 (1997). Indeed, this doctrinal march is evident in the long line of Establishment Clause cases beginning at least as early as *Mueller v. Allen*, 463 U.S. 388 (1983), *see* State Pet. at 18-25, and continuing through the Court's decision just weeks ago in *Good News Club v. Milford Central School*, 121 S.Ct. 2093, 2001 U.S. Lexis 4312 (June 11, 2001).

Good News Club—an important decision that respondents oddly ignore—reconfirms that "'a significant

factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion.'" *Id.*, 2001 U.S. Lexis 4312 at *28-29, quoting *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 839 (1995) (emphasis in original). *Good News Club* declares that to suggest, as respondents do, that granting religious institutions access to public programs destroys neutrality "defies logic." *Good News Club*, 2001 U.S. Lexis 4312 at *29. As the Court emphasized, "the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.'" *Id.*, quoting *Rosenberger*, 515 U.S. at 839.

c. Nor does inclusion of religious schools destroy the "private choices" that parents enjoy. In their various assessments of the program, respondents repeatedly trumpet the percentages of participating schools that are religious and of participating students that are enrolled in religious schools. They darkly suggest that these purportedly high percentages result from purportedly lower tuition costs in religious schools and, ultimately, from state coercion in some measure. Respondents conveniently forget, however, that "there is no evidence that any of the several nonreligious, private schools participating in the program have *ever* rejected a single voucher applicant for any reason," nor is there any evidence "that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive." *Simmons-Harris v. Zelman*, 234 F.3d 945, 971 (6th Cir. 2000) (Ryan., J., dissenting) (emphasis in original) (Pet. App. at 51a-52a). In short, nothing in the record suggests that respondents' much-trumpeted percentages are due to anything other than well-considered and truly private

choices made by eligible parents, and the social and cultural characteristics of the Cleveland community.

d. Although respondents long ago conceded that the Scholarship Program had a secular purpose, they take this opportunity to attack the intentions of Ohio's General Assembly (particularly with respect to the inclusion in the program of schools from adjacent public school districts) and the State's educational priorities. These calumnies are both unfair and misguided. As Judge Ryan explained in his dissent below, "there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate," *id.* at 968 (Pet. App. at 46a), and there is no reason to doubt it now. *See also Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) (inquiry into legislative purpose "should be deferential and limited"), citing *Everson v. Board of Educ.*, 330 U.S. 1, 6 (1947) (courts must exercise "the most extreme caution" in assessing whether a state statute has a proper public purpose).

Notwithstanding respondents' baseless insinuations, the Ohio General Assembly enacted the Scholarship Program to provide alternatives to public education for families in districts like the Cleveland school district, which was facing great challenges. Although the public schools in Cleveland have improved, *see* Center for Educ. Reform *Amicus* Brief at 5-10, education reform, including the assessment and development of alternatives, must continue. It is for that very reason that the State of Ohio comes before the Court in this case—to seek much-needed clarification of the options available to lawmakers and educators as they fashion solutions for our most challenging educational problems.

3. What is manifest from respondents' oppositions is that a state of confusion reigns over this Court's Establishment Clause jurisprudence. As the Simmons-Harris respondents concede, the record in this case is well-developed and demonstrates that the Scholarship Program has had its "intended effect of enabling thousands of children from lower-income families to attend sectarian [and, the State submits, non-sectarian] private schools. . . ." Simmons-Harris Opp. Brief at 9, n.6. This case is, accordingly, an ideal vehicle for resolving the constitutional uncertainties that have long plagued debates over school choice by providing definitive answers to these vital constitutional questions of the highest order.

CONCLUSION

For these reasons and those set forth in our petition, the petition should be granted.

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Nos. 00-1751, 00-1777 and 00-1779

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

JOINT APPENDIX

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Certiorari Granted: September 25, 2001

526 pp

TABLE OF CONTENTS

PAGE

Appendix A
(Relevant docket entries from the Courts below) 1a

Appendix B
(Ohio Rev. Code 3313.974)..... 21a

Appendix C
(Ohio Rev. Code 3313.975)..... 24a

Appendix D
(Ohio Rev. Code 3313.976)..... 28a

Appendix E
(Ohio Rev. Code 3313.977)..... 31a

Appendix F
(Ohio Rev. Code 3313.978)..... 33a

Appendix G
(Ohio Rev. Code 3313.979)..... 38a

Appendix H
(Ohio Rev. Code 3314.01)..... 41a

Appendix I
(Ohio Rev. Code 3314.02)..... 44a

Appendix J
(Ohio Rev. Code 3314.04)..... 49a

Appendix K
(Ohio Rev. Code 3314.06)..... 50a

Appendix L
(Ohio Rev. Code 3314.11)..... 52a

Appendix M
(Ohio Rev. Code 3314.12)..... 53a

Appendix N
(Affidavit of Caroline M. Hoxby) 54a

Appendix O
(Affidavit of Kim Metcalf)..... 66a

Appendix P
(Affidavit of Paul E. Peterson) 73a

Appendix Q
(Affidavit of David L. Brennan)..... 144a

Appendix R
(Affidavit of Jim Daubenmire)..... 149a

Appendix S
(Affidavit of Steven M. Puckett)..... 157a

Appendix T
(Affidavit Lytle Davis)..... 165a

Appendix U
(Affidavit of Leigh-Anne Ford)..... 168a

Appendix V
(Affidavit of Linda Massengale) 171a

Appendix W
(Affidavit of Senel Taylor)..... 173a

Appendix X
(Affidavit of Johnnietta McGrady)..... 176a

Appendix Y
(Affidavit of Amy Hudock)..... 179a

Appendix Z
(Affidavit of Shelia Bolek)..... 182a

Appendix AA
(Affidavit of Delories Jones)..... 186a

Appendix BB
(Affidavit of Cynthia L. Felden)..... 188a

Appendix CC
(Affidavit of Dawn Call) 190a

Appendix DD
(Affidavit of Angela Grandberry) 192a

Appendix EE
(Affidavit of Thomas Barrett) 194a

Appendix FF
(Affidavit of Ivy T. Chambers) 196a

Appendix GG
(Affidavit of China Weaver-Brown) 198a

Appendix HH
(Joint Affidavit of School Psychologists)..... 200a

Appendix II
(The Racial, Economic, and Religious Context of Parental Choice in Cleveland) 206a

Appendix JJ
(Affidavit of Christine Suma) 220a

Appendix KK
(Declaration of David P. Zanotti) 223a

Appendix LL
(Declaration of Dr. Howard Fuller) 228a

Appendix MM
(Declaration of Alice O'Brien) 237a

Appendix NN
(Exhibits B-G of the Alice O'Brien Declaration) 245a

Appendix OO
(Statements regarding religiously-affiliated schools) 293a

Appendix A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

NO. 99-CV-1740

DORIS SIMMONS-HARRIS, ET AL., PLAINTIFFS

V.

SUSAN TAVE ZELMAN, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBERS	PROCEEDINGS
7/20/99	1	COMPLAINT for declaratory & injunctive relief. (Service by Clerk requested: summons issd, magistrate consent form issd by cert mail on 7/20/99) (35 pgs) (dh) [Entry date 07/21/99] [1:99cv1740]

* * * * *

7/27/99	17	ANSWER to Complaint by Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, Amy Hudock (5 pgs) (dh) [Entry date 07/28/99] [1:99cv1740]

* * * * *

8/2/99	23	MOTION by Hanna Perkins School to intervene (17 pgs) w/attached proposed ans & memo contra mot for prel inj (jk) [Entry date 08/03/99] [1:99cv1740]

* * * * *

8/24/99	48	ORDER granting motion by pltfs for preliminary injunction; the defts are enjoined from instituting or continuing to administer the Ohio Pilot Scholarship Program pending the outcome of a decision on the merits in this case. [3-1] (issued on 8/24/99) (28 pgs) Judge Solomon Oliver Jr. [EOD Date: 8/24/99] (dh) [1:99cv1740]

* * * * *

8/24/99	53	ORDER consolidating case 1:99cv1740 with case 1:99cv1818, as pltf Gatton, et al's mtn was granted in case 1:99cv1818. (issued on 8/25/99) (1 pg) Judge Solomon Oliver Jr. [EOD Date: 8/26/99] (dh) [Entry date 08/26/99] [1:99cv1740]

* * * * *

8/27/99	55	ORDER: motion by state defts to stay the order of 8/24/99 [49-1] is granted in part and denied in part, with the following modifications: 1) The stay is applicable to only those students who were enrolled in the Pilot Program under the 1995 Act during the last academic year; it is not applicable to students who are new enrollees; 2) The stay shall extend only for one semester or until the court renders a final decision on permanent injunctive relief, whichever is sooner; and 3) The Ct sets the following schedule for trial of this action: (a) counsel shall confer and work out a discovery schedule regarding any pertinent issues, including those which specifically bear on whether or not the Program involved has a primary effect of advancing religion and whether it avoids excessive entanglements under applicable Supreme Court precedents, by 9/6/99. Discovery to be complete by 10/29/99; (b) telephonic conference is set for 1:00 p.m. on 9/7/99; (c) Any dispositive motions must be filed by 11/15/99, responses are due by 11/29/99, replies by 12/8/99; and (d) Trial is set for 9:00 a.m. on 12/13/99 (issd on 8/27/99) (4 pgs) Judge Solomon Oliver Jr. [EOD Date: 8/27/99] (shh) [Edit date 08/27/99] [1:99cv1740]

* * * * *

8/31/99	58	ORDER granting motions by Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston & Amy Hudock [14-1] & Hanna Perkins School to intervene as defts in case 1:99cv1740 [23-1] (issd by fax 8/31/99) (5 pgs) Judge Solomon Oliver Jr. [EOD Date: 9/1/99] (dh) [Entry date 09/01/99] [Edit date 09/08/99] [1:99cv1740]

* * * * *

9/15/99	66	ORDER denying motion by state dfts' to dismiss [29-1] in 1:99cv01740 & 1:99cv1818. (issd by fax 9/15/99) (12 pgs) Judge Solomon Oliver Jr. [EOD Date: 9/16/99] (dh) [Entry date 09/16/99] [Edit date 04/26/00] [1:99cv1740 1:99cv1818]

* * * * *

9/29/99	74	ANSWER to pltfs Doris Simmons-Harris, et al's Complaint by deft Susan Tave Zelman in 1:99-cv-01740 & defts Susan Tave Zelman, State of Ohio & Sandra Berry in 1:99-cv-01818. (9 pgs) (dh) [Edit date 09/29/99] [1:99cv1740 1:99cv1818]
9/29/99	75	ANSWER to pltfs Sue Gatton, et al's Complaint by deft Susan Tave Zelman in 1:99-cv-01740 & defts Susan Tave

Zelman, State of Ohio & Sandra Berry in 1:99-cv-01818. (11 pgs) (dh) [1:99cv1740 1:99cv1818]

* * * * *

12/20/99	131	ORDER granting motion by pltfs in 1:99cv1740 for summary judgment & denying defts mtn for summary judgment; State defts are permanently enjoined from administering the Voucher Program; this Ct stays this Ct's Order pending Sixth Circuit review, as all cnsl have consented to a stay. [83-1], [97-1], [92-1], [86-1] dismissing case (issued on 12/20/99) (59 pgs) Judge Solomon Oliver Jr. [EOD Date: 12/20/99] (dh) [1:99cv1740]
12/20/99	132	JUDGMENT entered for pltfs Doris Simmons-Harris, et al & pltfs Sue Gatton, et al & against defts Susan Tave Zelman, et al, intervening defts Senel Taylor, et al & intervening defts Hanna Perkins School, et al, as the Ct granted pltfs' mtn for SJ & denied defts' mtn for SJ. (issued on 12/20/99) (2 pgs) Judge Solomon Oliver Jr. [EOD Date: 12/20/99] (dh) [1:99cv1740]

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1/12/00	137	NOTICE of Appeal by intervenors/defts Senel Taylor

Johnietta McGrady, Christine Suma, Arkela Winston and Amy Hudock in 1:99cv01740 & 1:99cv1818 re: order [131-2] & re: jgm entry [132-1] (cc: all counsel-notice only. USCA-notice and doc(s) mailed on 1/12/00) (1 pg) (shh) [Edit date 01/12/00] [1:99cv1740]

* * * * *

1/12/00	138	NOTICE of Appeal by State defts Susan Tave Zelman, the State of Ohio and Saundra Berry in 1:99cv1740 & 1:99cv1818 re: order [131-2] & re: jgm entry [132-1] (cc: all counsel-notice only. USCA-notice and doc(s) mailed on 1/13/00) (4 pgs) (shh) [Entry date 01/13/00] [1:99cv1740]

* * * * *

1/13/00	139	NOTICE of Appeal by intervenor-deft Hanna Perkins School in 1:99cv1740 & 1:99cv1818 re: order [131-2] & re: jgm entry [132-1] (cc: all counsel-notice only. USCA-notice and doc(s) mailed on 1/13/00) (3 pgs) (shh) [1:99cv1740]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

NO. 99-CV-1818

SUE GATTON, ET AL., PLAINTIFFS

V.

SUSAN TAVE ZELMAN, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBERS	PROCEEDINGS
7/29/99	1	COMPLAINT for Declaratory & Injunctive Relief. (Service: summons issd by cert mail by Clerk, magistrate consent form issd) (12 pgs) (jam) [Entry date 07/30/99] [1:99cv1818]

* * * * *

8/3/99	8	MOTION by Hanna Perkins School, et al for intervention as defts. (Proposed answer attached) (attach & 4 pgs) (jam) [Edit date 08/03/99] [1:99cv1818]

* * * * *

8/5/99	14	ORDER transferring case to Judge Solomon Oliver Jr. as a case related to 1:99cv1740 (issued on 8/5/99) (1 pg) Judge Ann Aldrich & Judge Solomon Oliver Jr. [EOD Date: 8/6/99] (jam) [Entry date 08/06/99] [1:99cv1818]

* * * * *

8/10/99	15	ANSWER to Complaint by proposed intervenors/defts Senel Taylor, et al., (8 pgs) (jw) [Entry date 08/11/99] [1:99cv1818]

* * * * *

8/24/99	24	ORDER granting pltfs' motion for prel inj; the defts are enjoined from instituting or continuing to administer the Ohio Pilot Scholarship Program pending the outcome of a decision on the merits in this case. [3-2] (issued on 8/24/99) (28 pgs) Judge Solomon Oliver Jr. [EOD Date: 8/24/99] (dh) [1:99cv1818]

* * * * *

8/24/99	29	ORDER granting motion by pltfs in case 1:99cv1818 for consolidation of this action with 1:99cv1740 [3-1] (issued on 8/25/99) (1 pg) Judge Solomon Oliver Jr. [EOD Date:

8/26/99] (dh) [Entry date 08/26/99] [1:99cv1818]

* * * * *

8/27/99	30	ORDER: motion by state defts to stay order of 8/24/99 [25-1] is granted in part and denied in part, with the following modifications: 1) The stay is applicable to only those students who were enrolled in the Pilot Program under the 1995 Act during the last academic year; it is not applicable to students who are new enrollees; 2) The stay shall extend only for one semester or until the court renders a final decision on permanent injunctive relief, whichever is sooner and 3) The Ct sets the following schedule for trial of this action: (a) counsel shall confer and work out a discovery schedule regarding any pertinent issues, including those which specifically bear on whether or not the Program involved has a primary effect of advancing religion and whether it avoids excessive entanglements under applicable Supreme Court precedents, by 9/6/99. Discovery to be complete 10/29/99; (b) telephonic conference is set for 1:00 p.m. on 9/7/99; (c) Any dispositive motions must be filed by 11/15/99; responses are due by 11/29/99; replies by 12/8/99; (d) Trial is set for 9:00 a.m. on 12/13/99 (issd on 8/27/99) (4 pgs) Judge Solomon

Oliver Jr. [EOD Date: 8/27/99] (shh) [Edit date 08/27/99] [1:99cv1818]

* * * * *

8/31/99 32 ORDER granting motion by Hanna Perkins School, et al for intervention as defts. [8-1] Hanna Perkins School, Ivy Chambers, Carol Lambert, Delories Jones, Our Lady of Peace, Westpark Lutheran, Lutheran Memorial added as intervenors to case(s) 1:99-cv-01818. (issued by fax 8/31/99) (5 pgs) Judge Solomon Oliver Jr. [EOD Date: 9/1/99] (dh) [Entry date 09/01/99] [1:99cv1818]

* * * * *

9/15/99 36 ORDER denying motion by state dfts' to dismiss [29-1] in 1:99cv01740 & 1:99cv1818. (issd by fax 9/15/99) (12 pgs) Judge Solomon Oliver Jr. [EOD Date: 9/16/99] (dh) [Entry date 09/16/99] [Edit date 04/26/00] [1:99cv1740 1:99cv1818]

* * * * *

9/29/99 38 ANSWER to pltfs Doris Simmons-Harris, et al's Complaint by deft Susan Tave Zelman in 1:99-cv-01740 & defts Susan Tave Zelman, State of Ohio & Sandra Berry in 1:99-cv-01818. (9 pgs) (dh) [Edit date 09/29/99] [1:99cv1740 1:99cv1818]

9/29/99 39 ANSWER to pltfs Sue Gatton, et al's Complaint by deft Susan Tave Zelman in 1:99-cv-01740 & defts Susan Tave Zelman, State of Ohio & Sandra Berry in 1:99-cv-01818. (11 pgs) (dh) [1:99cv1740 1:99cv1818]

* * * * *

12/20/99 40 ORDER granting pltfs mtn for summary judgment & denying defts mtn for summary judgment; State defts are permanently enjoined from administering the Voucher Program; this Ct stays this Ct's Order pending Sixth Circuit review, as cnsl for all pltfs have consented to a stay; dismissing case (issued on 12/20/99) (59 pgs) Judge Solomon Oliver Jr. [EOD Date: 12/20/99] (dh) [1:99cv1818]

12/20/99 41 JUDGMENT entered in favor of pltfs Doris Simmons-Harris, et al & pltfs Sue Gatton, et al & against defts Susan Tave Zelman, et al, intervening defts Senel Taylor, et al & intervening defts Hanna Perkins School, et al purs to Order of 12/20/99. (issued on 12/20/99) (2 pgs) Judge Solomon Oliver Jr. [EOD Date: 12/20/99] (dh) [1:99cv1818]

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1/12/00	44	NOTICE of Appeal by intervenors/ defts Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston and Amy Hudock in 1:99cv1740 & 1:99cv1818 re: order [40-2] & re: jgm entry [41-1] (cc: all counsel-notice only. USCA-notice and doc(s) mailed on 1/12/00) (1 pgs) (shh) [1:99cv1818]

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1/12/00	45	NOTICE of Appeal by State defts Susan Tave Zelman, the State of Ohio & Sandra Berry in 1:99cv1740 & 1:99cv1818 re: order [40-2] & re: jgm entry [41-1] (cc: all counsel-notice only. USCA-notice and doc(s) mailed on 1/13/00) (4 pgs) (shh) [Entry date 01/13/00] [1:99cv1818]

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1/13/00	46	NOTICE of Appeal by intervenor-deft Hanna Perkins School in 1:99cv1740 & 1:99cv1818 re: order [40-2] & re: jgm entry [41-1] (cc: all counsel-notice only. USCA-notice and doc(s) mailed on 1/13/00) (3 pgs) (shh) [1:99cv1818]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-3055/3060/3063

DORIS SIMMONS-HARRIS; MARLA FRANKLIN; STEVEN BEHR, Rev.; SUE GATTON; MARY MURPHY; MICHAEL DEBOSE; CHERYL DEBOSE; GLENN ALTSCHULD; DEIDRA PEARSON

Plaintiffs - Appellees

v.

SUSAN TAVE ZELMAN, Superintendent of Public Instruction, State of Ohio; SAUNDRA BERRY

Defendants - Appellants

DOCKET ENTRIES

DATE	PROCEEDINGS
1/13/00	Civil Case Docketed. Notice filed by Appellant Susan Tave Zelman, Appellant Saundra Berry. Transcript needed: [00-3060]

* * * * *

1/24/00 ORDER filed granting motion to consolidate for briefing; appellant's to file one consolidated appendix; granting the motion to expedite argument at the earliest practicable date, filed by Clint Bolick, Marvin E. Frankel, Andrew D. Roth, Karen L. Lazorishak, David J. Young [00-3055, 00-3060, 00-3063] (nb) [00-3055 00-3060 00-3063]

* * * * *

5/1/00 CERTIFIED RECORD filed. Volumes include 2 Tr; 13 Pl. [00-3055, 00-3060, 00-3063] (dac) [00-3055 00-3060 00-3063]

* * * * *

5/18/00 APPENDIX filed by Edward B. Foley for Appellant Saundra Berry, Appellant Susan Tave Zelman in 00-3055; 00-3060; 00-3063 (Volumes I through X). Copies: 5. Certificate of service date 5/15/00 [00-3055, 00-3060, 00-3063] (tmb) [00-3055 00-3060 00-3063]

* * * * *

5/22/00 FINAL BRIEF filed by David C. Tryon, Matthew Berry, and Clint Bolick for Appellant Senel Herman Taylor. Copies: 7. Certificate of service date 5/19/00. Number of Pages: 50. [00-3055] (vf) [00-3055]

5/22/00 FINAL REPLY BRIEF filed by David C. Tryon, Matthew Berry, and Clint Bolick for Appellant Senal Herman Taylor. Copies: 7. Certificate of

service date 5/19/00. Number of Pages: 24. [00-3055] (vf) [00-3055]

* * * * *

5/23/00 FINAL BRIEF filed by James G. Tassie, Karen L. Lazorishak, Roger F. Carroll, Mary Lynn Readey, and Edward B. Foley for Appellant Saundra Berry, Appellant Susan Tave Zelman. Copies: 7. Certificate of service date 5/22/00. Number of Pages: 56. [00-3060] (vf) [00-3060]

5/23/00 FINAL REPLY BRIEF filed by James G. Tassie, Karen L. Lazorishak, Roger F. Carroll, Mary Lynn Readey, and Edward B. Foley for Appellant Saundra Berry, Appellant Susan Tave Zelman. Copies: 7. Certificate of service date 5/22/00. Number of Pages: 20. [00-3060] (vf) [00-3060]

* * * * *

5/23/00 FINAL BRIEF filed by Michael R. Reed and David J. Young for Appellant Hanna Perkins. Copies: 7. Certificate of service date 5/22/00. Number of Pages: 47. [00-3063] (vf) [00-3063]

5/23/00 FINAL REPLY BRIEF filed by Michael R. Reed and David J. Young for Appellant Hanna Perkins. Copies: 7. Certificate of service date 5/22/00. Number of Pages: 26. [00-3063] (vf) [00-3063]

* * * * *

5/23/00 FINAL BRIEF filed by Andrew D. Roth for Appellee Mary Murphy, Appellee Steven Behr, Appellee Marla Franklin, Appellee Doris

Simmons-Harris, Christopher A. Lopez for Appellee Steven Behr, Appellee Marla Franklin, Appellee Doris Simmons-Harris , Judith E. Schaeffer for Appellee Steven Behr, Appellee Marla Franklin, Appellee Doris Simmons-Harris, Elliot M. Mincberg for Appellee Steven Behr, Appellee Marla Franklin, Appellee Doris Simmons-Harris, Raymond Vasvari for Appellee Steven Behr, Appellee Marla Franklin, Appellee Doris Simmons-Harris, David G. Latanick for Appellee Steven Behr, Appellee Marla Franklin, Appellee Doris Simmons-Harris, Robert H. Chanin for Appellee Doris Simmons-Harris, Steven K. Green for Appellee Deidra Pearson, Appellee Glenn Altschuld, Appellee Cheryl DeBose, Appellee Michael DeBose, Appellee Mary Murphy, Appellee Sue Gatton, Appellee Steven Behr, Appellee Marla Franklin, Appellee Doris Simmons-Harris, Elliot M. Mincberg for Appellee Deidra Pearson, Appellee Steven Behr, Appellee Marla Franklin, Appellee Doris Simmons-Harris, Alice Margaret O'Brien for Appellee Deidra Pearson, Appellee Steven Behr, Appellee Doris Simmons-Harris. Copies: 7. Certificate of service date 5/22/00 . Number of Pages: 68. [00-3055, 00-3060, 00-3063] (vf) [00-3055 00-3060 00-3063]

5/23/00 FINAL BRIEF filed by Marvin E. Frankel for Appellee Cheryl DeBose, Appellee Sue Gatton. Copies: 7. Certificate of service date 5/22/00. Number of Pages: 47. [00-3055, 00-3060, 00-3063] (vf) [00-3055 00-3060 00-3063]

* * * * *

12/11/00 OPINION filed: AFFIRMED, decision for publication pursuant to local rule 206 [00-3055, 00-3060, 00-3063]. James L. Ryan, Circuit Judge concurring in part and dissenting in part, Eugene E. Siler, Circuit Judge, Eric L. Clay, Authoring Circuit Judge. (nb) [00-3055 00-3060 00-3063]

12/11/00 JUDGMENT: AFFIRMED. (nb) [00-3055 00-3060 00-3063]

12/19/00 OPINION CORRECTION LETTER sent indicating revisions to published opinion filed December 11, 2000 [00-3055, 00-3060, 00-3063] (lkm) [00-3055 00-3060 00-3063]

12/22/00 PETITION for en banc rehearing filed by Edward B. Foley for Appellants Saundra Berry, Susan Tave Zelman. Certificate of service date 12/21/00. [00-3055, 00-3060, 00-3063] (blh) [00-3055 00-3060 00-3063]

12/27/00 ADDITIONAL PETITION for en banc rehearing filed by David J. Young for Appellant Hanna Perkins. Certificate of service date 12/22/00. [00-3055, 00-3060, 00-3063] (blh) [00-3055 00-3060 00-3063]

12/27/00 ADDITIONAL PETITION for en banc rehearing filed by Clint Bolick for Appellant Senel Herman Taylor. Certificate of service date 12/22/00. [00-3055, 00-3060, 00-3063] (blh) [00-3055 00-3060 00-3063]

1/22/01 LETTER SENT by blh to Marvin E. Frankel and Robert H. Chanin for Appellees Cheryl DeBose, Sue Gatton, Steven Behr, Marla Franklin, Doris

Simmons-Harris, Deidra Pearson notifying that party is to respond to a petition for en banc rehearing [2280088-1] filed by David J. Young, [2280089-1] filed by Clint Bolick, [2280086-1] filed by Edward B. Foley. Response due by 2/7/01. [00-3055, 00-3060, 00-3063]. (blh) [00-3055 00-3060 00-3063]

2/6/01 RESPONSE to a petition for en banc rehearing [2280088-1] filed by David J. Young, [2280089-1] filed by Clint Bolick and [2280086-1] filed by Edward B. Foley. Response filed by Robert H. Chanin for Appellees Doris Simmons-Harris, Deidra Pearson, Steven Behr, Marla Franklin. Certificate of service date 2/5/01. [00-3055, 00-3060, 00-3063] (blh) [00-3055 00-3060 00-3063]

2/7/01 RESPONSE to a petition for en banc rehearing [2280088-1] filed by David J. Young, [2280089-1] filed by Clint Bolick, and [2280086-1] filed by Edward B. Foley. Response filed by Marvin E. Frankel for Appellees Cheryl DeBose, Sue Gatton, Deidra Pearson, Steven Behr, Marla Franklin, Doris Simmons-Harris. Certificate of service date 2/6/01. [00-3055, 00-3060, 00-3063] (blh) [00-3055 00-3060 00-3063]

* * * * *

2/28/01 ORDER filed denying petition for en banc rehearing [2280088-1] filed by David J. Young, the petition en banc rehearing [2280089-1] filed by Clint Bolick, and the petition for en banc rehearing [2280086-1] filed by Edward B. Foley [00-3055, 00-3060, 00-3063]. James L. Ryan,

Eugene E. Siler, Eric L. Clay, Circuit Judges. (blh) [00-3055 00-3060 00-3063]

3/2/01 Appellant MOTION filed to stay mandate pending filing for certiorari and final disposition of this case before the Supreme court. Motion filed by Karen L. Lazorishak for Appellant Saundra Berry, Appellant Susan Tave Zelman in 00-3060, Roger F. Carroll for Appellant Saundra Berry, Appellant Susan Tave Zelman in 00-3060, Mary Lynn Readey for Appellant Saundra Berry, Appellant Susan Tave Zelman in 00-3060. Certificate of service date 3/2/01 [00-3055, 00-3060, 00-3063] (nb) [00-3055 00-3060 00-3063]

3/5/01 Appellant MOTION filed to stay mandate pending conclusion of all proceedings before the U.S. Supreme Court. Motion filed by Clint Bolick for Appellant Senel Herman Taylor in 00-3055. Certificate of service date 3/2/01 [00-3055, 00-3060, 00-3063] (nb) [00-3055 00-3060 00-3063]

3/5/01 Appellant MOTION filed to stay mandate. Motion filed by Michael R. Reed for Appellant Hanna Perkins in 00-3063, David J. Young for Appellant Hanna Perkins in 00-3063. Certificate of service date 3/5/01 [00-3055, 00-3060, 00-3063] (nb) [00-3055 00-3060 00-3063]

3/7/01 Appellee RESPONSE filed regarding a motion to stay mandate; previously filed by Clint Bolick in 00-3055. Response from Marvin E. Frankel for Appellee Cheryl DeBose, Appellee Sue Gatton in 00-3055, Robert H. Chanin for Appellee Doris Simmons-Harris in 00-3055. Certificate of

service date 3/6/01 [00-3055, 00-3060, 00-3063] (nb) [00-3055 00-3060 00-3063]

3/8/01 ORDER filed granting motion to stay mandate to allow appellants' time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but the mandate shall promptly issue if the petition is not filed within 90 days from the date of final judgment by this Court. [00-3055, 00-3060, 00-3063] in 00-3055, 00-3060, 00-3063. Entered by order of the court. (nb) [00-3055 00-3060 00-3063]

Appendix B

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.974 (Anderson 1999)

§3313.974 Definitions.

As used in this section and in sections 3313.975 [3313.97.5] to 3313.979 [3313.97.9] of the Revised Code:

(A) "Individualized education program" and "handicapped child" have the same meanings as in section 3323.01 of the Revised Code.

(B) "Mainstreamed handicapped student" means a handicapped child who has an individualized education program providing for the student to spend more than half of each school day in a regular school setting with nonhandicapped students.

(C) "Separately educated handicapped student" means a handicapped child who has an individualized education program providing for the student to spend at least half of each school day in a class or setting separated from nonhandicapped students.

(D) "Low-income family" means a family whose income is below the level which the superintendent of public instruction shall establish.

(E) "Parent" has the same meaning as in section 3313.98 of the Revised Code.

(F) "Registered private school" means a school registered with the superintendent of public instruction pursuant to section 3313.976 [3313.97.6] of the Revised Code.

(G) "Alternative school" means a registered private school located in a school district or a public school located in an adjacent school district.

(H) "Tutorial assistance" means instructional services provided to a student outside of regular school hours approved by the commission on school choice pursuant to section 3313.976 [3313.97.6] of the Revised Code.

HISTORY: 148 v H 282. Eff 6-29-99.

The provisions of §§ 41, 46 of HB 282 (148 v --) read as follows:

SECTION 41. Sections 3313.974, 3313.975, 3313.976, 3313.977, 3313.978, and 3313.979 of the Revised Code contained within the purview of Sections 1 and 2 of this act, which establish the Pilot Project Scholarship and Tutorial Assistance Program, are repealed and reenacted with a modification in order to restore them to effectiveness as part of the law and to reinstate the program with a modification. The Supreme Court of Ohio, in *Simmons-Harris v. Goff* (1999), [86 Ohio St.3d 1, 711 N.E.2d 203] invalidated the sections as they resulted from Am. Sub. H.B. 117 of the 121st General Assembly, 146 Ohio Laws 900, holding their enactment in that act to have been violative of the one-subject rule, Ohio Constitution, Article II, Section 15(D).

This reinstatement of the Pilot Project Scholarship and Tutorial Assistance Program is a continuation of the program operating in the 1998-1999 school year, with the

modifications made in this act. Students who received scholarships that year may continue to receive scholarships in subsequent years, as provided in division (C)(1) of new section 3313.975 of the Revised Code, until they complete eighth grade, as long as they comply with the requirements of new sections 3313.974 to 3313.979 of the Revised Code and the General Assembly appropriates funds for the program.

Amendments to the Pilot Project Scholarship Program subsequent to Am. Sub. H.B. 117 also lost effectiveness because of the invalidation of the original enactment. The repeal and reenactment of section 3313.975 of the Revised Code contained within the purview of Sections 1 and 2 of this act also restore these subsequent amendments, by Am. Sub. H.B. 215 and Am. Sub. H.B. 770 of the 122nd General Assembly, to effectiveness as part of the law. The amendment of section 3313.975 of the Revised Code in Am. Sub. H.B. 215 corrected a constitutional deficiency noted in *Simmons-Harris v. Goff*, unreported, 10th District Court of Appeals (1997).

Section 3313.977 as repealed and reenacted within the purview of Sections 1 and 2 of this act omits original division (A)(1)(d) of that section to correct a constitutional deficiency noted in *Simmons-Harris v.* Goff (1999) [86 Ohio St.3d 1, 711 N.E.2d 203].

SECTION 46. The repeal by this act of sections 3313.974, 3313.975, 3313.976, 3313.977, 3313.978, 3313.979, 3317.053, and 3317.16 of the Revised Code is not subject to the referendum. Therefore, under Ohio Constitution, Article II, Section 1d and section 1.471 of the Revised Code, the repeals go into immediate effect when this act becomes law.

Appendix C

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.975 (Anderson 1999)

§3313.975 Pilot project scholarship program established.

As used in this section and in sections 3313.975 [3313.97.5] to 3313.979 [3313.97.9] of the Revised Code, "the pilot project school district" or "the district" means any school district included in the pilot project scholarship program pursuant to this section.

(A) The superintendent of public instruction shall establish a pilot project scholarship program and shall include in such program any school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent. The program shall provide for a number of students residing in any such district to receive scholarships to attend alternative schools, and for an equal number of students to receive tutorial assistance grants while attending public school in any such district.

(B) The state superintendent shall establish an application process and deadline for accepting applications from students residing in the district to participate in the scholarship program. In the initial year of the program students may only use a scholarship to attend school in grades kindergarten through third.

The state superintendent shall award as many scholarships and tutorial assistance grants as can be funded given the amount appropriated for the program. In no case, however, shall more than fifty per cent of all scholarships awarded be used by students who were enrolled in a nonpublic school during the school year of application for a scholarship.

(C)(1) The pilot project program shall continue in effect each year that the general assembly has appropriated sufficient money to fund scholarships and tutorial assistance grants. In each year the program continues, no new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three. However, any student who has received a scholarship the preceding year may continue to receive one until the student has completed grade eight.

(2) If the general assembly discontinues the scholarship program, all students who are attending an alternative school under the pilot project shall be entitled to continued admittance to that specific school through all grades up to the eighth grade that are provided in such school, under the same conditions as when they were participating in the pilot project. The state superintendent shall continue to make scholarship payments in accordance with division (A) or (B) of section 3313.979 [3313.97.9] of the Revised Code for students who remain enrolled in an alternative school under this provision in any year that funds have been appropriated for this purpose.

If funds are not appropriated, the tuition charged to the parents of a student who remains enrolled in an alternative school under this provision shall not be increased beyond the amount equal to the amount of the scholarship plus any additional amount charged that student's parent in the most recent year of attendance as a participant in the pilot

project, except that tuition for all the students enrolled in such school may be increased by the same percentage.

(D) Notwithstanding sections 124.39, 3307.35, and 3319.17 of the Revised Code, if the pilot project school district experiences a decrease in enrollment due to participation in a state-sponsored scholarship program pursuant to sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code, the district board of education may enter into an agreement with any teacher it employs to provide to that teacher severance pay or early retirement incentives, or both, if the teacher agrees to terminate the employment contract with the district board, provided any collective bargaining agreement in force pursuant to Chapter 4117. Of the Revised Code does not prohibit such an agreement for termination of a teacher's employment contract.

HISTORY: 148 v H 282. Eff 6-29-99.

The provisions of §§ 4.34, 4.35 of HB 282 (148 v --) read as follows:

SECTION 4.34. The Superintendent of Public Instruction shall contract with an independent research entity to develop a methodology and research design for an evaluation of the pilot project approved pursuant to section 3313.975 of the Revised Code. The independent research entity shall consult with the Legislative Office of Education Oversight in the development of the methodology and research for the evaluation. The evaluation shall consist of two parts. The first part shall be a formative evaluation examining the implementation of the program, which shall be completed by December 31, 1997. The second part shall be a comprehensive evaluation of the results of the program, which shall be completed by September 1, 1999. The

comprehensive evaluation shall include at a minimum a study of the impact of scholarships on student attendance, conduct, commitment to education, and standardized test scores; parental involvement; the school district's ability to provide services to district students; and the availability of alternative educational opportunities. The evaluation shall also study the economic impact of scholarships on the school district.

SECTION 4.35. Notwithstanding division (C)(1) of new section 3313.975 of the Revised Code, in addition to students in kindergarten through third grade, initial scholarships may be awarded to fourth, fifth, and sixth grade students in fiscal year 2000 and to fourth, fifth, sixth, and seventh grade students in fiscal year 2001.

See provisions, §§ 41, 46 of HB 282 (148 v --), following RC § 3313.97.4.

Appendix D

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.976 (Anderson 1999)

§3313.976 Eligibility of private schools and public schools in adjacent districts; tutorial assistance.

(A) No private school may receive scholarship payments from parents pursuant to section 3313.979 [3313.97.9] of the Revised Code until the chief administrator of the private school registers the school with the superintendent of public instruction. The state superintendent shall register any school that meets the following requirements:

(1) The school is located within the boundaries of the pilot project school district;

(2) The school indicates in writing its commitment to follow all requirements for a state-sponsored scholarship program specified under sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code, including, but not limited to, the requirements for admitting students pursuant to section 3313.977 [3313.97.7] of the Revised Code;

(3) The school meets all state minimum standards for chartered nonpublic schools in effect on July 1, 1992, except that the state superintendent at the superintendent's discretion may register nonchartered nonpublic schools meeting the other requirements of this division;

(4) The school does not discriminate on the basis of race, religion, or ethnic background;

(5) The school enrolls a minimum of ten students per class or a sum of at least twenty-five students in all the classes offered;

(6) The school does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion;

(7) The school does not provide false or misleading information about the school to parents, students, or the general public;

(8) The school agrees not to charge any tuition to low-income families participating in the scholarship program in excess of ten per cent of the scholarship amount established pursuant to division (C)(1) of section 3313.978 [3313.97.8] of the Revised Code, excluding any increase described in division (C)(2) of that section. The school shall permit any such tuition, at the discretion of the parent, to be satisfied by the low-income family's provision of in-kind contributions or services.

(B) The state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any of the provisions of division (A) of this section.

(C) Any public school located in a school district adjacent to the pilot project district may receive scholarship payments on behalf of parents pursuant to section 3313.979 [3313.97.9] of the Revised Code if the superintendent of the district in which such public school is located notifies the state superintendent prior to the first day of March that the

district intends to admit students from the pilot project district for the ensuing school year pursuant to section 3327.06 of the Revised Code.

(D) Any parent wishing to purchase tutorial assistance from any person or governmental entity pursuant to the pilot project program under sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code shall apply to the state superintendent. The state superintendent shall approve providers who appear to possess the capability of furnishing the instructional services they are offering to provide.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix E

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.977 (Anderson 1999)

§3313.977 Admission of students to registered private school.

(A)(1) Each registered private school shall admit students to kindergarten and first, second, and third grades in accordance with the following priorities:

(a) Students who were enrolled in the school during the preceding year;

(b) Siblings of students enrolled in the school during the preceding year, at the discretion of the school;

(c) Children from low-income families attending school or residing in the school district in which the school is located until the number of such students in each grade equals the number that constituted twenty per cent of the total number of students enrolled in the school during the preceding year in such grade. Admission of such twenty per cent shall be by lot from among all low-income family applicants who apply prior to the fifteenth day of February prior to admission.

(d) All other applicants residing anywhere, provided that all remaining available spaces shall be filled from among such applicants by lot.

Children from low-income families not selected by lot under division (A)(1)(c) of this section shall be included in the lottery of all remaining applicants pursuant to division (A)(1)(d) of this section.

(2) Each registered private school shall first admit to grades four through eight students who were enrolled in the school during the preceding year. Any remaining spaces for students in these grades may be filled as determined by the school.

(B) Notwithstanding division (A) of this section, except where otherwise prohibited by federal law, a registered private school may elect to admit students of only one gender and may deny admission to any separately educated handicapped student.

(C) If a scholarship student who has been accepted in accordance with this section fails to enroll in the school for any reason or withdraws from the school during the school year for any reason, the school may elect to replace such student with another scholarship student only by first offering the admission to any low-income scholarship students who filed applications by the preceding fifteenth day of February and who were not accepted at that time due to space limitations.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix F

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.978 (Anderson 1999)

§3313.978 Implementation of program by state superintendent and school officials; scholarships and tutorial assistance grants.

(A) Annually by the first day of November, the superintendent of public instruction shall notify the pilot project school district of the number of initial scholarships that the state superintendent will be awarding in each of grades kindergarten through third.

The state superintendent shall provide information about the scholarship program to all students residing in the district, shall accept applications from any such students until such date as shall be established by the state superintendent as a deadline for applications, and shall establish criteria for the selection of students to receive scholarships from among all those applying prior to the deadline, which criteria shall give preference to students from low-income families. For each student selected, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the scholarship amount. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the scholarship amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of

the scholarship amount. The state superintendent shall notify students of their selection prior to the fifteenth day of January and whether they qualify for seventy-five or ninety per cent of the scholarship amount.

(1) A student receiving a pilot project scholarship may utilize it at an alternative public school by notifying the district superintendent, at any time before the beginning of the school year, of the name of the public school in an adjacent school district to which the student has been accepted pursuant to section 3327.06 of the Revised Code.

(2) A student may decide to utilize a pilot project scholarship at a registered private school in the district if all of the following conditions are met:

(a) By the fifteenth day of February of the preceding school year, or at any time prior to the start of the school year, the parent makes an application on behalf of the student to a registered private school.

(b) The registered private school notifies the parent and the state superintendent as follows that the student has been admitted:

(i) By the fifteenth day of March of the preceding school year if the student filed an application by the fifteen day of February and was admitted by the school pursuant to division (A) of section 3313.977 [3313.97.7] of the Revised Code;

(ii) Within one week of the decision to admit the student if the student is admitted pursuant to division (c) of section 3313.977 [3313.07.7] of the Revised Code.

(c) The student actually enrolls in the registered private school to which the student was first admitted or in another registered private school in the district or in a public school in an adjacent school district.

(B) The state superintendent shall also award in any school year tutorial assistance grants to a number of students equal to the number of students who receive scholarships under division (A) of this section. Tutorial assistance grants shall be awarded solely to students who are enrolled in the public schools of the district in a grade level covered by the pilot project. Tutorial assistance grants may be used solely to obtain tutorial assistance from a provider approved pursuant to division (D) of section 3313.976 [3313.97.6] of the Revised Code.

All students wishing to obtain tutorial assistance grants shall make application to the state superintendent by the first day of the school year in which the assistance will be used. The state superintendent shall award assistance grants in accordance with criteria the superintendent shall establish. For each student awarded a grant, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the grant amount and so notify the student. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the grant amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the grant amount.

(C)(1) In the case of basic scholarships, the scholarship amount shall not exceed the lesser of the tuition charges of the alternative school the scholarship recipient

attends or an amount established by the state superintendent not in excess of twenty-five hundred dollars.

(2) The state superintendent shall provide for an increase in the basic scholarship amount in the case of any student who is a mainstreamed handicapped student and shall further increase such amount in the case of any separately educated handicapped child. Such increases shall take into account the instruction, related services, and transportation costs of educating such students.

(3) In the case of tutorial assistance grants, the grant amount shall not exceed the lesser of the provider's actual charges for such assistance or a percentage established by the state superintendent, not to exceed twenty per cent, of the amount of the pilot project school district's average basic scholarship amount.

(4) No scholarship or tutorial assistance grant shall be awarded unless the state superintendent determines that twenty-five or ten per cent, as applicable, of the amount specified for such scholarship or grant pursuant to division (C)(1), (2), or (3) of this section will be furnished by a political subdivision, a private nonprofit or for profit entity, or another person. Only seventy-five or ninety per cent of such amounts, as applicable, shall be paid from state funds pursuant to section 3313.979 [3313.97.9] of the Revised Code.

(D)(1) Annually by the first day November, the state superintendent shall estimate the maximum per-pupil scholarship amounts for the ensuing school year. The state superintendent shall make this estimate available to the general public at the offices of the district board of education together with the forms required by division (D)(2) of this section.

(2) Annually by the fifteenth day of January, the chief administrator of each registered private school located in the pilot project district and the principal of each public school in such district shall complete a parental information form and forward it to the president of the board of education. The parental information form shall be prescribed by the department of education and shall provide information about the grade levels offered, the numbers of students, tuition amounts, proficiency examination results, and any sectarian or other organizational affiliations.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix G

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3313: BOARDS OF EDUCATION

ORC Ann. 3313.979 (Anderson 1999)

§3313.979 Payment of scholarships and grants to parents or to school district; monthly reports by private school.

Each scholarship or grant to be used for payments to a registered private school or to an approved tutorial assistance provider is payable to the parents of the student entitled to the scholarship or grant. Each scholarship to be used for payments to a public school in an adjacent school district is payable to the school district of attendance by the superintendent of public instruction.

(A)(1) By the fifteenth day of each month of the school year that any scholarship students are enrolled in a registered private school, the chief administrator of that school shall notify the state superintendent of:

(a) The number of students who were reported to the school district as having been admitted by that private school pursuant to division (A)(2)(b) of section 3313.978 [3313.97.8] of the Revised Code and who were still enrolled in the private school as of the first day of such month, and the numbers of such students who qualify for seventy-five and ninety per cent of the scholarship amount;

(b) The number of students who were reported to the school district as having been admitted by another private school pursuant to division (A)(2)(b) of section 3313.978

[3313.97.8] of the Revised Code and since the date of admission have transferred to the school providing the notification under division (A)(1) of this section, and the numbers of such students who qualify for seventy-five and ninety per cent of the scholarship amount.

(2) From time to time, the state superintendent shall make a payment to the parent of each student entitled to a scholarship. Each payment shall include for each student reported under division (A)(1) of this section, a portion of seventy-five or ninety per cent, as applicable, of the scholarship amount specified in divisions (C)(1) and (2) of section 3313.978 [3313.97.8] of the Revised Code. This amount shall be proportionately reduced in the case of any such student who is not enrolled in a registered private school for the entire school year.

(3) The first payment under this division shall be made by the last day of November and shall equal one-third of seventy-five or ninety per cent, as applicable, of the estimated total amount that will be due to the parent for the school year pursuant to division (A)(2) of this section.

(B) The state superintendent, on behalf of the parents of a scholarship student enrolled in a public school in an adjacent school district pursuant to section 3327.06 of the Revised Code, shall make the tuition payments required by that section to the school district admitting the student, except that, notwithstanding sections 3323.13, 3323.14, and 3327.06 of the Revised Code, the total payments in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the scholarship amount provided in divisions (C)(1) and (2) of section 3313.978 [3313.97.8] of the Revised Code.

(C) Whenever an approved provider provides tutorial assistance to a student, the state superintendent shall pay the parent for such costs upon receipt of a statement from the parent specifying the services provided and the costs of the services, which statement shall be signed by the provider. The total payments to any parent under this division for all provider services to any individual student in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the grant amount provided in division (C)(3) of section 3313.978 [3313.97.8] of the Revised Code.

HISTORY: 148 v H 282. Eff 6-29-99.

Appendix H

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.01 (Anderson 1998)

§3314.01 Permission to become community school; status and general powers of community school.

(A)(1) A board of education may permit all or part of any of the schools under its control, upon request of a proposing person or group and provided the person or group meets the requirements of this chapter, to become a community school.

(2) Any person or group of individuals may propose the creation of a community school pursuant to the provisions of this chapter. No nonpublic chartered or nonchartered school in existence on January 1, 1997, is eligible to become a community school under this chapter.

(B) A community school created under this chapter is a public school, independent of any school district, and is part of the state's program of education. A community school may sue and be sued, acquire facilities as needed, contract for any services necessary for the operation of the school, and enter into contracts with a sponsor pursuant to this chapter. The governing authority of a community school may carry out any act and ensure the performance of any function that is in compliance with the Ohio Constitution, this chapter, other statutes applicable to community schools, and the contract entered into under this chapter establishing the school.

HISTORY: 147 v H 215 (Eff 6-30-97); 147 v S 55 Eff 7-1-98.

The effective date is set by section 6 of SB 55.

The provisions of §§ 50.39, 50.52, Subsection 2(B) paragraph 1 of HB 215 (147 v --) read as follows:

SECTION 50.39. By December 31, 2002, the Legislative Office of Education Oversight shall complete an evaluation of the assets and liabilities to the state's system of educational options that result from the establishment of community schools under this act. The evaluation shall at least include an assessment of any advantages to providing a greater number of educational choices to Ohio parents, any detrimental impacts on the state education system or on individual school districts, and the effects of attending community schools on the academic achievement of students.

* * *

SECTION 50.52. * * *
Subsection 2. * * *

(B) The General Assembly finds that the establishment of independent community schools throughout the state has potential desirable effects, including providing parents a choice of academic environments for their children and providing the education community with the opportunity to establish limited experimental educational programs in a deregulated setting. However, the potential effects of a statewide system of community schools could also generate some adverse results. Therefore, the General Assembly finds it advisable to establish a pilot project in the Lucas County area which will permit the operation of community schools in a limited area of the state in order to provide for the evaluation and measurement of the effects of these schools.

[Sec. 50.52.2 was amended in HB 770 (147 v --), however, division (B) was not changed.]

Appendix I

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.02 (Anderson 1999)

§3314.02 Proposal for converting public school to community school; new start-up school in challenged district; preliminary agreement; contract for each school.

(A) As used in this chapter:

(1) "Sponsor" means a public entity listed in division (C)(1) of this section with which the governing authority of the proposed community school enters into a contract pursuant to this section.

(2) "Pilot project area" means the school districts included in the territory of the former community school pilot project established by former Section 50.52 of Am. Sub. H.B. No. 215 of the 122nd general assembly.

(3) "Challenged school district" means any of the following:

(a) A school district that is part of the pilot project area;

(b) A school district that is in a state of academic emergency under section 3302.03 of the Revised Code;

(c) A big eight school district;

(d) An urban school district.

(4) "Big eight school district" means a school district that for fiscal year 1997 had both of the following:

(a) A percentage of children residing in the district and participating in the predecessor of Ohio works first greater than thirty per cent, as reported pursuant to section 3317.10 of the Revised Code;

(b) An average daily membership greater than twelve thousand, as reported pursuant to former division (A) of section 3317.03 of the Revised Code.

(5) "New start-up school" means a community school other than one created by converting all or part of an existing public school, as designated in the school's contract pursuant to division (A)(17) of section 3314.03 of the Revised Code.

(6) "Urban school district" means one of the state's twenty-one urban school districts as defined in division (O) of section 3317.02 of the Revised Code as that section existed prior to July 1, 1998.

(B) Any person or group of individuals may initially propose under this division the conversion of all or a portion of a public school to a community school. The proposal shall be made to the board of education of the city, local, or exempted village school district in which the public school is proposed to be converted. Upon receipt of a proposal, a board may enter into a preliminary agreement with the person or group proposing the conversion of the public school, indicating the intention of the board of education to support the conversion to a community school. A proposing person or group that has a preliminary agreement under this division may proceed to finalize plans for the school, establish a

governing authority for the school, and negotiate a contract with the board of education. Provided the proposing person or group adheres to the preliminary agreement and all provisions of this chapter, the board of education shall negotiate in good faith to enter into a contract in accordance with section 3314.03 of the Revised Code and division (C) of this section.

(C)(1) Any person or group of individuals may propose under this division the establishment of a new start-up school to be located in a challenged school district. The proposal may be made to any of the following public entities:

(a) the board of education of the district in which the school is proposed to be located;

(b) The board of education of any joint vocational school district with territory in the county in which is located the majority of the territory of the district in which the school is proposed to be located;

(c) The board of education of any city, local, or exempted village school district having territory in the same county where the district in which the school is proposed to be located has the major portion of its territory;

(d) The state board of education;

(e) If the school is proposed to be located in the pilot project area, the governing board of the educational service center serving the county containing the majority of the territory of the pilot project area;

(f) If the school is proposed to be located in the pilot project area, a sponsoring authority designated by the board

of trustees of a state university located in the pilot project area, or the board of trustees itself.

The public entity may enter into a preliminary agreement pursuant to division (C)(2) of this section with the proposing person or group.

(2) A preliminary agreement indicates the intention of a public entity described in division (C)(1) of this section to sponsor the community school. A proposing person or group that has such a preliminary agreement may proceed to finalize plans for the school, establish a governing authority for the school, and negotiate a contract with the public entity. Provided the proposing person or group adheres to the preliminary agreement and all provisions of this chapter, the public entity shall negotiate in good faith to enter into a contract in accordance with section 3314.03 of the Revised Code.

(3) A new start-up school that is established in a school district while that district is in a state of academic emergency under section 3302.03 of the Revised Code may continue in existence once the school district is no longer in a state of academic emergency, provided there is a valid contract between the school and a sponsor.

(D) A majority vote of a sponsoring school district board and a majority vote of the members of the governing authority of a community school shall be required to adopt a contract and convert the public school to a community school or establish the new start-up school. An unlimited number of community schools may be established in any school district provided that a contract is entered into for each community school pursuant to this chapter.

HISTORY: 147 v H 215 (Eff 6-30-97); 147 v S 55 (Eff 7-1-98); 147 v H 650 (Eff 7-1-98); 148 v H 282. Eff 9-28-99.

Appendix J

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.04 (Anderson 1997)

§3314.04 Exemption from state laws and rules.

Except as otherwise specified in this chapter and in the contract between a community school and a sponsor, such school is exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grant certain rights to parents.

HISTORY: 147 v H 215. Eff 6-30-97.

Appendix K

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.06 (Anderson 1999)

§3314.06 Admission procedures.

The governing authority of each community school established under this chapter shall adopt admission procedures that specify the following:

(A) That except as otherwise provided in this section, admission to the school shall be open to any individual age five to twenty-two entitled to attend school pursuant to section 3313.64 or 3313.65 of the Revised Code in a school district in the state.

(B) That admission to the school may be limited to students who have attained a specific grade level or are within a specific age group; to students that meet a definition of "at-risk," as defined in the contract; or to residents of a specific geographic area within the district, as defined in the contract.

(C) Whether enrollment is limited to students who reside in the district in which the school is located or is open to residents of other districts, as provided in the policy adopted pursuant to the contract.

(D) That there will be no discrimination in the admission of students to the school on the basis of race, creed, color, handicapping condition, or sex; and that, upon

admission of any handicapped student, the community school will comply with all federal and state laws regarding the education of handicapped students.

(E) That the school may not limit admission to students on the basis of intellectual ability, measures of achievement or aptitude, or athletic ability.

(F) That the community school will admit the number of students that does not exceed the capacity of the school's programs, classes, grade levels, or facilities.

(G) That, except as otherwise provided under division (B) of this section, if the number of applicants exceeds the capacity restrictions of division (F) of this section, students shall be admitted by lot from all those submitting applications, except preference shall be given to students attending the school the previous year and to students who reside in the district in which the school is located. Preference may be given to siblings of students attending the school the previous year.

Notwithstanding divisions (A) through (G) of this section, in the event the facial composition of the enrollment of the community school is violative of a federal desegregation order, the community school shall take any and all corrective measure to comply with the desegregation order.

HISTORY: 147 v H 215 (Eff 6-30-97); 148 v H 282. Eff 6-29-99.

Appendix L

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.11 (Anderson 1999)

§3314.11 State office of school options.

The department of education shall establish the state office of school options to provide advice and services for the community schools program, established pursuant to Chapter 3314. of the Revised Code, and the pilot project scholarship program, established pursuant to sections 3313.974 [3313.97.4] to 3313.979 [3313.97.9] of the Revised Code. The office shall provide services that facilitate the management of the community schools program and the pilot project scholarship program, including providing technical assistance and information to persons or groups considering proposing a community school, to governing authorities of community schools, and to public entities sponsoring or considering sponsoring a community school.

HISTORY: 147 v S 55 (Eff 7-1-98); 148 v H 282. Eff 6-29-99.

Appendix M

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE 33 EDUCATION—LIBRARIES
CHAPTER 3314: COMMUNITY SCHOOLS

ORC Ann. 3314.12 (Anderson 1999)

§3314.12 Annual composite report on community schools.

The legislative office of education oversight shall produce and issue an annual composite informational report on community schools established under this chapter to the speaker of the house of representatives, the president of the senate, and the governor. The report shall include the number of schools in operation, the size and characteristics of enrollment for the schools, the academic performance of the schools, the financial status of the schools, and any other pertinent information.

HISTORY: 147 v H 770 (Eff 7-1-98); 148 v H 282. Eff 6-29-99.

Appendix N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al. Plaintiffs	:	CASE NO. 1:99 CV 1740
v.	:	JUDGE SOLOMON OLIVER, JR.
DR. SUSAN TAVE ZELMAN Defendant	:	
SUE GATTON, et al. Plaintiffs	:	CASE NO. 1:99 CV 1818
v.	:	
DR. SUSAN TAVE ZELMAN, et al. Defendants	:	

AFFIDAVIT OF CAROLINE M. HOXBY

In the Commonwealth of Massachusetts	:	
	:	SS.
County of Middlesex	:	

Being first duly cautioned and sworn, Caroline M. Hoxby, says and deposes that she has personal knowledge of the following:

1. I am the Morris Kahn Associate Professor of Economics at Harvard University. My area of study includes education economics, including school choice. A true and accurate copy of my current visa is attached hereto and incorporated herein as Exhibit 1.

2. I have been the principal investigator for several studies involving school choice and its economic affect on public schools. See, for example, "Analyzing School Choice Reforms Using America's Traditional Forms of Parent Choice," as it appears in the text, *Learning from School Choice*, attached hereto and incorporated herein in as Exhibit 2. See also "When Parents Can Choose, What Do They Choose? The Effects of School Choice on Curriculum," as it appears in the text, *When Schools Make A Difference*, attached hereto and incorporated herein as Exhibit 3. See also "Evidence on Private School Vouchers: Effects on Schools and Students," as it appears in the text, *Performance-Based Approaches to School Reform*, attached hereto and incorporated herein as Exhibit 4.

3. I am familiar with the Ohio Pilot Scholarship Program, which provides vouchers to scholarship recipients in the Cleveland public school system, I am also familiar with the other choice alternatives available to students in the Cleveland Public School System including magnet schools and community schools.

4. The Ohio Department of Education has supplied me with the information that the amount of money that the State of Ohio provides for each scholarship in The Cleveland Scholarship Program differs from the per-pupil amount of money that the State provides to community schools. The amount of money that the

State of Ohio provides for each scholarship in the The Cleveland Scholarship Program also differs from the per-pupil amount of money that the Cleveland public school district spends in its schools, including its magnet schools.

a. For families whose income is not more than 200% of the federal poverty line, the scholarship program provides a maximum scholarship or $2250, or 90% of private school tuition. These low-income families must pay the remaining 10% or $250.

b. For other families that participate in the scholarship program, the program provides a maximum scholarship of $1875, up to 75% of the private school's tuition. These families must pay the remaining 25% of tuition, or up to $625.

c. The State of Ohio provides to each community school in Cleveland $4518 for each student enrolled in the school. A community school may also receive special education and Disadvantaged Pupil Impact Aid from the State of Ohio.

d. In fiscal year 1998, the Cleveland public school district spends an average of $7,097 for each student enrolled in its schools, including its magnet schools. The State of Ohio provides $4,167 of this $7,097. Therefore, the State of Ohio provides more per pupil to the Cleveland public school district and to community schools than it provides to The Cleveland Scholarship Program.

e. In my research, I have found that parents tend to choose schools that spend more money per student, other things being equal. Moreover, I am familiar with a large and well-established body of research that shows that parents tend to choose schools that spend more money per student, other things being equal. A small sample of the literature on this subject includes: Daniel Rubinfeld and Perry Shapiro, "Micro-estimation of the Demand for Schooling: Evidence from Michigan and Massachusetts" in *Regional Science & Urban Economics*, Vol. 19 (3); Arthur Denzau and Kevin Grier, "Determinants of Local School Spending: Some Consistent Estimates," in *Public Choice*, Vol. 44 (2); Theodore Bergstrom, Daniel Rubinfeld, and Perry Shapiro, "Micro-Based Estimates of Demand Functions for Local School Expenditures." In *Econometrica*, Vol. 50 (5); Daniel Rubinfeld Perry Shapiro, and Judith Roberts, "Tiebout Bias and the Demand for Local Public Schooling," in *Review of Economics and Statistics*. Vol. 69 (3); Dennis Epple, Radu Filimon, and Thomas Romer, "Equilibrium among Local Jurisdictions: Toward an Integrated Treatment of Voting and Residential Choice," in *Journal of Public Economics*, Vol. 24 (3); Edward Gramlich and Daniel Rubinfeld, "Micro Estimates of Public Spending Demand Functions and Tests of the Tiebout and Median-Voter Hypotheses," in *Journal of Political Economy*, Vol. 90 (3); Dan Goldhaber, "An Endogenous Model of Public School Expenditures and Private School Enrollment," in *Journal of Urban*

Economics, Vol. 46 (1); Arthur Denzau, "An Empirical Survey of Studies on Public School Spending," in *National Tax Journal*, Vol. 28 (2).

f. Because the State of Ohio provides more money per pupil to the Cleveland public school districts and to community schools than it provides to The Cleveland Scholarship Program, the State of Ohio has not created a spending incentive for Cleveland parents to choose a religious private school rather than a non-religious community school, public school, or magnet school.

g. On the contrary, the fact that the State of Ohio provides more money per pupil to community schools and the Cleveland public schools (including magnet schools) than it provides to The Cleveland Scholarship Program means that parents have a spending incentive to choose a public school (community, conventional, or magnet) over a private school. If one takes account of all spending (state, local, and federal) on each student in the Cleveland public schools, parents face a strong spending incentive to choose the Cleveland public schools over private schools.

h. Given the results of my research, one would expect that many Cleveland parents who want to send their child to an independently operated school (as opposed to the public schools operated by the Cleveland school district) will choose community schools over voucher schools, especially if they receive that

the greater spending per student at community schools gives the community schools an opportunity to provide more ample educational services than the voucher schools can provide.

i. Given the greater state per-pupil spending on community schools, the State of Ohio has not created a preferential subsidy in favor of religious, independently operated schools over non-religious, independently operated schools.

j. Given the great state per-pupil spending on community schools and the Cleveland public schools (including magnet schools), the State of Ohio has not created a preferential study in favor of private schooling over public schooling.

5. Community schools in Cleveland provide a form of competition to both private schools, including those that participate in The Cleveland Scholarship Program, and conventional public schools operated by the Cleveland public school district.

   a. An educational market is composed of all the schools that parents have an opportunity to choose among. In the city of Cleveland, the educational market includes conventional public schools, magnet schools, community, and voucher schools.

   b. A new non-religious school (that is, one that has no religious affiliation or religious content in its curriculum) that starts up will tend to enter the market as a community school rather

than a voucher school because the per pupil government subsidy for a community school is greater than the amount of the voucher.

c. I understand that the start-up Hope schools in Cleveland have terminated their status as private schools participating in the voucher program and have reopened as new community schools. This behavior by a participant in the market confirms that spending by the State of Ohio gives non-religious start-up schools an incentive to become community schools.

d. I also understand that many parents who previously sent their children to the Hope voucher schools have chosen to enroll their children this year in the newly reorganized Hope community schools. This fact demonstrates that these parents think that non-religious, independently operated schools are at least as desirable when they are community schools as when they are voucher schools.

6. Community schools are only in their second year of operation in Cleveland. As long as the State Board of Education continues to approve new community schools, in the future one would expect to see the formation of new community schools in Cleveland if there is unmet demand for non-religious alternatives to conventional public schools operated by the local Cleveland district.

a. The evidence from Arizona and other states where charter schools have been in operation for a period of time longer than in Ohio

indicates that, as long as the government is willing to charter new schools and as long as charter school funding is somewhat commensurate with spending on conventional public schools, new schools do enter to meet parents' demands for alternative schools.

b. New community schools are particularly likely to enter at the elementary school level, where small schools can operate without experiencing unduly high costs that occur when a school has an inefficiently small scale. Compared to a high school, elementary schools need few specialized inputs. High school students benefit from access to specialized teachers and specialized equipment (such as libraries, laboratory equipment, shop equipment, and athletic facilities) so that a high school that is at minimum efficient scale is much larger than an elementary school that it is at minimum efficient scale.

c. In Cleveland, if there is an as-yet-unmet demand for non-religious, independently operated elementary schools, additional community schools are likely to enter the market to satisfy this demand. These would compete for students with both the existing voucher schools and the conventional public schools. Recall that the voucher program applies only to elementary schools.

d. Conversely, if no or few community schools entered the Cleveland educational market over the next few years (and assuming no increased

obstacles to entry from the State Department of Education), the best explanation would be that the existing community schools satisfy parents' demands for non-religious alternatives to religious, independently operated schools (such as many of the existing voucher schools).

e. More generally, if the current regulatory environment and spending patterns persist, we would expect that, over time, students who use vouchers to attend religious voucher schools would become the majority of students who use vouchers. This phenomenon would not be the consequence of a government spending incentive to choose religious schools. It would be the consequence of exactly opposite incentives: the spending incentives for parents who prefer non-religious schools to choose community schools or conventional public schools over voucher schools. If some students were to continue to use the voucher program to attend religious schools, this would be the result of their families' preferences for religious rather than non-religious schooling, not the result of any governmental incentive to choose religious voucher schools over non-religious community schools.

7. My own research tends to show that a significant effect of school choice is the effect that they have upon conventional public school districts, which have to respond to parents' having alternative school choices. The effects of school choice on *students who attend conventional public schools* are perhaps more

important than the effects on students who attend choice schools (such as voucher or community schools), simply because the number of students who benefit when conventional public schools improve is large relative to the number of students who actually attend choice schools.

a. My work has shown that suburban school districts tend to perform better in areas where there are more suburban districts available for parents to choose among.

b. Similarly, public school districts tend to provide better achievement outcomes for their students if they operate are in areas where it is easier and less expensive for parents to send their children to private schools. This is the case even with traditional private schools (that is, in the absence of any voucher program or other government subsidy for private schools). For instance, in areas where private schools have more funds from non-tuition sources (such as endowment income or donations), private schools charge less to parents and are more readily available to parents. In such areas, public school students tend to have higher achievement.

c. Because vouchers increase the ability of private schools to compete with public schools, particularly for low-income children, the available evidence suggests that one effect of vouchers will be to exert competitive pressure on public schools, giving them an incentive to improve the quality of their performance.

8. My research demonstrates that choices made by parents in this country have traditionally been an important force in determining the education their children receive. Parents are not all equally able to exercise choice. Parents with middle to high incomes routinely exercise more choice than low-income parents because they (the middle-to-high income parents) are able to choose among more school districts and private schools. Low-income and minority households are the most likely to be prevented from making reasonably optimal investments in their children's schooling because they are unable to choose among school districts when they choose their residences (either because of their budgets or housing discrimination).

9. My research also demonstrates that providing parents with choices among schools tends to increase parents' involvement in their children's schooling. Parents' influence on school policy, which is greater when choice is greater, will reflect, on average, their stated preferences for schools that foster achievement and self-discipline.

10. Because a private school is equally eligible to participate in The Cleveland Scholarship Program whether or not it includes religion in its curriculum, The Cleveland Scholarship Program does not create a financial incentive for private schools to teach religion.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Caroline M. Hoxby
CAROLINE M. HOXBY

Sworn to before me and subscribed in my this 26th day of October, 1999.

NOTARY PUBLIC

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al.,	:	CASE NO. 1:99 CV 1740
Plaintiffs,	:	CASE NO. 1:99 CV 1818
vs.	:	
DR. SUSAN TAVE ZELMAN	:	JUDGE SOLOMON OLIVER, JR.
Defendant.	:	
SUE GATTON, et al.,	:	
Plaintiffs,	:	
vs.	:	
DR. SUSAN TAVE ZELMAN, et al.,	:	
Defendants	:	

AFFIDAVIT OF KIM METCALF

In the State of Indiana	:	ss
County of Monroe	:	

Being first duly cautioned and sworn, Kim K. Metcalf says and deposes that he has personal knowledge of the following:

1. I am Associate Professor, Department of Curriculum & Instruction School of Education, Indiana University and Director of the Indiana Center for Evaluation. As Director, I am responsible for establishing and overseeing a university sponsored center offering contract evaluation services to the state and federal agencies and non-profit organizations. I am author of many research articles, which have appeared in peer reviewed journals. A true and accurate copy of my Curriculum Vitae, which provides more detailed information regarding my professional and educational background is attached hereto as Exhibit 1.

2. The Ohio Department of Education retained the Indiana Center to develop a methodology and research design for an evaluation of the pilot project scholarship program. The evaluation was to focus on a variety of factors associated with the implementation and impact of the pilot program in Cleveland. The Indiana Center was chosen after a competitive bidding process and because it demonstrated evaluative competence and objectivity and a record of neutrality on school choice and school vouchers.

3. In March, 1998, under my supervision a project report entitled a Comparative Evaluation of the Cleveland Scholarship and Tutoring Grant Program, Year One 1996-1997 was issued. The report is attached hereto as Exhibit 2.

4. In November, 1998, under my supervision a report entitled Evaluation of the Cleveland Scholarship Program Second Year Report (1997-1998), was

issued which is attached hereto as Exhibit 3. The Second Year results showed:

- The scholarship program provided additional educational options to low income, minority and single parent families.

- Students who continued in the program for at least two years are comparable to their public school peers in demographic characteristics and previous academic achievement.

- The scholarship program seems to be successfully meeting the goal of promoting educational choice without drawing only the best students from public schools.

5. On September 2, 1999, under my supervision a report entitled Evaluation of the Cleveland Scholarship and Tutoring Grant Program 1996-1999, was issued, which is attached hereto as Exhibit 4.

6. The September 2, 1999 report collected data on the characteristics of scholarship families by using Cleveland Municipal School District records, scholarship office records and through extensive parent/family interviews.

7. Scholarship students share the same characteristics as the children attending public schools in the Cleveland Municipal School District. However, the parents of scholarship students are more likely to have a high school diploma and a four year college degree than parents of Cleveland public school students. Scholarship students are primarily non-white, low

income, and almost equally divided between male and female and their families are headed by a single mother.

- 73.4% of the scholarship families are non-white 60% of the non-white families are African-American.

- 70% of the households of scholarship families are headed by a single mother and the mean family income is $18,750.00.

- Scholarship families are similar to families of students attending the Cleveland public schools.

- In general, the scholarship program is serving the families for which it was intended to serve, minority families of low income. Because these students frequently live in a household headed by a single mother they are further at risk academically.

8. The majority of children who participated in the scholarship program would have been unable to enroll in a private school without a scholarship.

9. Based upon interviews conducted in the spring of the third year of the program, the study examined how and why educational choices were made by parents. The most important reasons for applying for the scholarship program were educational quality and school safety.

- 96.4% of the respondents indicated that the fact that they believed that their private schools

offered a better education than the public schools was either a very important or somewhat important reason for applying for a scholarship.

- 84.6% indicated that public schools provided a "low quality education."

- 78% reported a general dislike of the Cleveland public schools.

- 95% of the respondents indicated that a concern for their child's safety was an important reason for applying for a scholarship.

- 88.7% of the families applying for a scholarship indicated that financial reasons were very important or somewhat important in applying for a scholarship. The scholarship was the only way they could send their child to a private school.

10. There are a variety of factors utilized by scholarship winners in determining which school to enroll their children.

    - 96.6% believed that the reputation of the school was important.

    - 92.7% indicated that availability of space was important.

    - 86.4% indicated located of the school in relation to the families' residence was important.

    - 80.6% indicated that the recommendations of other people were important.

11. The least important reason of the five factors in making a private school selection was the religious affiliation of the school.

12. For a large proportion of scholarship families the scholarship program provided educational opportunities and choice that they would not otherwise have had.

13. The scholarship program provides opportunities for low income minority families, but it is also effective in ensuring that scholarships are awarded to families with the greatest need.

14. Parents of scholarship recipients reported that their children were more enthusiastic about learning than did parents of applicants/non-recipients and parents of public school students.

15. Parents of scholarship students reported participating in more activities at their child's school than did parents of public school students.

16. Parents of scholarship students have a significantly higher level of overall satisfaction with their children's schools than do public school or applicant/non-recipient parents. Scholarship parents are more satisfied with their child's teachers, more satisfied with academic standards at the child's school, more satisfied with order and discipline, more satisfied with social activities at the school, more satisfied with their child's classmates and more satisfied with the other children at the child's school.

17. A primary focus of the evaluation is the impact of the scholarship program on students' academic

achievement. A standardized test Terra Nova is administered to public and private school students throughout Cleveland. Available data indicated small, but statistically significant effects on students' achievement for scholarship students in existing private schools after two years in the program when compared to public school students in existing private schools after two years in the program when compared to public school students in language (45 versus 40) and science (40.0 versus 36.0).

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Kim Metcalf
KIM METCALF

Sworn to before me and subscribed in my presence this 26th day of October, 1999.

NOTARY PUBLIC

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al.,	:	CASE NO. 1:99 CV 1740
Plaintiffs,	:	CASE NO. 1:99 CV 1818
vs.	:	
DR. SUSAN TAVE ZELMAN	:	JUDGE SOLOMON OLIVER, JR.
Defendant.	:	
SUE GATTON, et al.,	:	
Plaintiffs,	:	
vs.	:	
DR. SUSAN TAVE ZELMAN, et al.,	:	
Defendants	:	

AFFIDAVIT OF PAUL E. PETERSON

In the Commonwealth of Massachusetts	:	ss
County of Norfolk	:	

Being first duly cautioned and sworn, Paul E. Peterson says and deposes that he has personal knowledge of the following:

This affidavit is divided into seven major parts:

1. Autobiographical information;

2. Relationship between school vouchers to other forms of school choice available in the United States and the State of Ohio.

3. Participation in voucher programs—who, why, and why not.

4. Impact of vouchers on student learning and school environment.

5. Role of religion in voucher programs.

6. Impact of vouchers on civil society.

7. Conclusions

Autobiographical Information

I am the Henry Lee Shattuck Professor of Government and the Director of the Program on Education Policy and Governance at Harvard University. I am a former Director of the Governmental Studies program at the Brookings Institution, Washington, D.C. I am an author or editor of several books and numerous articles about education reform, including school choice. A true and accurate copy of my curriculum vitae, which provides additional information about my educational background and activities, is attached hereto and incorporated herein as Exhibit 1.

My current research focuses on school governance questions. The Program on Education Policy and

Governance conducts research and hosts seminars and conferences on current education subjects, including the examination of alternative forms of school governance such as charter schools, magnet schools, inter-district choice programs and school vouchers. I am also the principal investigator or co-principal investigator for several evaluations of both publicly-funded and privately-funded school voucher pilot programs in the following cities: Cleveland, Ohio; Dayton, Ohio; the Edgewood Independent School District in San Antonio, Texas; New York City, NY; Milwaukee, Wisconsin; and Washington, D.C.[1] Support for the evaluation in Cleveland which I directed was provided in part by the State of Ohio's Department of Education, and I also served as a member of the Advisory Committee to a second evaluation of the Cleveland Scholarship program conducted by investigators at Indiana University. My evaluations have been published in several reports and publications; true and accurate copies of these reports and publications are attached hereto and incorporated herein as Exhibit 2. In addition to reporting and interpreting results from my own research, I shall rely upon and refer to the results of investigations by other scholars whenever these results bear upon any inferences that I have drawn and conclusions that I have reached.

Choice and Competition in American Education

Historically, most school boards in the United States assigned students to schools by drawing boundaries that established specific attendance areas. Where one lived determined the school one attended, if one chose to attend a public school. Families did not *seem* to have any choice at all—though the reality, as we shall see, was not quite this simple.

The situation has changed substantially in recent years. Today, a wide variety of school choice mechanisms are available to parents and students—vouchers, magnet schools, charter schools, inter-district choice programs, home-schooling, tax credits and tax deductions for private tuition, and, above all, school choice through residential selection. Responding to the increasing demand by parents for greater choice among schools, states today provide a greater range of choices to parents than ever before. Approximately 63 percent of American families with school-age children are making a choice when sending their child to school. According to a 1993 Department of Education survey, 39 percent of all parents said that where they have chosen to live was influenced by the school their child would attend.[2] Another 11 percent of the population sends their children to private school.[3] And still another 13 percent of families have a choice of some kind of public school such as a magnet school, charter school, participation in an inter-district choice program or other choice program.[4]

Indeed, one can appreciate the place of the Cleveland Scholarship Program in the system of school choices available only by understanding the local and national context in which this educational innovation is embedded. This scholarship program, which I shall usually refer to as a voucher program to facilitate comparison with similar programs elsewhere, is just one example of how there has been a dramatic increase in the interest the public has expressed in finding appropriate mechanisms for enhancing competition and parental choice in American education. Currently, choice programs are rapidly expanding in size and number, and the topic has become a matter of significant public discussion and debate, with most public opinion studies finding increased demand for school choice, especially among citizens from low-income and minority backgrounds.[5]

II.A. Origins of the Choice Concept in Education

The extended and explicit practice of school choice in the United States came of age only in the late 1980s and early 1990s. But choice in education is an ancient concept, dating back to the days when Socrates and his fellow philosophers walked the Athenian Agora, teaching for a fee.[6] The earliest forms of choice left education strictly to the private market. It was John Stuart Mill who first made a fully developed argument on behalf of school choice within the context of publicly-funded, universal education: "Is it not almost a self-evident axiom, that the State should require and compel the education ... of every human being who is born its citizen?" he asks. He then goes on to point out that were the duty of enforcing universal education once admitted, there would be an end to the difficulties about what the State should teach, and how it should teach, which now convert the subject into a mere battlefield for sects and parties, causing the time and labor which should have been spent in educating, to be wasted in quarreling about education.... It might leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees.[7]

In the United States school choice within a system of publicly-funded, universal education is first seriously broached by economist Milton Friedman, who in 1955 argued that a voucher-like arrangement where the government finances the education but families choose the school would lead to a more efficient educational system.[8] Published in an obscure collection, the argument rested until the early 1970s, when the Office of Economic Opportunity helped fund a school choice experiment in a the Alum Rock school district in California. When this experiment encountered strong opposition from teacher organizations and failed to be implemented effectively,[9] enthusiasm for school choice waned for about a decade, except for sporadic

use of the magnet-school concept as a tool for school desegregation.

So as late as 1980 there was very little in the way of explicit choice mechanisms within the publicly-funded sector of American education (other than choice by means of residential selection, as discussed below). Then, in the 1980s and early 1990s, a number of events helped give the school-choice movement new impetus. First, a major study by a research team headed by James Coleman (discussed more fully below) reported that students in Catholic schools outperformed their public-school peers. These findings were subsequently supported by a second major study by the Brookings Institution that in addition explained the original results by showing that private schools had more autonomy and, as a result, were organized more effectively than public schools.[10] The authors, John Chubb and Terry Moe, proposed school vouchers as the solution. Although critics questioned both studies, their impact was reinforced by a Department of Education proposal to give compensatory education funds directly to low-income families to be used as vouchers.[11] At the same time, experiments that gave families greater choice of public school began to appear in Minnesota, Massachusetts, Wisconsin, and East Harlem. When test-score gains were reported for East Harlem, public interest in the idea grew rapidly, producing today a wide variety and ever-growing set of school-choice initiatives.[12] What had been the gleam in the eye of a few intellectuals in 1970 had become by the end of the century, a major political movement with a wide variety of actual policies operating in many parts of the United States.

II.B. Residential Location and School Choice

Still, one can only understand the new interest in school choice by placing in the context of the oldest form of

school choice in the publicly-funded sector of American education, the opportunity families have to choose a school by locating in a particular community. Although it has not always been recognized by interpreters of the American system of education, self-conscious school choice has always been exercised by many families when they rent or purchase a house in a place where they think the school is good. Because the quality of the school affects a family's residential decisions, housing prices vary with the quality of local schools. As a result, many families indirectly pay for their children's education by purchasing homes that cost more, simply because the home is located in a neighborhood which is perceived to have a higher-quality school.[13]

School choice by residential selection is highly inegalitarian, especially when one considers that the purchase of a home requires a capital investment. As school quality drives up housing prices, access to the neighborhood school is determined by one's capacity to obtain a mortgage. Those with higher earning power and more capital resources are able to command access to the best schools.

School choice by residential selection, the most inegalitarian form of school choice, is becoming more widespread, simply because more families have more choice in selecting a neighborhood in which to live than ever before. A half-century ago, the attractiveness—and thus the average cost (per square foot)—of a residential location was strongly influenced by its proximity to workplaces, which were concentrated in specific parts of a metropolitan area, primarily the central city. But when highways replaced railroads and rapid transit systems as the primary mode of transport in metropolitan areas, employment opportunities diffused throughout the metropolitan area. Once jobs became widely distributed, the dominant factors affecting community housing prices became local amenities, such as

the neighborhood school.[14] By 1993, 39 percent of families said they considered the local school when selecting a place to live.[15]

The amount of school choice by residential selection varies across metropolitan areas. In the Miami metropolitan area, for example, this form of choice is restricted by the fact that one school district is responsible for almost the entire metropolitan area, whereas the Boston metropolitan area is divided into over one hundred school districts. There are thirty-one school districts in Cuyahoga county, the county that constitutes much of the Cleveland metropolitan area. Still additional school districts are located in adjacent counties that are also considered a part of the Cleveland metropolis.

The quality of education is higher in metropolitan areas that give parents more choice by virtue of the fact that they have more school districts. Students take more academic courses, students spend more time on their homework, classes are more structured and disciplined, parents are more involved with schools, student test scores are higher, and sports programs are given less emphasis.[16]

It is difficult for low-income families to exercise choice through residential selection. Most do not have the earning power nor access to financial markets to locate in neighborhoods with schools perceived to be of high quality. On the contrary, they often can afford a home or apartment only because it is located in a neighborhood where schools are perceived to be of low quality, a perception that depresses property values. In short, in a system of residentially-determined school choice, such as exists in most metropolitan areas today, low-income families are very likely to be concentrated in areas where schools are thought to be of low quality. Conversely and ironically, once a neighborhood

school serving a low-income community improves, local land values will rise, making it more difficult for additional poor families to gain access to the school.

It was precisely this link between school and residence that provoked one of the most turbulent periods in American educational history, the school busing controversy. Since school choice by residential selection gave better-off families access to better schools, many felt that racial segregation and inequality could be obtained only by forcefully breaking the link between school and residence by compelling families to send their children by bus to schools distant from their place of residence.[17]

II.C. Magnet schools

So unpopular was compulsory busing with many Americans from all ethnic backgrounds that the magnet school, exploiting the choice concept, was developed to replace it. Magnet schools sought to increase racial and ethnic integration of schools by enticing families to choose integrated schools by offering distinctive, improved education programs. The magnet idea was initially broached in the 1960s. But it was not until after 1984 that the magnet-school concept, now supported by federal funding under the Magnet Schools Assistance program, began to have a national impact. "Between 1984 and 1994, 138 districts nationwide received a total of $955 million" in federal funds to implement this form of school choice.[18] As a consequence, the number of schools with magnet programs doubled between 1982 and 1991, while the number of students tripled.[19] In some school districts, parents can choose a magnet school only if their choice increases the level of racial integration within the magnet school. In other school districts, magnet school places are offered on a first-come, first-served basis. In still other school districts,

schools that are highly magnetic must choose students by means of a lottery. Nationwide, in the early 1990s, over 1.2 million students attended 2,400 magnet schools in over 200 school districts.[20]

In Cleveland, magnet schools were introduced on a widespread scale in response to court orders requiring that Cleveland schools be desegregated. In 1981, the federal district court issued an order that explicitly called for the establishment of magnet schools, and a number of magnet schools were established over the subsequent decade. In 1994 the City of Cleveland and the State of Ohio agreed to a plan that would "enlarge the capacity of its magnet schools from 6,800 seats in 1992-93 to approximately 12,800 seats by the 1994-95 school year."[21] In the 1999-2000 school year 23 magnet schools were expected to enroll well over 10,000 students in kindergarten through eighth grade.

The magnet school concept, if taken to its logical conclusion, opens all the public schools in a district to all families, allowing them to select their preferred public school, subject to space constraints. Such programs, generally identified as open-enrollment programs, can be found at the high school and middle school levels in a few school districts.

Most studies of the effects of magnet schools and open-enrollment programs find positive effects on student learning.[22] Although some of these findings have been questioned on the grounds that the apparent effects were simply a function of the initial ability of the students selected to attend magnet schools,[23] two studies that carefully addressed this issue still found positive effects from attendance at a magnet school.[24]

II.D. Inter-district school choice

If most magnet-school programs limit parental choice to public schools within a particular school district, in a number of places school choice has been expanded to include access to public institutions outside the local school district. As early as 1985, Minnesota gave local school boards permission to allow students from outside their district to attend their school (but the program was restricted to students who would not adversely affect the racial integration of participating school districts).[25] By 1997 nearly 20,000 students were participating.[26] In 1966, Massachusetts enacted a program that allowed minority students to exit the Boston schools and enter participating suburban schools, then in 1991 enacted a more general inter-district choice program without regard to a student's ethnicity or a district's racial composition.[27] By 1995 nearly 7,000 students and over 300 school districts were participating in this program. By 1997 similar programs had been enacted in sixteen states.

Although many of these programs are too new to enable researchers to draw conclusions about their long-term effect, preliminary evidence from the Massachusetts program indicates that the students participating in the programs enacted in that state are ethnically representative of the student composition of the public schools more generally. Also, it appears that school districts losing students often make significant efforts to upgrade their curriculum in order to staunch the flow of students outside the district.[28]

II.E. Charter Schools

Magnet schools and inter-district enrollment programs limit parental choice to schools operated by school boards. Charter schools have enlarged choice opportunities so as to include government-financed schools operated by

non-governmental entities. By 1998 thirty-four states and the District of Columbia had enacted charter-school legislation, and more than 1,199 charter schools were educating over a quarter million students.[29] At the beginning of the 1999 school year the number of charter schools had increased 40 percent, to 1,684—a notable increment by any criterion.[30] Although the percentage of students in charter schools nationwide is still a small fraction of all students, in some states charter schools are providing the school of choice for a significant fraction of the student population. For example, in 1997, 4.4 percent of the students in Arizona were attending charter schools.[31]

Charter school terminology varies by state, as does the legal framework under which these schools operate. The common characteristics of charter schools are two-fold: First, the entity operating the school is ordinarily not a government agency, though it may receive most of its operating revenue from either the state or a local school board. Second, charter schools do not serve students within a specific attendance boundary; instead they recruit students from a large catchment area that may be beyond the attendance boundaries of traditional public schools. As a result, they must persuade parents that their offerings are superior to those provided by traditional public schools in their vicinity.

The State of Ohio has enacted charter legislation establishing what the State calls "community" schools. In Cleveland, ten community schools are in operation for the 1999-2000 school year, eight of them serving elementary school students. The schools are eventually projected to enroll over 1,500 students, and additional community schools are in the process of being formed.

For the 1999-2000 school year, the community schools in Cleveland are to receive $4,518 per student. In most states, charter schools receive an amount that is roughly equivalent to the average expenditure per pupil in the state or local district. However, most charter schools must obtain capital funding to cover start-up costs from other sources.

Studies of charter schools find that, on average and taken as a whole, students attending charter schools are fairly representative of the school population more generally.[32] Most charter schools are popular with parents and substantially oversubscribed, though some charter schools have been closed because safety and education standards are subnormal. Charter schools are better able than traditional public schools to attract teachers who were educated at selective colleges and who have received higher education in mathematics and science.[33] Whether or not students learn more in charter schools than traditional public schools has yet to be ascertained by an independent research team.

II.F. Tax Deductions/Credits for Private Education

Recently, two states—Minnesota and Arizona—have facilitated parental access to private schools by providing tax deductions or tax credits that can be used to help pay the cost of private education. In Minnesota, families earning under $33,500 per year can claim a tax credit of up to $1,000 per child ($2,000 per family) for school-related expenses, including costs incurred in attending a private school such as the purchase of books and other educational materials—although a credit cannot be claimed for private school tuition. Any family can claim a tax deduction for educational expenses of up to $1,625 for students in kindergarten through sixth grade and $2,500 for students in seventh grade through high school. Private school tuition counts toward the deduction.[34] Demonstrating its popularity, 37,951

Minnesotans claimed the tax credit in 1998, averaging $371 per credit. (Information on the deduction is not available at this writing.)[35] In Arizona, any person may receive a tax credit of up to $500, if they contribute to a foundation that is providing scholarships to students attending private schools. Again, this program has proven popular, with 5,100 Arizonans claiming the credit.[36] If this practice should spread to other states, it is possible that the growth in the numbers of students attending private school might increase in future years.

Although research on the operations of these recently-enacted programs is not, to my knowledge, yet available, other information about the place of private schools in the U.S. educational system is extensive, because the presence of private schools constitutes the oldest form of school choice—dating back to before the Constitution was ratified. At that time, education was privately provided, mainly be schools that had a religious affiliation. Those who wanted to enhance educational opportunity sought to do so by means of voucher-like arrangements. For example, when the radical populist, Thomas Paine, proposed a more egalitarian system of education, he recommended a system of vouchers: Government should provide monies to parents, he said, so that they could send their children "to school, to learn reading, writing and common arithmetic; the ministers of every parish, of every denomination to certify ... that the duty is performed."[37]

State-operated schools were constructed in the United States only many decades later—largely in response to the migration of poor Catholics from Ireland and Germany into the large cities of the Northeast in the 1840s. In 1852 the Boston School Committee urged that "in our schools they [the foreign-born children] must receive moral and religious teaching, powerful enough if possible to keep them in the

right path amid the moral darkness which is their daily and domestic walk." Horace Mann, the first secretary of education for the Commonwealth of Massachusetts, explained the need for public schools in the following terms: "How shall the rising generation be brought under purer moral influences" so that "when they become men, they will surpass their predecessors, both in the soundness of their speculations and in the rectitude of their practice?" When Mann established public schools in Massachusetts, the new institutions won praise from the Congregational journal, *New Englander*, which excitedly exclaimed in language that anticipated the phrasing (if not quite the sentiments) of the Gettysburg Address: "these schools draw in the children of alien parentage ... and assimilate them to the native born... So they grow up with the state, of the state, and for the state."[38]

Over the ensuing decades, public schools grew rapidly, and the share of the population attending private schools shrunk substantially. In some states—most notably, Nebraska and Oregon—the state legislature attempted to consolidate state power over the education of children by closing private schools, but key Supreme Court decisions declared such actions unconstitutional.[39] Nonetheless, the share of the population educated in private schools dropped steadily throughout the late nineteenth and early twentieth century until by 1959 the percentage of students attending private school was but 12.8 percent and by 1969 as low as 9.3 percent.

After reaching this nadir, the place of the private school began to stabilize and edge back upwards. By 1980, 11.5 percent of students in kindergarten through twelfth grade were attending private schools, a number that has stayed relatively constant since then.[40] Families who could afford the cost of private education were increasingly

reaching the conclusion that they needed to consider an alternative to what was being provided by the public sector.

The image of private education held by some is of an expensive day school catering to well-to-do families or an exclusive boarding school attended by college-bound "preppies." The reality is quite different. Most private schools have a religious affiliation, modest tuition, and limited facilities. Nationwide, the average private school expenditures per pupil in 1993-94 were estimated at $3,116, considerably less than public school expenditure per pupil, which was $6,653.[41]

Inasmuch as private schools have fewer fiscal resources, for many years it was generally believed that the education provided by these schools was, on average, inferior to the education provided by public schools. As a result, researchers and policy makers were surprised when a national study, funded by the U.S. Office of Education, undertaken by a research team headed by the well-known, reputable sociologist, James Coleman (later elected president of the American Sociological Association), found that students attending Catholic schools outperformed public school students.[42] This result was obtained even after Coleman and his colleagues took into account family background characteristics which also affect school performance.

Coleman's findings were so surprising and upsetting that they were subjected to careful scrutiny. Many methodological issues were raised, and numerous similar studies have subsequently been undertaken. Some scholars continue to find that students learn more in Catholic and other private schools; other scholars do not detect any differences.[43] Two conclusions may be drawn from the literature, taken as a whole: 1) Students, on average, learn at

least as much (or more) in Catholic schools. 2) While it is not altogether clear whether middle-class students learn more in Catholic schools, low-income, minority students clearly do. For this segment of the population, there is a definite advantage that comes from attending a private school.[44]

Where access to private schools is more readily available, their presence seems to provide desirable competition that spurs a positive response from public schools: The test scores of public-school students are higher, the likelihood that public-school students will attend college increases, and the wages they earn later in life are higher.[45]

II.G. Home schooling

Home-schooling constitutes one of the more rapidly growing segments of the American education systems. Although home-schooling has an enviable historic reputation—Abraham Lincoln was home-schooled, and so were Theodore and Franklin Delano Roosevelt—as late as 1980 only three states explicitly sanctioned this practice. But between 1982 and 1992, thirty-two states changed their compulsory school attendance rules so as to specifically allow families, under certain conditions, to education their children at home.[46] But in recent years it has grown rapidly. The full size and extent of home schooling is unknown; estimates of the number of students who are home-schooled vary between a half million and 1.2 million.[47] Despite the fact that at least one study suggests that home-schoolers are learning more than schooled students,[48] the recent growth in home-schooling has generated a good deal of controversy. When a charter school in California offered its services to home-schooled students by means of the Internet, the state legislature passed a law limiting the practice to students within the county and adjacent counties.[49] Nonetheless, as the Internet's educational potential is more fully exploited, it

is likely to give further impetus to the home-schooling movement.

II.H. Voucher programs

Residential selection, magnet school, inter-district enrollment, private schools and charter schools are mechanisms that provide options to a wide range of groups, but, on balance, these options, when taken together, tend to give more choice to middle than low-income families. Vouchers, as currently designed and operated, serve almost exclusively a low-income population. In this respect, they provide in a few places a significant, egalitarian complement to other choice programs by offering choice opportunities to those that otherwise have none.

The initial voucher program was established in Milwaukee in 1990. Since then, two major types of voucher programs have come into being—publicly-funded and privately-funded.

II.H.1. Publicly-funded voucher programs.

The three publicly funded voucher programs are to be found in Cleveland, Milwaukee, and the State of Florida. In Cleveland, students began matriculation in private schools in the fall of 1996; in the fall of 1999 the number of participating students was nearly 4,000 students. In 1999 students received a scholarship of up to $2,250, substantially less than the amount spent per student by Cleveland public schools or the amount provided to students at community schools.

The Milwaukee program, initially established in 1990, originally allowed students to attend schools without a religious affiliation. Only a few hundred students

participated in the program in its first year. In the 1998-99 school year, the program was expanded to include religious schools, and the number of participating students increased to nearly 6,000. In that year participating students received a scholarship or voucher of up to nearly $5,000.[50] A fairly small number of students became eligible for participation in the Florida program for the first time in the fall of 1999; however, the program is expected to expand substantially in the next few years. In 1999 participating students could receive a scholarship or voucher of up to $3,389.[51] All three of the publicly-funded programs are designed in such a way that students are to be selected by means of a lottery, if the number of applicants exceeds the number of school spaces available.

II.H.2. Privately-funded voucher programs.

In the United States, the private sector often plays a major role in social experimentation. Ideas that are initially too untried and controversial for governments to attempt will often be explored by private or non-profit entities, with the sponsorship of tax-exempt private foundations. The Ford Foundation sponsored the "gray areas" program that became the model for the community action program of the war on poverty established in 1965.[52] Results from evaluations of privately funded pre-school programs provided the impetus for Head Start. Privately-funded services for disabled students antedated and facilitated the design of the federally-funded special education program enacted in 1975.[53] In all cases, privately-funded programs provided important information to policy makers about the potential value of a social innovation.

Learning about school vouchers is taking place in much the same way. Several privately-funded voucher programs are currently providing valuable information about

the way in which voucher programs operate in practice. These privately-funded voucher programs differ from traditional scholarship programs in two important ways. First, the offer of the voucher to students is not conditioned on student performance. If more applications are received than can be funded by resources available to the private foundation sponsoring the program, the vouchers are distributed either by means of a lottery or on a first-come, first-served basis. Second, the scholarship is not tied to a particular school or religious denomination. Instead, the family may choose from among a wide variety of participating secular or parochial schools with any one of a multiplicity of religious affiliations. In these ways, the private programs are approximations of what is developing in the public sector.

The privately-funded voucher programs that have been studied by independent research teams are located in Dayton, the Edgewood school district in San Antonio, Indianapolis, New York City, and Washington, D.C. The major characteristics of these programs as well as the Milwaukee and Cleveland programs are described in Table 1. (Exhibit 3.)[54]

II.J. Relationships among School-Choice Programs

One cannot understand the full range of school choices available to families apart from an appreciation of the relationships among the wide variety of programs and policies that have been outlined. In every state, families have some choice of school, even if it is limited to paying for a private education or choosing to live in a neighborhood served by a school the family thinks desirable. In Many metropolitan areas, including Cleveland, families have a choice among magnet schools, charter schools (designated as community schools in Ohio), and a voucher program—as

well as selecting a neighborhood of choice or paying for a private school.

When several programs are located in the same place, they can affect one another in important ways. Schools that once participated in a voucher program may establish themselves as charter schools, perhaps because charter-school funding generally exceeds state funding under voucher programs.[55] Parents with students in private schools may decide to save money by enrolling their child in charter schools instead.

All of these choice programs provide traditional public schools an incentive to modify their practices in such a way as to maintain their enrollments—and the per pupil state aid that they have previously received. Already, there is some evidence that the availability of school vouchers is affecting public-school policies and practices. In the Edgewood school district in San Antonio, Texas, for example, the local school board accepted the resignation of its superintendent and, in a reversal of an earlier decision, established a school-uniform policy.[56] In Florida, the first two schools judged to be failing by the state—and therefore placed immediately in the voucher program—made significant policy changes after receiving their ignominious designation. One school introduced uniforms, a new phonics reading program, and class-size reduction in kindergarten; the other introduced Saturday and after-school tutoring sessions and had school staff visit parents at home to discourage truancy. Both schools have begun to focus on the basics of reading, writing, and math, in part by hiring more full-time reading and writing specialists.[57]

Within a year of the enlargement of the voucher program in Milwaukee, a new school board, elected in a hotly contested race, accepted the resignation of the school

superintendent and announced its determination to respond to the challenges provided by the new choice arrangements. In Albany, New York, all the students at a particular elementary school (deemed to have the lowest scores in the city) were offered a voucher by a private individual; the school board responded by changing the principal, the teaching staff and the curriculum.

More systematic evidence is available from ongoing research on other choice experiments. According to a study of the impact of charter schools on traditional public schools in Arizona, "districts that have lost large numbers of children to charter schools make efforts to win those children back. Sometimes those efforts pay off."[58] Similarly, in Massachusetts, districts losing students to inter-district programs are making efforts to retain their student body, with some apparent success.[59]

These are only preliminary pieces of information. It is not yet possible to know how this ferment in American education, which is undoubtedly giving families greater choice than previously available, will affect education policy and governance in the long run. Nor do we know for certain how school choice will affect students and families in the long run. It is important to continue to try out the full range of school options in a variety of contexts in order to determine which, if any, may benefit students and their families in the long term. Nonetheless, an increasing amount of information is already available on the kinds of individuals who participate in voucher programs, the quality of the schools voucher students attend, the effects of vouchers on student learning, the effects on the relationships between vouchers and religious institutions, and the effects of school vouchers on civil society. It is to these topics that the remainder of this affidavit is devoted.

Participation in Voucher Programs

Critics of school vouchers have argued that only more advantaged families will apply for vouchers and that private schools will select out only the best and the brightest students. They have also suggested that low-income families will not have good education reasons for choosing a school. Evaluations of both publicly-funded and privately-funded voucher programs now provide us with information on these topics.

III.A. Description of Evaluations

The information reported in this and subsequent parts of the report come from both Cleveland and other voucher programs. I report results from investigations in which I have participated as well as from studies by other investigators.

III.A.1. Cleveland evaluations.

The evaluations of the Cleveland voucher program which my colleagues and I conducted are primarily based on two telephone surveys of parents. The first was conducted in the summer of 1997 after the voucher program had been in effect for one year.[60] This evaluation sought to capitalize on the fact that more families had applied for a Cleveland scholarship than could be granted a scholarship under the terms of the legislation creating the program. As a result, one could compare those who received a voucher and made use of it to attend a participating private school with those who applied, but did not use a voucher. Using a telephone survey, we obtained information from random samples of these two groups of parents.

One year later, in the summer of 1998, we conducted a second wave of interviews.[61] This time we compared the responses of this group of parents with those of a random sample of all low-income families with children in public schools in the same grades as those eligible for vouchers.

In addition to the surveys of parents, the evaluations also include the results of analyses of test-score data provided to us in 1997 and 1998 by the administrators of the Hope schools, two of the schools that participated in Cleveland's voucher program during its initials years. In the summer of 1999 the Hope schools closed, and the administration created community schools in their stead.

A separate investigation of the Cleveland scholarship program was conducted by an evaluation team from the School of Education at Indiana University. Its findings are also reported whenever they bear on the particular topic at hand.[62] Additional data collection and methodological information is provided in the endnotes.

III.A.2. Evaluations of other voucher programs.

In addition to the evaluation of the Cleveland scholarship program, studies have been conducted on the Milwaukee voucher program and four privately-funded voucher programs located in the Edgewood school district in San Antonio, Texas, New York City, Washington, D.C. and Dayton, Ohio. Each of the six programs is operated differently and has been in place for differing lengths of time, and the design of the evaluation varies from place to place. As a result, the nature and quality of the information available differs among these cities. In the remainder of the essay, we will provide information from each city whenever relevant data are available. Data collection and

methodological information on these evaluations are provided in the endnotes.

III.B. Characteristics of Scholarship Recipients

Critics say that voucher programs will "cream" or "cherry-pick" the public schools, attracting the participation of the most talented students and the higher-income, better educated families. As a consequence, public schools will be left with an increasingly difficult population to educate and without the support of informed, engaged parents. Defenders of vouchers have replied that families have little incentive to move their child from one school to another, if the child is already doing well in school.[63]

Considerable information is now available on the types of students and families who participate in means-tested voucher programs such as the one currently operating in Cleveland. In general, there is little evidence that voucher programs either skim the best and brightest students from public schools or attract only the lowest-performing students. On the contrary, voucher recipients resemble a cross-section of public-school students, though in some cases they may come from somewhat more educated families.

III.B.1. Cleveland findings.

In Cleveland, first-year scholarship recipients did not differ substantially from applicants who in the end did not use a scholarship but remained in public schools. Voucher recipients, on average, actually had lower incomes. The educational background of the mothers of recipients did not differ from those remaining in a public school. They were about equally likely to be employed full time.[64]

Neither was there much evidence of skimming when parents of voucher recipients attending private schools in the second year of the Cleveland program (1997-98) were compared to a cross-section of all low-income parents with children in the same grades in Cleveland's public schools. The evaluation found the parents of students with vouchers to be of lower income and the mothers more likely to be African American than a random sample of public-school parents. Mothers had less than a year's worth of additional education beyond that of the public-school mothers, and they were not significantly more likely to be employed full-time.[63]

Nor were the students themselves the "best and the brightest." On the contrary, students with vouchers were less likely to have been in a program for gifted or talented students than were children remaining in public schools. However, students with vouchers were less likely to have a learning disability.[66]

Similar findings were obtained by the evaluation of the Cleveland scholarship program undertaken by the Indiana University's School of Education, which found that "scholarship [voucher] students, like their families, are very similar to their public-school counterparts." According to the results from this investigation, voucher recipients, on average, had lower family incomes and were more likely to be headed by a single mother. However, they found that voucher parents were less likely to be from a minority background than public-school parents. Mothers of voucher students were somewhat more likely than public-school mothers to have completed high school.[67]

III.B.2. Findings from evaluations of other voucher programs.

Nor can one find much evidence of "skimming" the best and brightest from the public schools in other cities. In Edgewood school district in San Antonio, Texas, vouchers were offered to all low-income residents. Those who accepted the vouchers had math scores which, upon beginning their new private school, were similar to those of students in public schools. Reading scores were only modestly higher. Voucher students were no more likely to have been in programs for gifted students, though they were less likely to have been in special education. Household income was similar, as was the percentage of families with two parents in the household. Mothers of voucher recipients had, on average, an additional year of education.[68]

In New York City, the household income of those who applied for participation in the lottery that selected voucher winners did not differ significantly from all those eligible to participate. They were slightly more likely to be African American and slightly more likely to be receiving welfare assistance. The probability that fathers were employed did not differ significantly between applicants and those eligible. Nor was there a significant difference in the probability that parents would be working full-time. However, mothers of those applying for a voucher were more likely to have received a college education.[69]

Not all of those who received the offer of a voucher in New York City accepted, providing another opportunity to ascertain which families are most likely to make use of the voucher opportunity. When voucher users and voucher non-users were compared, it was found that the test scores in reading and math of the two groups did not differ significantly at the time of application to the voucher

program. Voucher users were more likely to be African American and less likely to be white. The household annual income of voucher users was only slightly higher ($10,500 as compared to $8,500), and mothers were only moderately more likely to have had some college education (55 percent versus 46 percent).[70]

III.C. Reasons for Accepting a Voucher and Attending Private School

Just as concerns about "skimming" or "cherry-picking" have been voiced in voucher debates, so have questions been raised about the motivations of voucher participants. Some have said that educational concerns would not be the primary motivations for participation of low-income parents. Instead, they are likely to choose a private school over a public school for such non-educational reasons as religion, or to have the child attend a school with friends, or to secure a school that is conveniently located. In the words of one group of critics, "when parents do select another school, academic concerns are not central to the decision."[71] Writer Nicholas Lemann made much the same point more provocatively: When a major impediment to the achievement of poor children is "their parents' impoverishment, poor education, lax discipline and scant interest in education," he argued, it is absurd to think that these same parents will become "tough, savvy demanding education consumers" once they have the right to choose.[72]

III.C.1. Cleveland findings.

To ascertain the reasons parents themselves gave for participating in the scholarship program, Cleveland parents were asked to indicate from among a number of reasons which were very important for their decision to apply for a voucher. (Parents could say that any or all of the reasons

were very important to them.) The reason most frequently stated to be very important was the academic quality of their child's education. Eighty-five percent of the parents of a child not previously in a private school said this consideration was very important to them. Second in importance was the greater safety to be found at choice schools, a reason identified as very important by 79 percent of the recipients. Location was ranked third, and religion was ranked fourth.[73]

The Indiana University evaluation of the Cleveland voucher program also found that "the most important reasons for applying to the scholarship program were educational quality and school safety."[74] The Indiana team also asked parents the importance of five factors relevant to their choice of school: reputation of the school, availability of space, location, recommendations of other people and religion. Of the five factors, "religion was the least important reason for their private school selection."[75]

III.C.2. Findings from evaluations of other voucher programs.

To determine what was absolutely paramount in the minds of voucher participants, parents in the Edgewood school district in San Antonio were asked to give the single most important reason for their choice of private school. Nearly 60 percent of parents accepting vouchers said "academic quality," "teacher quality" or "what was taught in class" was the single most important reason.[76] In New York City, parents who received vouchers were asked which considerations were very important for their choice of school. The six reasons most frequently mentioned were teacher quality, what is taught in class, safety, school discipline, school quality and class size. Religious instruction was seventh on the list, convenient location was ninth, and the

sports program and a school where a child's friend was attending were tied at the bottom of the list.[77]

III.D. Reasons for not using a voucher

Critics of school vouchers argued that low-income families will not be able to find the school of their choice, because private schools will refuse to admit them for academic reasons or because they are not members of the religious group with which the school is affiliated.[78] Defenders say that private schools open their doors to a wide range of students.

When parents themselves are asked about their reasons for not making use of a voucher, they provide a wide range of explanations for their decision. Most parents said that they found a school they wanted their child to attend. Only a tiny percentage of those who do not find the school of their choice said that it was due to the fact that they were not a member of the religious group with which the school is affiliated.

III.D.1. Cleveland Results.

In Cleveland the statute requires that lotteries be used to allocate the vouchers. If more students in a given category apply for vouchers than are available, a lottery is used to determine the voucher recipients. If more students apply for admission to a particular school than can be admitted, the school must choose among applicants by means of a lottery.[79] Our survey of parents indicates that the admission practices actually in place seem to conform to these legislative requirements. Those parents who applied for the program in its initial year but in the end did not make use of the voucher, despite the fact that they had been notified that they could receive one, were asked why they chose not to

participate in the program. They were invited to give many different reasons, if they felt it was appropriate. The three reasons most frequently mentioned were as follows: 1) transportation costs (the program had problems with transportation during its initial year); 2) the child had obtained admission to a desired public school (as mentioned above, Cleveland public schools offer a number of magnet schools and programs); and 3) financial considerations (inasmuch as the voucher did not cover the full cost of private schooling). The fourth most frequently mentioned reasons was that the family was unable to obtain admission to their desired private school.[80] The results from the Indiana University evaluation in Cleveland were similar: Families who were offered but did not use a scholarship chose not to do so for a variety of reason. The reason given most frequently was that they discovered that their household income was too high for them to be eligible. Others said they were notified too late to make use of the scholarship or didn't'' recall having been notified at all; they were concerned about the private school's capacity to serve a child with special needs; transportation problems; lack of space in the school they preferred; or inadequate financial reasons. There is little evidence from either evaluation that students were excluded for religious reasons.[81]

III.D.2. Results from other Voucher Evaluations.

In New York City 72 percent of the families who were offered a voucher said they were able to attend a school the family preferred. Families could given multiple reasons for not finding the school of their choice. The reason parents most frequently offered (by 15 percent of the parents) was the cost of the school—the privately-funded voucher in New York was only $1,400, which was significantly less than the tuition charged by most private schools. Other reasons, in order of importance, were as follows: no space available (7

percent), applied too late (5 percent), transportation problems (4 percent), child not given space (4 percent), school location (3 percent), child failed admission test (2 percent), and child not a member of the church with which the school is affiliated, a reason given by just one percent of the families offered a scholarship.[82]

In the Edgewood school district in San Antonio, a random sample of all public school parents were asked why they had not applied for a voucher, even though they were eligible.[83] Three-fourths of the public-school families said they were already sending their child to the school they preferred, indicating that they chose to remain within the public-school system. Seventeen percent said they lived outside the boundaries of their preferred school, which seems to imply that these public-school families would prefer another public school but did not live in the appropriate neighborhood. Eight percent said they could not afford to send their child to their preferred school, 6 percent said they could not pay transportation costs, and 3 percent said they were not a member of the church with which the school was affiliated.[84]

School Quality and Student Learning

Proponents of school vouchers expect that schools will perform better—and students will learn more—if families can choose their children's schools. There will be a better match between the students' needs and the schools' characteristics. A stronger identification between family and school will be realized. Competition among schools will spur each to higher levels of performance. Critics of vouchers say that student performance is mainly a function of a child's family background, and that little can be gained by giving families a greater choice among alternatives.

Preliminary information on these questions can be obtained both by examining student test scores and by examining the quality of the school experience, including discipline within school, the amount of homework the student is doing, the communications between home and school, suspension and school-mobility rates, and the level of parental satisfaction with the school. In general, the information suggests that vouchers enhance the school experience of students by giving them a more structured school environment, engaging them in more homework, enhancing communication between home and school, and raising the level of parental satisfaction with the school. Students with vouchers do at least as well—and perhaps better—than students in public schools.

IV.A. Test Scores

The debate over student achievement is likely to continue for some years to come, not only because it is very difficult to measure how much children are learning in school, but also because different groups and individuals have different views as to what in fact *should* be learned in school. But on some matters, the evidence produced thus far is quite substantial: According to test-score results, students who receive vouchers seem to learn at least as much in private schools as their public school counterparts. Some studies reach even stronger conclusions, indicating that students who use vouchers to attend private school achieve higher test scores.

IV.A.1. Cleveland results.

Evidence with respect to test-score performance in Cleveland comes from studies by two research teams, one that I have directed, the other by an evaluation team at the School of Education at Indiana University. Although the

findings from the two studies differ in some respects, both find positive test-score effects from participating in the voucher program.

The central component of the Indiana University study was a two-year evaluation of the performance of students who had used a voucher to enter Grade 3 in established private schools in the fall of 1996. (One-year results from two newly established schools, the Hope schools, were analyzed separately—see discussion below.) After two years in the program, the students in the private schools were found to have "higher test scores than public school students in language (45.0 versus 40.0 [National Curvilinear Equivalent points]) and science (40.0 versus 36.0)." However, there were no statistically significant differences between the voucher students and the [comparison group of] public-school students in three other subject areas.[85] In short, the study found that students who entered the voucher program in third grade did, after two years in private school, as well as their public-school counterparts in three subject domains and significantly better in two.

Less clear are results from evaluations of the Hope schools, two secular schools that originally participated in the voucher program but in the summer of 1999 closed and opened as two new community schools (charter schools). The Indiana evaluation found that third-grade students attending the Hope schools did not perform as well as those remaining in public school.[86] These results are at odds with the research that my colleagues and I conducted. We found sizeable test-score gains in the first year of the program, gains that were maintained but which did not increase in the program's second year. The findings from the two studies may be reconciled in the following way: 1) the Indiana evaluation looked at the test scores of only the third-graders,

whereas our results are based on all the students with vouchers at the Hope schools. 2) The Indiana evaluation only looked at the third-year students' test score performance only in the second year students of the program, whereas we observed the students in both the first and second years, finding gains in year one but no additional gains in year two.[87]

Taken altogether, the findings seem to suggest that the voucher students in Cleveland did at least as well—and in some subject domains better than—the students in the public schools.

IV.A.2. Findings from evaluations of other voucher programs.

Three separate investigations have examined the impact of vouchers on student learning in Milwaukee. The investigation conducted by my colleagues and I found that students receiving vouchers had, after three and four years in the program, higher scores in both mathematics and reading than students offered vouchers but remaining in public schools.[88] Another study found no differences in the reading or math scores of students in the voucher group and a comparison group of students in public schools.[89] The third investigation found higher scores in mathematics, but not in reading.[90]

The three studies all relied upon the same set of information, so the differing results are dependent on the specific analytic strategy of the investigator. Although it is my opinion that the analytic strategy that my colleagues and I employed (which compares students who have been randomly assigned to test and control groups, the procedure used in careful medical research) is the preferred methodology, one need not dwell on this question but simply

state the scholarly consensus as follows: All studies of the Milwaukee voucher program have concluded that the students in voucher schools performed at least as well as the students remaining in public schools—and two of the three studies found that the students receiving vouchers learned more mathematics than did their public-school counterparts.

A considerable amount of information is missing from the data available on the test scores of students participating in the Milwaukee voucher program, which for the period that data was collected (1991-1994) was limited to a few schools. In New York City more reliable information is available. Over two hundred private schools participated in the program, including many with a religious affiliation; the evaluation of the program was carefully designed as a randomized experiment; and the data collection was more complete than in any other locale. The findings, after the program had been in operation for one year, were as follows: differences between the groups for grades two and three were slight and inconsistent; for grades four and five substantial, positive effects of participation in the voucher program were found in mathematics and, to a lesser extent, in reading.[91] A secondary analysis of this evaluation reached similar conclusions.[92]

IV.B. High School Completion and College Attendance

It is too early to know what impact vouchers will have on high school completion rates and college attendance. However, information on the effects of attendance at a Catholic high school are contained in a recent University of Chicago analysis of the National Longitudinal Survey of Youth, conducted by the Department of Education, a survey of over 12,000 young people. Students from all racial and ethnic groups are more likely to go to college if they attended a Catholic school, but the effects are the greatest for urban

minorities. The probability of graduating from college rises from 11 to 27 percent, if such a student attends a Catholic high school.[93]

The University of Chicago study confirms results from two other analyses that show positive effects for low-income and minority students of attendance at Catholic schools on high school completion and college enrollment.[94] Even Professor John Witte, a voucher critic, agrees that studies of private schools "indicate[s] a substantial private school advantage in terms of completing high school and enrolling in college, both very important events in predicting future income and well-being. Moreover, ... the effects were most pronounced for students with achievement test scores in the bottom half of the distribution."[95]

IV.C. School Discipline

School discipline seems to be more effective in the private schools voucher students attend than the inner-city public schools their peers are attending. Parents and students who have received vouchers report less fighting, cheating, property destruction and other forms of disruption than do the parents and students who are in public schools.

IV.C.1. Cleveland Findings.

When Cleveland parents were asked about disruptions, the parents who were using vouchers reported fewer discipline problems than a random sample of low-income of parents with children in Cleveland's public schools. Specifically, the voucher parents reported significantly less vandalism, absenteeism, and fighting at school than did a cross-section of Cleveland's public-school parents.[96]

IV.C.2. Findings from evaluations of other voucher programs.

Reports from parents participating in the voucher program in New York City were similar.[97] Sixty-eight percent of parents report that fighting is a serious problem in New York's public schools, compared to only 39 percent of parents with children in private schools. Significant differences of a similar nature were observed with respect to destruction of property, cheating and tardiness.[98]

Reports from parents in the Edgewood school district in San Antonio were much the same.[99] Over half the parents in the public schools of Edgewood reported fighting as a very serious problem, as compared to about a fourth of the parents of students receiving vouchers. A significantly higher percentage of public-school parents reported that guns or other dangerous weapons were a very serious problem.[100]

In Washington, D.C. students in grades five through eight were asked whether or not they felt safe at school. Twenty percent of the public-school students said they did not feel safe, as compared to 5 percent of the private-school students.[101]

IV.C.3. National Data.

Nationwide information on public and private schools yields similar information. A survey undertaken by Educational Testing Service found that eighth-grade students encounter more such problems in public than in private schools. Fourteen percent of public-school students, but only 2 to 3 percent of private-school students, say physical conflicts are a serious or moderate problem. Four percent of public-school students report racial or cultural conflicts are a serious or moderate problem and 5 per cent say drug use is,

while less than one percent of private school students indicate they are. Nine percent of public-school students say they feel unsafe in school, but only 4 percent of private-school students give the same response.[102]

IV.D. Homework

Parents of students in voucher programs report that their child has more homework than do the parents of students in public schools. This finding was consistent across a range of studies.

IV.D.1. Cleveland results.

In Cleveland, parents of students in the voucher program were significantly less likely than a cross-section of Cleveland public-school parents to report that "teachers do not assign enough homework."[103]

III.D.II. Results from evaluations of other voucher programs.

In New York City, 55 percent of the parents with students in private schools reported that their child had more than one hour of homework per day, while only 34 percent of a comparable group of students remaining in public schools reported this much homework.[104] Similarly, in the Edgewood school district in San Antonio, half of the parents of students receiving vouchers reported more than one hour of homework, while only 16 percent of parents of students in public schools reported that their child had this much homework.[105]

IV.E. Parental-School Communications

Parents of students in voucher programs report more extensive communications with their school than do parents with children in public schools.

IV.E.1. Cleveland results.

In Cleveland, our research team found that parents with students in the voucher program attend more school events each semester than public-school parents. They are also more likely to discuss school affairs with other school parents.[106] Similarly, the Indiana evaluation team reported that "parents of scholarship students reported participating in significantly more activities than did parents of public school students." Results from a teacher survey, the Indiana team say, "support this finding."[107]

IV.E.2. Results from evaluations of other voucher programs.

In other cities, parents of students with vouchers also report higher levels of involvement with their school than do parents of public-school students. In New York City, parents of students in private schools reported that they were more likely to receive grade information from the school, participate in instruction, attend parent nights, and attend regular parent-teacher conferences.[108] In the Edgewood school district in San Antonio, parents of students with vouchers were more likely to report that they had attended a school activity at least once in the past month than were parents of students in public schools. They were also more likely to report that they had attended a parent-teacher conference.[109]

IV.F. Suspensions, Expulsions, Absenteeism and School Changes

Most educators think that, all things being equal, it is better that students stay in the same school, especially during a given school year; students usually learn more when not subjected to the disruption that comes from changing schools. Of course, parents should be allowed to move their child from one school to another, if family circumstances require or if a school is not suitable. But forced changes in the middle of an elementary education—either by government fiat or by an individual school—should not be undertaken, unless the reasons for doing so are compelling.

In this regard, some have expressed concern about vouchers and other school-choice programs. Professor John Witte of the University of Wisconsin has argued that "attrition" from the Milwaukee voucher program was its "most troubling aspect."[110] But this suggestion has not gone undisputed. Analyst Daniel McGroarty, for example, has argued that mobility rates among participants in Milwaukee's school choice program were lower than the mobility rates among the city's public school students.[111]

Despite this controversy, the empirical information is unequivocal. Students in the Cleveland voucher program and other voucher programs are not moving from one school to another any more frequently than are students in public schools. Also, suspension and mobility rates are essentially the same for students with vouchers and for students in public schools.

IV.F.1. Cleveland findings.

In Cleveland, the expulsion rate reported by parents with vouchers was well under one per cent (0.2 percent) in both the 1996-96 and 1997-98 school year.[112]

Although reported expulsion rates from private schools were very low, it is still possible that private schools in other ways discouraged low-income families from continuing in their school. To see whether this was occurring, the evaluation asked parents if the child had attended the same school throughout the entire school year. No differences were reported by Cleveland parents of students with vouchers and parents of the comparison group of students continuing in public school. Nor did public-school and voucher-school parents in Cleveland differ significantly in their estimate of the likelihood that their child would be returning to the same school the next year.[113]

To find out whether students from low-income families were being discouraged from returning by private-school officials, parents who had decided to change schools were asked to give their reasons. The reasons for not planning to return to the school were as follows in order of the frequency with which they were mentioned: the quality of the school; graduating to another school, moving from the area, prefer a different private school, cost, and transportation difficulties. Less than one half of one percent said their child had been refused readmission.[114]

IV.F.2. Findings from evaluations of other voucher programs.

These findings are not peculiar to Cleveland. In the Edgewood school district in San Antonio, voucher parents were no more likely to report their child had been suspended

than were public-school parents. And the parents of students in the voucher program were more likely than public-school parents to say their child had remained in the same school all year long. Plans for attending the school during the coming year were similar for the two groups of families. Less than one percent of parents of students with vouchers reported that their child had been asked not to return.[115]

The story in New York City is basically the same. Suspension rates for public-school and voucher students did not differ significantly. Neither did the percentage of parents reporting their child had remained in the same school throughout the school year. The most important reason given by parents of students using vouchers for not remaining in the same school was that the school was too expensive, a reason given by 2 percent of the parents. The percentage planning to place their child in the same school next year was also essentially the same for the two groups of parents.[116]

IV.G. Parental Satisfaction with Public and Voucher Schools

Many economists think that consumer satisfaction is the best measure of school quality, just as it is the best measure of any product. According to this criterion, vouchers are a clear success. All evaluations of vouchers have found higher levels of parental satisfaction among parents receiving vouchers than among comparison groups of parents with students in public schools.

IV.G.1. Cleveland results.

After the first year of the voucher program had been completed, my colleagues and I asked parents how satisfied they were with the school their child had attended. We found much higher levels of satisfaction among parents using

vouchers in the program's first year than among parents who did not use them—even though they had applied for program participation. For example, 63 percent of the parents with vouchers said they were very satisfied with the academic quality of the school, as compared to 29 percent of those who had not used them. Similar differences in satisfaction levels were observed for school safety, school discipline, parental involvement, class size and parental involvement.[117]

Some interpreted these findings as showing only that those who had applied for but not received a voucher were particularly unhappy with their public school, not that private-school families were particularly satisfied. Those not receiving the voucher of scholarship might simply be called a bunch of "sour grapes" uncharacteristic of public school parents in general.

To ascertain whether the "sour grape" hypothesis was correct, my colleagues and I, at the end of the second year of the voucher program, surveyed parents once again but this time compared the satisfaction levels of voucher parents with the satisfaction levels of a random sample of all of Cleveland's low-income, public-school parents. We found little support for the "sour grape" hypothesis. Once again, we found significantly higher levels of parental satisfaction with the academic program, school safety, school discipline and other characteristics of the school their child was attending, if the child had a voucher.[118] The Indiana University study also found higher levels of parental satisfaction among parents of voucher recipients than among all public-school parents as well as those who applied for but did not use a voucher. According to this study, satisfaction levels were higher in several domains: the teacher, academics, order, social, classmates, and other children.[119]

IV.G.2. Results from evaluations of other voucher programs.

The findings from Cleveland parallel those obtained in other cities. In Milwaukee, the evaluation team found that "in all three years, choice parents were more satisfied with choice schools than they had been with their prior public schools and more satisfied than [Milwaukee public school] parents with their schools.... Attitudes were more positive on every item, with "discipline in the school" showing the greatest increase in satisfaction."[120] Studies of the Indianapolis program and an early voucher program in San Antonio (predating the one in the Edgewood school district) also found higher levels of parental satisfaction, when families with vouchers were compared to families with students in public schools.[121] A comparison of similar groups of students from low-income families attending public and private schools in Washington, D.C. and Dayton, Ohio also found much higher levels of parental satisfaction with the private schools.[122]

Similarly, my colleagues and I found large differences in satisfaction levels of voucher recipients in New York City and parents of students remaining in public schools.[123] Much the same results were obtained from the survey of parents in the Edgewood school district in San Antonio. For example, 62 percent of the parents of students with vouchers said they were very satisfied with the academic quality of their school, as compared to 35 percent of the public-school parents. Significant differences in the level of parental satisfaction were also observed in many other aspects of the school, including school discipline, school safety, teaching, and the teaching of moral values.[124]

Religious Identification and School Experiences

The role of religious identification and affiliation has been mentioned in passing throughout this affidavit. Given the interest in ascertaining whether or not religious motivations are the dominant factor in shaping parental choices and school experiences, a variety of information relevant to this question are brought together in this section of the affidavit, whether or not the information has been presented above.

V.A. Religious affiliation

Families newly attending private schools under the voucher program in Cleveland came from a wide range of religious backgrounds. Forty percent were Baptist, 14 percent were other Protestants of various denominational affiliations, 25 percent were Catholic, 13 percent were affiliated with another religion, and 8 percent said they had no religious affiliation.[125]

This same broad range of religious affiliations were also reported by parents applying for vouchers in two other cities. In Washington, D.C., for example, 39 percent of the mothers had a Baptist affiliation, 15 percent had another Protestant affiliation, 30 percent had a Catholic affiliation, 9 percent were affiliated with another religious group, and 4 percent said they had no religious affiliation.[126] In Dayton, Ohio, 43 percent of the mothers of applicants for scholarships were affiliated with the Baptist church, 20 percent were affiliated with other Protestant groups, 13 percent were Catholic, 13 percent had affiliations with other religious groups, and 13 percent said they had no religious affiliation.[127]

V.B. Selecting a school

Parents have a wide range of reasons for selecting a school. The predominant reasons are to obtain a quality educational experience and a safe learning environment. Religious motivations are secondary. When parents in Cleveland were asked the reasons they applied for a scholarship, academic quality was the response most frequently listed as very important, with greater safety and location mentioned second and third. Religion only ranked fourth.[128] When parents in New York City were asked what were the considerations that were very important in their choice of a school, religious instruction was the seventh most frequently mentioned consideration. Such educational and safety considerations as what is taught in class, teacher quality, safety, school discipline, academic quality and class size were all mentioned more frequently.[129] When parents were asked what was the single most important reason for selecting a school, one of three educational reasons—academic quality, what is taught in class, and teacher quality—was mentioned by nearly 60 percent of the parents, while religious considerations were mentioned by 15 percent.[130] As mentioned previously, the Indiana team also asked parents the importance of five factors relevant to their choice of school: reputation of the school, availability of space, location, recommendations of other people, and religion. Of the five factors, "religion was the least important reason for their private school selection."[131]

V.C. Satisfaction with school

Many students attended schools whose religious affiliation differed from their own. However, no evaluation has yet found that the religious affiliation of the family systematically affects the parent's satisfaction with the school. In Cleveland, for example, an analysis was

performed that enabled the evaluation team to ascertain whether or not parents were more satisfied with a school, if the family's and the school's religious affiliation was the same. We found no relationship between these two factors.[132] This finding is based on data that includes families with no religious affiliation, suggesting that children of many different religious backgrounds can have positive educational experiences, regardless of whether they attend compatible secular or parochial schools.

V.D. Religious involvement

In New York City, students who use a voucher to attend private schools are more likely than those who remain in public schools to attend religious services and participate in religious groups.[133]

Impact of Voucher Programs on Civil Society

A major concern of critics of school vouchers involves its potential impact on civil society. Even if students learn to read, write and calculate more by means of a voucher program, these gains will be more than offset, it is argued, by the polarization and balkanization of our society that necessarily accompany greater parental choice in education. In the words of commentator Michael Kelley, "public money is shared money, and it is to be used for the furtherance of shared values, in the interests of *e pluribus unum*. Charter schools and their like ... take from the *pluribus* to destroy the *unum*."[134] Amy Gutmann, the Princeton political theorist, makes much the same argument, if in less colorful prose: "Public, not private, schooling is ... the primary means by which citizens can morally educate future citizens."[135]

Some information about the impact of vouchers on civil society is now available. In this section we provide information about the effect of vouchers and private-school attendance on racial and ethnic integration, racial and ethnic conflict, political participation, civic participation, and political tolerance.

VI.A. Race and Ethnic Relationships

Vouchers have a generally positive effect on race and ethnic relationships. Ethnic utilization of vouchers varies modestly from one context to another; often, African Americans are more likely to seek and use vouchers than are other ethnic groups. Those who use their vouchers find themselves in schools with a more integrated and positive racial climate.

VI.A.1. Voucher utilization by ethnic groups.

Ethnic group utilization of the vouchers varied somewhat from city to city. In Cleveland, those using the voucher were somewhat more likely to be African American than public-school students in general. They were somewhat less likely be white.[136] A similar pattern emerged in New York City. Here, African Americans were more likely to make use of a voucher offered to them, while whites were less likely to use the voucher.[137] In the Edgewood school district in San Antonio, a predominantly Latino Community, the ethnicity of voucher users and non-users was essentially the same.

VI.A.2. Racial and ethnic integration.

Private schools are more likely than public schools—or at least no less likely—to be racially and ethnically integrated, perhaps because private schools can draw students

from a more extensive catchment area, and religious schools may provide a common tie that cuts across racial lines.

Nationally, private school classrooms are estimated to be 7 percentage points more integrated than public schools.[138] Consistent with the national picture, voucher recipients in New York City moved from a less racially integrated to a more racially integrated setting when they left public schools for private ones.[139] However, no differences between public and private school were observed in the Edgewood school district.[140]

In Edgewood we asked students with whom they ate lunch, because inter-racial conversations at lunch time suggests that students enjoy eating together a particularly meaningful finding. Students with vouchers were just as likely as public school students to say that they ate lunch with people of other ethnic backgrounds. Another study of public and private schools in San Antonio that directly observed students at lunch found that students in private schools were in fact more likely to sit with someone of another racial group at lunch time than students attending public schools.[141]

VI.A.3. Racial conflict in school.

Students in private schools are often less likely to be engaged in or witness racial conflicts. Nationally, more interracial friendships are reported by students in private schools than in public schools. Students also report less interracial fighting in private schools than public ones, as also do administrators and teachers.[142] Consistent with these national findings, parents of students with vouchers in Cleveland reported less racial conflict than students in public schools.[143] Similar differences between public and private schools were reported by parents in New York City,

Washington, D.C. and Dayton, Ohio.[144] However, in the Edgewood school district students in public and private schools were equally likely to report racial conflict at their school.[145]

VI.B. Civic Participation and Political Tolerance

Private-school students are also more community-spirited than those enrolled in public schools. Nationwide, students at private schools are more likely to think that it is important to help others and volunteer for community causes. They also are more likely than public school students to report that they, in fact, did volunteer in the past two years. Finally, private school students were more likely to say their school expected them to volunteer.[146]

Public-school administrators themselves (in a confidential survey) are less likely to say their school does an outstanding job of promoting citizenship than private-school administrators do. Similar differences appear when administrators are asked to rate their school's performance in teaching values and morals or promoting awareness of contemporary and social issues.[147] Students educated in private schools are also more likely to be tolerant of unpopular groups.[148]

Conclusions

Choice in American education is now widespread and has taken many forms—charters, magnet schools, tax-deduction programs, inter-district enrollment programs, private schools, choice by residential selection, and school vouchers. Many of these programs give greater choice to middle and upper income families than to poor families. In this context, school vouchers, as currently designed, provide an egalitarian supplement to existing choice arrangements.

They do so without restricting choices to parents with specific religious affiliation or any religious affiliation at all. Given the widespread public interest in finding better ways of educating disadvantaged families, it is particularly important that pilot voucher programs be continued so as to permit an assessment of the effectiveness of school vouchers as tools for achieving greater equity in American education, especially since early evaluations of their effectiveness have yielded promising results. If vouchers don't work, they will be discarded. If vouchers do work, their adoption will gradually spread. But if their exploration is prematurely ended, the country will be denied a valuable tool that could help it to consider the best ways of improving its educational system.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Paul E. Peterson
PAUL E. PETERSON

Sworn to before me and subscribed in my presence this 27th day of October, 1999.

NOTARY PUBLIC

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[42] James S. Coleman, Thomas Hoffer, and Sally Kilgore, *High School Achievement* (New York: Basic Books, 1982).

[43] Major studies finding positive educational benefits from attending private schools include Chubb and Moe, 1990; Derek Neal, "The Effects of Catholic Secondary Schooling on Educational Achievement," (University of Chicago, Harris School of Public Policy and National Bureau for Economic Research, 1996). Critiques of Coleman's findings and other studies have been prepared by Arthur S. Goldberger and Glen G. Cain, "The Causal Analysis of Cognitive Outcomes in the Coleman Hoffer, and Kilgore Report," *Sociology of Education*, 55 (April-July 1982): 103-22; Douglas J. Wilms, "Catholic School Effects on Academic

Achievement: New Evidence from the High School and Beyond Follow-up Study," *Sociology of Education*, 58 (1985): 98-114.

[44] John F. Witte, "School Choice and Student Performance," in Helen F. Ladd, ed., *Holding Schools Accountable: Performance-Based Reform in Education* (Washington, D.C.: Brookings, 1996), p. 167.

[45] Caroline Minter Hoxby, "The Effects of Private School Vouchers on Schools and Students," in Helen F. Ladd, ed., *Holding Schools Accountable: Performance-Based Reform in Education* (Brookings, 1996), pp. 177-208; Caroline Minter Hoxby, "Do Private Schools Provide Competition for Public Schools?" Working Paper 4978, Cambridge, MA: National Bureau of Economic Research, 1994.

[46] Christopher J. Klicka and Gregg Harris, *The Right Choice* (Gresham, OR: Noble Publishing Associates, 1992), 356-57, as cited in Coulson, 1999, pp. 120-21.

[47] Patricia Lines, *Home Schools: Estimating Numbers and Growth*. U.S. Department of Education Technical Paper, 1998; Current Population Reports. Population Characteristics: School Enrollment—Social and Economic Characteristics of Students: October 1995. Paul Hill, University of Washington, has provided me with this information.

[48] The study is based on a group of families who agreed to participate, making it difficult to generalize to all home-schooled students. Lawrence M. Rudner, "Scholastic Achievement and Demographic Characteristics of Home School Students in 1998", *Education Policy Analysis Archives* Vol. 7, No. 13, April, 1999. For a commentary on this article, see Kariane Mari Welner and Kevin G. Welner,

"Contextualizing Home-schooling Data: A Response to Rudner," *Education Policy Analysis Archives* Vol. 7, No. 13, April, 1999.

[49] Jessica L. Sandham, "Calif. Rules Hitting Home for Charter Schools," *Education Week*, September 8, 1999.

[50] Paul E. Peterson and Jay P. Greene, "Vouchers and Central-City Schools" in Christopher H. Foreman, Jr., ed., *The African American Predicament* (Washington, D.C.: Brookings, 1999), p. 85.

[51] Florida Begins Voucher Plan for Education," *New York Times*, August 17, 1999, p. A15.

[52] J. David Greenstone and Paul E. Peterson, *Race and Authority in Urban Politics: Community Participation and the War on Poverty* (New York: Russell Sage, 1973).

[53] Paul E. Peterson, *Making the Grade* (New York: Twentieth Century Fund, 1983), Ch. 4-5.

[54] This table is taken from Peterson, "Vouchers and Central City-Schools," 1999, p. 85.

[55] Jeff Archer, "Two Cleveland Schools Plan Rebirth With Charter Status," *Education Week*, July 14, 1999.

[56] Anastasia Cisneros-Lunsford, "Munoz Leaving District, Edgewood Chief Gains New Position," *San Antonio Express-News*, September 10, 1999; Anastasia Cisneros-Lunsford, "Edgewood Oks Uniforms for Youngsters," *San Antonio Express-News*, April 28, 1999.

[57] Jessica L. Sandham, "Schools Hit By Vouchers Fight Back," *Education Week*, September 15, 1999.

[58] Robert Maranto, Scott Milliman, Frederick Hess, and April Gresham, "Lessons from a Contested Frontier," in Robert Maranto, Scott Milliman, Frederick Hess and April Gresham, eds., *School Choice in the Real World: Lessons from Arizona Charter Schools* (Boulder, CO: Westview, 1999), p. 237.

[59] Susan L. Aud, "Competition in Education: 1999 Update of School Choice in Massachusetts," (Boston: Pioneer Institute for Public Policy Research, September 1999), p. 36.

[60] The results of the first evaluation are reported in Greene, Howell, and Peterson, 1999.

[61] The results from the second evaluation are reported in Peterson, Howell, Greene, 1999.

[62] Kim K. Metcalf, William J. Boone, Frances K. Stage, Todd L. Chilton, Patty Muller, and Polly Tait, "A Comparative Evaluation of the Cleveland Scholarship and Tutoring Grant Program: Year One: 1996-97," School of Education, Smith Research Center, Indiana University, March 1998; Kim K. Metcalf "Evaluation of the Cleveland Scholarship and Tutoring Grant Program, 1996-1999," Indiana Center for Evaluation, Smith Research Center, School of Education, Indiana University, 1999.

[63] This issue quickly came to the forefront of public debates over the voucher program in Edgewood school district in San Antonio, Texas. Shortly after the program was announced, an officer of the Texas Federation of Teachers predicted that the private schools would "cherry pick" desirable students so as to "shorten the honor roll" in public schools. Kelley Shannon, "Texas Kids to get School Vouchers," Associated Press news release, April 22, 1998. EISD school superintendent, Dolores Munoz, speaking on national

television, said that "Right now, I don't have the profile of every child," but she was willing to "guarantee you that at least 80 percent will be the high-achieving students. They will be. The private schools are having the choice of the best students around, because they have a criteria, and not every child is taken into consideration, and their doors are ... not open for every child." (News Hour Online, A News Hour with Jim Lehrer, "School Vouchers," November 27, 1998.) In reply, Horizon scholarship recipients "are not high-achieving students in an academic sense." (Ibid.) Similarly, the superintendent of San Antonio's Catholic schools said that, in order to meet the needs of the new students, his schools have had to add new weekend classes to help some voucher students with reading and math. "We don't bring in the brightest and smartest students," the superintendent said. "We wouldn't have these Saturday programs if that were true." (Laura M. Litvan, "A School Voucher Test Case?" *Investor's Business Daily*, January 21, 1999.)

[64] Greene, Howell, and Peterson, 1998, Table 14, pp. 364-65.

[65] Peterson, Howell, and Greene, 1999, Table 1, pp. 16-17.

[66] Peterson, Howell, and Greene, 1999, Table 2, p. 18.

[67] Metcalf, 1999, pp. 9-10.

[68] Peterson, Myers, and Howell, 1999, Tables 2, 3, pp. 41-42.

[69] Peterson, Myers and Howell, October 1998, Table 1, p.33.

[70] Peterson, Myers, Haimson, and Howell, November, 1997, Tables 1,2, pp. 7-11.

[71] Carnegie Foundation for the Advancement of Teaching, 1992, p. 13.

[72] Nicholas Lemann, "A False Panacea," *Atlantic Monthly* (January, 1991), p. 104, as quoted in Abigail Thernstrom, *School Choice in Massachusetts* (Boston: Pioneer Institute for Public Policy Research, 1991), p. 40.

[73] Greene, Howell, and Peterson, 1997 Table 1.5, p. 53.

[74] Metcalf, 1999, p. 11.

[75] Metcalf, 1999, p. 11.

[76] Peterson, Myers, and Howell, 1999, Table 1.5, p. 44.

[77] Peterson, Myers and Howell, 1998, Table 2, p. 35.

[78] Dan Murphy, F. Howard Nelson, and Bella Rosenberg, "*The Cleveland Voucher Program: Who Chooses? Who Gets Chosen? Who Pays?* A report by the American Federation of Teachers, 1997, pp. 9-10.

[79] The Voucher Statute regarding registration of private schools for the Scholarship Program also states, at Ohio Revised Code Section 3313.976(A)(4): "The state superintendent shall register any school that meets the following requirement... (4) The school does not discriminate on the basis of race, religion, or ethnic background."

[80] Greene, Howell, and Peterson, 1998, Table 14-5, p. 368.

[81] Metcalf, 1999, p. 11.

[82] Peterson, Myers and Howell, Table 5, p. 38.

[83] A few parents were not eligible because their income was above the eligibility line; however, 90 percent of the students

in Edgewood public schools were economically disadvantaged. Peterson, Myers, and Howell, 1999, p. 9.

[84] Parents could list more than one reason for their child not attending a preferred school, so some parents gave more than one of these reasons.

[85] Metcalf, 1999, p. 15.

[86] Metcalf, et al., 1998; Metcalf, 1999, p. 15.

[87] Greene, Howell, and Peterson, 1998, 380-87.

[88] Greene, Peterson and Du, 1998.

[89] The initial evaluation of the Milwaukee program was conducted by a Wisconsin research team which has issued the following reports:

John F. Witte, "Achievement Effects of the Milwaukee Voucher Program," Paper presented at the American Economics Association Annual Meeting, New Orleans, January, 1997.

John F. Witte, "First Year Report: Milwaukee Parental Choice Program," Department of Political Science and the Robert M. La Follette Institute of Public Affairs, University of Wisconsin-Madison (November, 1991); John F. Witte, Andrea B. Bailey and Christopher A. Thorn, "Second Year Report: Milwaukee Parental Choice Program," Department of Political Science and the Robert M. La Follette Institute of Public Affairs, University of Wisconsin-Madison (December, 1992).

John F. Witte, Andrea B. Bailey and Christopher A. Thorn, "Third Year Report: Milwaukee Parental Choice Program,"

Department of Political Science and the Robert M. La Follette Institute of Public Affairs, University of Wisconsin-Madison (December, 1993); John F. Witte, Christopher A. Thorn, Kim M. Pritchard, and Michele Claibourn, "Fourth Year Report: Milwaukee Parental Choice Program." Department of Political Science and the Robert M. La Follette Institute of Public Affairs, University of Wisconsin-Madison (December, 1994).

[90] Cecilia Rouse, "Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program," *Quarterly Journal of Economics* 113 (1998): 553-602.

[91] Peterson, Myers, Howell and Mayer, 1999, pp. 333-35.

[92] John Barnard, Constantine Frangakis, Jennifer Hill and Donald B. Rubin, "School Choice in New York City: A Bayesian Analysis of an Imperfect Randomized Experiment," Paper prepared for presentation before the annual meetings of the American Association for Public Policy and Management, 1999.

[93] Derek Neal, "The Effects of Catholic Secondary Schooling on Educational Achievement," (Harris School of Public Policy, University of Chicago and National Bureau for Economic Research, 1996), p. 26.

[94] William N. Evans and Robert M. Schwab, "Who Benefits from Private Education? Evidence from Quantile Regressions," (Department of Economics, University of Maryland, 1993); David Siglio and Joe Stone, "School Choice and Student Performance: Are Private Schools Really Better?" (University of Wisconsin Institute for Research on Poverty, 1977).

[95] John F. Witte, "School Choice and Student Performance," in Helen F. Ladd, ed., *Holding Schools Accountable: Performance-Based Reform in Education*, (Washington, D.C.: Brookings, 1996), p. 167. Professor Witte's criticisms of voucher programs can be found in Witte, September 1999.

[96] Peterson, Howell, and Greene, 1999, Table 6, p. 24, Table 7, p. 25.

[97] The results from the New York City evaluation are of particular interest because the two groups of students and parents being compared are similar. A lottery was used to decide which families would receive the voucher, and these families are compared to families who applied but did not receive the lottery. All results from New York City are based on this comparison.

[98] Peterson, Myers, Howell, and Mayer, 1999, Table 12.1, p. 327.

[99] In Edgewood, those receiving vouchers are compared to a cross-section of public-school comparisons. Findings reported in the affidavit remain statistically significant after adjustments are made for family background characteristics.

[100] Peterson, Myers, and Howell, 1999, Table 1.9, p. 48.

[101] Peterson, Greene, Howell, and McCready, 1998, Table 9A, p. 53. This finding remains statistically significant after adjustments are made for family background characteristics.

[102] Information in the preceding two paragraphs contained in Paul E. Barton, Richard J. Coley and Harold Wenglinsky, *Order in the Classroom: Violence, Discipline and Student Achievement*, Policy Information Center, Research Division,

Educational Testing Service, Princeton, New Jersey, 1998, pp. 21, 23, 25, 27, and 29.

[103] Peterson, Howell, and Greene, 1999, Table 5, p. 23.

[104] Peterson, Myers, Howell, and Mayer, 1999, Table 12-2, p. 328.

[105] Peterson, Myers, and Howell, 1999, Table 1.13, p. 52. Similar results were obtained when school effects were estimated controlling for family background characteristics. See Table 2.4, p. 63.

[106] Peterson, Howell, and Greene, 1999, Table 8, p. 26.

[107] Metcalf, 1999, pp. 18-19.

[108] Peterson, Myers, Howell and Mayer, 1999, Table 12-3, p. 329.

[109] Peterson, Myers, and Howell, September 1999, Table 1.14, p. 53.

[110] John F. Witte, "Who Benefits from the Milwaukee Choice Program?" in Bruce Fuller, Richard F. Elmore, and Gary Orfield, eds., *Who Chooses? Who Loses? Culture, Institutions and the Unequal Effects of School Choice* (New York: Teachers College Press, 1996), p. 133; see also Carol Ascher, Norm Fruchter, and Robert Berne, *Hard Lessons: Public Schools and Privatization* (New York: The Twentieth Century Fund Press, 1996), p. 71.

[111] Daniel McGroarty, "School Choice Slandered," *Public Interest* (Fall 1994), pp. 94-111.

[112] Greene, Howell, and Peterson, 1998, Table 14-10, p. 377; Peterson, Howell, and Greene, 1999, Table 10, p. 28.

[113] Data are available for the second year of the program. Peterson, Howell, and Greene, 1999, Table 10, p. 28.

[114] Greene, Howell, and Peterson, 1998, Table 14-11, p. 372.

[115] Peterson, Myers, and Howell, 1999, Tables 1.18, 1.19, pp. 58-59.

[116] Peterson Myers, and Howell, 1998, Tables 16 and 17, pp. 49-50.

[117] Greene, Howell, and Peterson, 1998, Table 1.8, p. 56.

[118] Peterson, Howell, and Greene, 1999, Table 3c, p. 21.

[119] Metcalf, 1999, p. 19-20.

[120] Witte, "Who Benefits from the Milwaukee Choice Program?" 1996, p. 132.

[121] David J. Weinschrott and Sally B. Kilgore, "Evidence from the Indianapolis Voucher Program," in Paul E. Peterson and Bryan Hassel, eds., *Learning from School Choice* (Brookings, 1998), pp. 307-334; R. Kenneth Godwin, Frank R. Kemerer, and Valerie J. Martinez, "Comparing Public Choice and Private Voucher Programs in San Antonio," in Paul E. Peterson and Bryan Hassel, eds., *Learning from School Choice* (Brookings, 1998), pp. 275-306.

[122] Peterson, Greene, Howell, and McCready, October 1998, Tables 7A, 7B, pp. 49-50.

[123] Peterson, Myers, and Howell, 1998, Table 15, p. 48.

[124] Peterson, Myers and Howell, 1999, Table 1.16, p. 55.

[125] Greene, Howell, and Peterson, 1998, Table 14-3, p. 365.

[126] Peterson, Greene, Howell and McCready, 1998, Table 1A, p. 33.

[127] Peterson, Greene, Howell, and McCready, 1998, Table 1B, p. 37.

[128] Greene, Howell and Peterson, 1998, Table 14-4, p. 367.

[129] Peterson, Myers and Howell, 1998, Table 2, p. 35.

[130] Peterson, Myers and Howell, 1999, Table 1.5, p. 44.

[131] Metcalf, 1999, p. 11.

[132] Greene, Howell and Peterson, 1998, Table 14.8, p. 373. Evaluations of the other voucher programs have not reported information on this point. I know of no evidence that is inconsistent with the findings from the Cleveland evaluation.

[133] Peterson, Myers, and Howell, 1998, Table 11, p. 44.

[134] Michael Kelly, "Dangerous Minds," *New Republic*, December 20, 1996.

[135] Amy Gutmann, *Democratic Education* (Princeton, N.J.: Princeton University Press, 1987), p. 70.

[136] Peterson, Howell, and Greene, 1999, Table 1, pp. 16-17.

[137] Peterson, Myers, Haimson, and Howell, 1997, Table 2, p. 10.

[138] Jay P. Greene, "Civic Values in Public and Private Schools," in Peterson and Hassel, 1998, p. 97.

[139] Peterson, Myers, and Howell, 1998, Table 6, p. 39.

[140] Peterson, Myers and Howell, 1999, Table 1.8, p. 47.

[141] Jay P. Greene and Nicole Mellow, "Integration Where it Counts: A Study of Racial Integration in Public and Private School Lunchrooms," Report Number 98-13, Program on Education Policy and Governance, Kennedy School of Government, Harvard University, 1998.

[142] Greene, 1998, p. 99.

[143] Peterson, Howell, and Greene, 1999, Table 6, p. 24.

[144] Peterson, Myers and Howell, 1998, Table 8, p. 41; Peterson, Greene, Howell, and McCready, Tables 9A, 9B, pp. 53-54.

[145] Peterson, Myers and Howell, 1999, Table 1.8, p. 47.

[146] Greene, 1998, p. 101.

[147] Greene, 1998, pp. 102-03.

[148] Jay Greene, Joseph Giammo, and Nicole Mellow, "The Effect of Private Education on Political Participation, Social Capital, and Tolerance: An Examination of the Latino National Political Survey," Working Paper, Program on Education Policy Governance, Kennedy School of Government, Harvard University, 1998.

Appendix Q

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al.,	:	CASE NO. 1:99 CV 1740
Plaintiffs, vs.	:	JUDGE SOLOMON OLIVER, JR.
DR. SUSAN TAVE ZELMAN	:	
Defendant.	:	
SUE GATTON, et al.,	:	CASE NO. 1:99 CV 1818
Plaintiffs	:	
vs.	:	
DR. SUSAN TAVE ZELMAN, et al.,	:	
Defendant	:	

AFFIDAVIT OF DAVID L. BRENNAN

In the State of Ohio : ss
County of Summit :

Being first duly cautioned and sworn, David L. Brennan, says and deposes that he has personal knowledge of the following:

1. Affiant is a lifelong resident of Akron Ohio, an attorney for 40 years, and over the last 25 years has been CEO of numerous manufacturing companies, employing over 5,000 people.

2. The manufacturing companies owned and operated by Affiant since 1975 are in traditional manufacturing industries, such as steel, stampings, plastics, and various fabricated parts. Because of the functional illiteracy and innumeracy of over half of the production employees in these companies, learning centers were established for the purpose of providing basic educational skills to employees. The programs were very successful utilizing computer-based instruction. Affiant attempted to involve the existing public school system using these techniques, to no avail. When scholarship/voucher and community/charter schools became available, this was the first opportunity to pursue education techniques which had been so successful for the company employees.

3. In 1998-99, HOPE Tremont Academy and HOPE Central Academy were two operating private schools, grades K-5. Students were funded under the Cleveland Scholarship and Tutoring Program (CSTP). In the spring of 1999, the Ohio Supreme Court had not yet decided about the constitutionality of the CSTP. Our parents were very anxious about the existence of the school for their children in September 1999. After consultation with the parents, it was decided to close the two voucher supported schools as of June 30, 1999, which was done. Two new community schools were formed to take over the premises as of July 1, 1999. Thus, the former students had the option of applying to other

participating scholarship schools, or applying to new community schools to be opened on the same premises. Many parents who previously sent their children to the two scholarship schools decided to enroll their children in the new community schools.

4. In order to attract students to our Cleveland Scholarship and Tutoring Program schools, only those students holding a scholarship were eligible to attend, and we competed with the other 54 schools in the program for these students. In 1996, 350 parents chose to send their children to our two new academies.

5. In order to attract students to our community schools, we engaged in newspaper and radio advertising, flyers, organization meetings, and the like. Further, we had teams of 6-8 people who went out into the neighborhoods surrounding our schools acquainting our neighbors with the availability of the school. All of our schools start with waiting lists for most of the classes.

6. Our community schools are in competition with all other schools in Cleveland. We compete with the Cleveland Municipal School District, traditional and magnet schools, and with other community schools located in Cleveland. A parent dissatisfied with the education offered at one of our community schools can easily choose one of the other available alternatives.

7. This competitive environment forces us to do our best to deliver high quality effective education to our students. Our typical classroom has a teacher, and a part-time or full-time aid, together with 6 computers,

utilizing fully integrated software, with Internet access.

8. I have been involved with the organization of 11 community schools in Ohio. There is a significant demand by parents for an alternative to the local public school system. Educational entrepreneurs like me stand ready to meet this demand. To the extent the current demand exceeds current supply, additional facilities will be built.

9. As the community school program grows, there should be no shortage of community schools, if the State Board of Education continues to approve the applications without additional regulatory requirements. The current level of $4,500 per student is adequate to start a comprehensive and effective school.

10. It has been my experience that the parents who sent their children to the two HOPE scholarship schools, as well as the parents who currently send their children to the community schools, are sophisticated educational consumers. They explore all the options and choose a school based upon what they believe is best for their children. Parents who choose a scholarship school, rather than a community school, make this choice because, from their perspective, that choice is a better option. The same can be said for parents who make the opposite choice.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ David L. Brennan
DAVID L. BRENNAN

Sworn to before me and subscribed in my presence this 26 day of October, 1999.

NOTARY PUBLIC

Appendix R

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al.,	
Plaintiffs,	
vs.	: CASE NO. 1:99 CV 1740
DR. SUSAN TAVE ZELMAN	
	: CASE NO. 1:99 CV 1818
Defendant.	
SUE GATTON, et al.,	: JUDGE SOLOMON
	: OLIVER, JR.
Plaintiffs.	
vs.	
DR. SUSAN TAVE ZELMAN, et al.,	
Defendant.	

AFFIDAVIT OF JIM DAUBENMIRE

In the State of Ohio	:	ss
County of Franklin	:	

Being first duly cautioned and sworn, Jim Daubenmire says and deposes that he has personal knowledge of the following:

1. I am Assistant Director, Division of Information and Management for the Ohio Department of Education. I have held this position for 15 years. The Division designs data systems for the collection of data and information from Ohio's school districts. The Division further collects, analyzes the data and information from the Ohio school districts.

2. The Division collects enrollment data from school districts which specify the enrollment for each school. Daubenmire Exhibit 1 is a list providing the enrollment data for particular schools in the Cleveland Municipal School District. At this time this is the most current data available to the Department of Education.

3. The Department of Education also collects enrollment data for chartered nonpublic schools. Daubenmire Exhibit 2 is a list providing the enrollment data for certain chartered nonpublic schools in the Cleveland Metropolitan area for fiscal year 1999. This is the most current data available to the Department of Education.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Jim Daubenmire
JIM DAUBENMIRE

Sworn to before me and subscribed in my presence this 29th day of October, 1999.

NOTARY PUBLIC

Cleveland's Magnet Schools (K-8)

School	Grades	Enrollment (Actual Fiscal Year 1999)
Accelerated Learing		
Henry W. Longfellow	K-5	433
Arts		
Newton D. Baker	K-5	605
CompuTech Centers		
Empire	K-5	665
Robert Jamison	K-5	714
Collinwood CompuTech Prog.	6-8	432
Thos. Jefferson CompuTech Prog.	6-8	1,066
Contemporary Academies		
Emile B. deSauze	K-5	466
Margaret A. Ireland	K-5	515
Lincoln	6-8	991
Foreign Language/International Studies		
Kenneth Clement	K-5	308
Robinson G. Jones	K-5	283
Joseph M. Gallagher Program	6-8	1,102
Fundamental Education Centers		
Clara Westropp	K-5	560
J.D. Rockefeller	K-5	478
Charles Mooney Program	6-8	1,157

Montessori		
Dike	K-5	288
H. Barbara Booker	K-5	353
Harry E. Davis	6-8	618
Science		
Orchard	K-5	558
Garrett Morgan	6-8	511
Schools of Tomorrow		
Benjamin Franklin	K-5	723
Joseph F. Landis	K-5	541
Year-Round School		
Douglas MacArthur	K-5	261

Daubenmire Exhibit 1

Total Enrollment 98-99 School Year

School	Enrollment
Archbishop James P. Lyke – Saint Catherine	173
Archbishop James P. Lyke – Saint Henry	257
Archbishop James P. Lyke – Saint Timothy	258
Birchwood E S	77
Blessed Sacrament School	163
Calvary Center Academy E S	110
*Cleveland Community Islamic School	NA
Corpus Christi E S	186
Covenant Kindergarten School	17
*Golden Christian Academy	NA
*Hanna Perkins School	NA
Holy Name Elementary	211
Holy Redeemer	146
Hough Brooks Academy	NEW
Immaculate Conception	193
Lewis Little Folks, Inc.	11

Luther Memorial School	132
Marotta Montessori – Carl B. Stokes	13
Marotta Montessori – Fruitland	20
Marotta Montessori – Glenville	110
Metro Catholic Parish – Saint Boniface	623
Metro Catholic Parish – Saint Stephen	
*Ministerial Full Day Kindergarten – Brackland	NA
*Ministerial Full Day Kindergarten – Superior	NA
Montessori School – Holy Rosary	35
Our Lady of Good Counsel	420
Our Lady of Mount Carmel	236
Our Lady of Peace	209
Ramah Junior Academy	125
Saint Adalbert	366
Saint Agatha – Saint Aloysius	253
Saint Francis	261
Saint Ignatius Elementary	451
Saint Jerome	220
Saint John Cantius	61

Saint John Nepomucene	227
Saint John Nottingham Lutheran	200
Saint Joseph Collinwood E S	220
Saint Leo The Great	525
Saint Mark Catholic	461
Saint Mark Lutheran E S	161
Saint Mary Byzantine	232
Saint Mary Collinwood E S	142
Saint Mel	402
Saint Patrick W. P.	609
Saint Rocco	214
Saint Stanislaus	370
Saint Thomas Aquinas – Saint Phillip	376
Saint Vincent De Paul E S	486
Saint Vitus School	199
Second New Hope Christian	223
Villa Montessori Center	15

West Park Lutheran School – Bethany	189
West Park Lutheran School – Holy Cross	
West Park Lutheran School – Puritas	
Westside Baptist Christian	175

*NA – No data available

Daubenmire Exhibit 2

Appendix S

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al.,	:	
Plaintiffs,	:	
vs.	:	CASE NO. 1:99 CV 1740
DR. SUSAN TAVE ZELMAN	:	
	:	CASE NO. 1:99 CV 1818
Defendant.	:	
SUE GATTON, et al.,	:	JUDGE SOLOMON
	:	OLIVER, JR.
Plaintiffs.	:	
vs.	:	
DR. SUSAN TAVE ZELMAN, et al.,	:	
Defendant.	:	

AFFIDAVIT OF STEVEN M. PUCKETT

In the State of Ohio	:	ss
County of Franklin	:	

Being first duly cautioned and sworn, Steven M. Puckett says and deposes that he has personal knowledge of the following:

1. I am Assistant Superintendent for Public Instruction for the Ohio Department of Education. As Assistant Superintendent, I oversee the State's Obligations in the desegregation lawsuits in Dayton, Cleveland and Cincinnati. I also oversee the office of school options, which includes the voucher and community schools programs.

   A true and accurate copy of my Curriculum Vitae which provides more detailed information regarding my professional and educational background is attached hereto as Puckett Exhibit 1.

2. In response to requests for greater choice, flexibility and accountability in education and to reform and revitalize public education in Ohio, legislation was enacted permitting the formation of community schools in Ohio.

3. Community schools are non-sectarian non-profit, non-discriminatory public schools that enroll a minimum of 25 students and provide at least 920 hours of instruction. They cannot charge tuition. A community school is independent of any school district and a part of the state's program of education.

4. Under Ohio law any local school district can convert all or a portion of an existing public school to a community school. A start up community school can be created in any of the eight Lucas County School Districts which were part of the original pilot program, any school district that is in a state of academic emergency or one of the 21 urban school districts.

5. More specifically, in the Cleveland Municipal School District community schools can be created in any of the following ways:

   1. The local school board can convert all or part of an existing public school to a community school.

   2. The local school board can sponsor an unlimited number of start-up community schools.

   3. The State Board of Education can sponsor a start-up community school.

6. Community schools may not choose students. They cannot discriminate in their admission process based on race, sex, religion, handicap conditions or intellectual or athletic ability. Community schools may limit admission to particular grade levels or the number of students they will serve, as well as, identify special areas of concentration. Community schools may also serve groups of students meeting the definition of "at risk." If there are more applicants than available slots, then the community school must use a lottery to fill the slots.

7. Any person or group of individuals planning to establish a community school must submit a proposal to a sponsor such as the local school board of education or the State Board of Education. Initially, the entities must enter into a preliminary agreement which permits the community school organizers to establish a governing authority which consists of individuals who will be directly responsible and accountable for the operation of the school. Each

community school establishes its own governance structure which describes the size, the selection/removal process, and length of term for the individuals serving on the governing authority. Each community school makes its own hiring decisions. Ultimately, the governing authority must negotiate a final contract with the sponsor, such as the State Board of Education.

8. Community schools promote choice. They allow parents, students and teachers to change the type and size of schools and to establish the design scope and focus of the school's curriculum and instruction and to choose the school's location. Community schools do not have the same curriculum requirements as traditional public schools and operate independently of many state requirements. With this opportunity for choice, flexibility and accountability, community schools can become vital resources for education and innovation.

9. In that community schools have the ability to select their own governing authority, hire their own teachers, and make their own curriculum choices, community schools are comparable to chartered nonpublic schools participating in the scholarship program. Community schools differ from these schools, however, in that if the number of applicants exceed the available spaces they must use a lottery, whereas, chartered nonpublic schools participating in the scholarship program are required only to admit their scholarship students on a lottery basis, but are free to select non-scholarship students on criterion of academic selectivity.

10. For the 1998-1999 school year, there were 10 startup community schools sponsored by the State Board of Education and 5 community schools which were part of the Lucas County pilot program.

11. For the year 1999-2000 school year, there are 36 start-up community schools sponsored by the State Board of Education, (one of these schools A Life Skills School will open shortly) 12 community schools which were part of the Lucas County pilot project and 2 converted schools. The law limits the number of startup community schools, which the State Board can sponsor outside the Lucas County pilot project to 75 this year, fiscal year 2000 and 125 in fiscal year 2001. Given the current number of community schools in existence this year, caps will not impact the decision of the State Board to sponsor startup community schools.

12. This school year, there are 10 start-up community schools in the Cleveland Municipal School District. There were three community schools last school year in Cleveland (1998-1999): Old Brooklyn Montessori School, Hope Academy Chapel Side, and Hope Academy Cathedral. The current list of community schools in Cleveland are the following:

	Grade	Projected Enrollment (1999-2000 School Year
Old Brooklyn Montessori	1-4	87
Hope Academy Chapel Side (serves general population)	K-8	315

Hope Academy Cathedral (serves general population)	K-8	375
Citizens Academy	K-2	120
Hope Academy Broadway (serves general population)	K-5	150
Horizon Science Academy (serves general population)	7-9	150
International Preparatory School (school targets students who live below the federal poverty level) (The school is currently looking for a new location and is not presently in operation)	K-12	350
Hope Lincoln Park (serves general population)	K-6	175
Life Skills Center of Cleveland (the goal is to help "at risk students pass the 9th grade proficiency test)	9-12	180
Cleveland Alternative Learning (the school will target students who have had numerous suspensions, behavioral problems and who are a grade level below their peers)	3-5	60

13. It is expected that there will be at least two additional start-up community schools in Cleveland the next school year. Fairhill Intergenerational Community School (K-2) with a projected enrollment of 60 has reached a preliminary agreement with the Department of Education and Academy of Cleveland Community School's (K-6) with a projected enrollment of 60, contract has been approved by the State Board of Education. Also, the State Board of Education has already approved contracts for 16 additional start-up community schools located throughout the State of Ohio to open their doors next year. There are also 2 additional community schools approved for Lucas County, for next year.

14. For fiscal year 2000 (1999-2000) a community school will receive from the State the (base cost) x the adjusted cost of doing business factor. Therefore, a community school in Cleveland will receive $4,052 x 1.1158 = $4,518.79 per pupil. A community school is also eligible for DPIA (Disadvantaged Pupil Impact Aid) funds, special education money and may participate in programs administered by the Ohio SchoolNet Commission.

15. The Ohio Department of Education remains committed to working with individuals and groups to facilitate the establishment of new community schools throughout the State. The Department of Education believes it is critical to continue to provide educators, students and parents with a variety of program options in order to encourage unique and innovative approaches toward learning through the community school program.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Steven M. Puckett
STEVEN M. PUCKETT

Sworn to before me and subscribed in my presence this 29th day of October, 1999.

NOTARY PUBLIC

Appendix T

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al.	: CASE NO. 1:99 CV 1740
Plaintiffs	: JUDGE OLIVER
v.	:
DR. SUSAN TAVE ZELMAN	:
Defendant	:

AFFIDAVIT OF LYTLE DAVIS

In the State of Ohio
County of Cuyahoga : ss

Being first duly cautioned and sworn, Lytle Davis, says and deposes that he has personal knowledge of the following:

1. I am the Tutoring Consultant for the Cleveland Scholarship and Tutoring Program. I have been in such capacity for three years. My responsibilities as Tutoring Consultant include implementing the tutoring portion of the Cleveland Scholarship and Tutoring Program.

2. The tutoring portion of the Scholarship Program currently serves children in kindergarten through fifth grade.

3. The maximum number of hours each student may receive tutoring is thirty-six (36) hours per school year.

4. The maximum payment to the tutor for tutoring services is $360 per child. Of that amount, the state will pay a maximum of $324, with the remaining portion being paid by the parent of the tutored student.

5. The total number of tutors available for the 1998-1999 school year was approximately 800. Only tutors approved by the Tutoring Program are eligible to participate in the Program.

6. During the 1998-1999 school year, 1391 students received tutoring assistance and 5145 students requested tutoring assistance. To be eligible for the Tutoring Program a child must be enrolled in the Cleveland Public School System.

7. For the 1998-1999 school year, there were 41 sites where children could receive tutoring. Of those sites, 33 were schools and 8 were other community sites.

8. Over 80% of the families with students participating in the tutoring program have family incomes at or below the poverty level.

9. I anticipate that the number of students to be tutored for the 1999-2000 school year will double from the previous year.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Lytle Davis
LYTLE DAVIS

Sworn to me and subscribed in my presence this 6th day of August, 1999.

NOTARY PUBLIC

Appendix U

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al., Plaintiffs, vs. SUSAN TAVE ZELMAN, Defendant.	: Case No. 1:99 CV 1740 : Judge Oliver
SUE GATTON, et al. Plaintiffs vs. SUSAN TAVE ZELMAN, et al., Defendants.	: Case No. 1:99 CV 1818 : Judge Oliver : (Consolidated Cases)

AFFIDAVIT OF LEIGH-ANNE FORD

In the State of Ohio
County of Cuyahoga: ss

Being first duly cautioned, Leigh-Anne Ford, states upon personal knowledge as follows:

My name is Leigh-Anne Ford. I reside in Cuyahoga County, Ohio. I live at 9104 Beckman Avenue, which is in the Cleveland Municipal School District. I have two

children. Their names are Ashleigh R. Ford who is nine years old and Darrick J. Ceasor, Jr. who is six years old.

During the 1996-1997 school year, my family applied for a scholarship so that Ashleigh could attend Cathedral Christian Academy School as part of the Cleveland Scholarship Program. I've since transferred her to Archbishop James P. Lyke—St. Henry Campus and also during the 1998-1999 school year, my family applied for another scholarship so that Darrick could attend Archbishop James P. Lyke—St. Catherine Campus School as part of the Cleveland Scholarship Program. In addition to applying for scholarships, my family explored the possibility of sending Ashleigh to Empire Computer Tech., a magnet school located in the City of Cleveland and Darrick to HOPE Cathedral Academy, a charter school located in the City of Cleveland.

On September of 1996 we were informed that Ashleigh had received a voucher and on May on 1998 that Darrick had received a voucher. Although we looked at Empire Computer Tech., we decided to accept the scholarship and enroll Ashleigh at Cathedral Christian Academy and Darrick we also decided to accept his scholarship and send him to Archbishop James P. Lyke—St. Catherine School. The reason why we enrolled Ashleigh at this school is because they had better teachers or should I say teacher who were willing to teach, and I felt that she would learn better in a smaller classroom with administrators who took the time with her, and made sure that she would get the education she needs to make it in today's world. Past experience with Cleveland Municipal Schools made the decision easy to accept the scholarship that was offered to my family. As far as the religious aspects that the school has to offer doesn't play a part of why I selected the school. Ashleigh is attending because she transferred from a Christian School to a Catholic School, the education value is

more important than the religious values. My child learns more and comes home to tell me about what she learned in math, reading, science, not religion class. This is the reason why I accept the voucher for Darrick also.

Further affiant sayeth naught.

/s/ Leigh-Anne Ford
Leigh-Anne Ford

Sworn to before me and subscribed in my presence this 6th day of October, 1999.

Notary Public

Appendix V

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al., Plaintiffs,	: Case No. 1:99 CV 1740
vs.	: Judge Oliver
SUSAN TAVE ZELMAN, Defendant.	:

SUE GATTON, et al. Plaintiffs	: Case No. 1:99 CV 1818
vs.	: Judge Oliver
SUSAN TAVE ZELMAN, et al., Defendants.	: (Consolidated Cases)

AFFIDAVIT OF LINDA MASSENGALE

In the State of Ohio
County of Cuyahoga: ss

Being first duly cautioned, Linda Massengale, states upon personal knowledge as follows:

My name is Linda Massengale. I reside in Cuyahoga County, Ohio. I live at 10739 Crestwood Ave, which is in the Cleveland Municipal School District. I have one child.

His name is Samuel Massengale. He is six years old. During the 1997 school year, I applied for a scholarship so that Samuel could attend St. Catherines School as part of the Cleveland Scholarship Program. I have had foster children who went to magnet school such as Whitney Young and Annette Morgan. Annette Morgan, I could not tell by looking at the curriculum that it was a magnet school. All types of children seemed to be allowed here. No certain standard was set. On the other hand; Whitney Young had an entrance exam in which the student had to pass to enter.

In the fall of 1997 I was notified that Samuel had received a voucher. I was happy! I was happy to know that I had a choice for my son's education.

My reason for enrolling Samuel at this school is because the teachers are better, as are the administrators. I am not Catholic, as far as my religious belief, but I do like the boundaries they set such as being kind and loving towards one another. They have a new word for the week. They give out incentive awards for just being a peacemaker. That's just great. I am very pleased with the school and being able to have made that choice.

Further affiant sayeth naught.

/s/ Linda Massengale
Linda Massengale

Sworn to before me and subscribed in my presence this 15th day of October, 1999.

Notary Public

Appendix W

AFFIDAVIT OF SENEL TAYLOR

Senel Taylor, being duly sworn, deposes and says:

1. I am the parent of a ten-year old daughter who has received a scholarship from the Cleveland Scholarship and Tutoring Program. I make this affidavit based upon my personal knowledge of the facts set forth below.

2. I am a resident of the City of Cleveland, Ohio and live at 3211 East 119th Street. I own and operate a small disco jockeying business. My wife, Jacqueline, is a legal secretary. My wife and I have two children. Our daughter, Kashmir Matthews, is fourteen years old and attends Hamilton Junior High School, a Cleveland public school. Our daughter, Saletta, is ten years old and is in the fourth grade at Second New Hope Christian Academy, a private school.

3. When I heard about the Cleveland Scholarship and Tutoring Program, I jumped at the chance to apply for a scholarship for Saletta. She has been in the program for two years. The scholarship has allowed Saletta the opportunity to receive an excellent education.

4. Saletta attended public school for a couple of years. She failed first grade and had to repeat it. Fortunately, it was right around that time that I learned of the Cleveland Scholarship and Tutoring Program. We applied and thankfully Saletta was accepted.

5. Saletta's progress at Second New Hope Christian Academy has been excellent. Her grades have improved dramatically. She likes Second New Hope much better than her public school, and as a result is excellent in school.

6. We chose to send Saletta to Second New Hope Christian Academy for a number of reasons. First, the level of participation of the teachers at Second New Hope is greater than at the public schools. The teachers are more demanding of the kids than are public school teachers. They do not let them get away with acting up. The classes are quiet and productive. The teachers keep control of the children.

7. Second, the teachers give feedback to parents. When Saletta was failing the first grade in a Cleveland public School, I did not know about it until three-quarters of the way through the school year, and by then it was too late. The public school does not let a parent know when his child is not doing well. There is much more interaction between the teacher and the parents at Second New Hope than at public school.

8. If the Cleveland Scholarship and Tutoring Program is not allowed to continue, Saletta will have to go back to public school. My wife and I cannot afford to send her to Second New Hope without the scholarship. This would be devastating for Saletta. She has had so much success at Second New Hope, and I know that this would not continue if she has to return to public school.

/s/ Senel Taylor
Senel Taylor

STATE OF OHIO)
) ss:
COUNTY OF)

Subscribed and sworn to me this 18 day of June, 1999.

Notary Public

Appendix X

AFFIDAVIT OF JOHNNIETTA MCGRADY

Johnnietta McGrady, being duly sworn, deposes and says:

1. I am the parent of a six-year-old daughter, Trinnietta, and a five-year-old son, Atlas. I am also raising two grandchildren, Reginald Phillips, who is eight years old, and D'Alante Phillips, who is four years old. I make this affidavit based upon my personal knowledge of the facts set forth below.

2. My daughter Trinnietta attends St. Thomas Aquinas Elementary School. My son, Atlas, will be attending St. Thomas Aquinas in the fall of 1999. I have received scholarships from the Cleveland Scholarship and Tutoring Program for both of my children to attend St. Thomas Aquinas. My grandson, Reginald, attends public school. My other grandson, D'Alante, attends Head Start at Backlend Academy. I do not receive a scholarship for D'Alante to attend Head Start.

3. I am a resident of the City of Cleveland, Ohio. My address is 11217 Primrose. I am a single mother. I work for the City of Cleveland as a school crossing guard and as a lunch aide for the Cleveland Public Schools.

4. When I heard about the voucher program I decided that this would be a once in a lifetime opportunity for my children. Trinnietta has been in the program for two years. The education she is receiving at St. Thomas Aquinas is far better than I ever could have hoped for.

5. I chose to send my children to St. Thomas Aquinas for many reasons: the curriculum, the teachers, and parental participation. Trinnietta started in kindergarten at St. Thomas. At St. Thomas she began to learn how to read in kindergarten. The curriculum at St. Thomas is much more difficult than in the public schools. Trinnietta receives six or seven pages of homework per night. My grandson, Reginald, is in public school and does not receive as much homework. Reginald has a good teacher, but at the private school the work is more advanced. In fact, sometimes Trinnietta, who is 6, helps Reginald, 8, with his homework. I noticed that the further the year progressed the work seemed to get harder and more challenging at St. Thomas Aquinas. I believe the education that Trinnietta is receiving at St. Thomas Aquinas is much better than the education that she would receive at a Cleveland public school.

6. Another important reason that I chose St. Thomas Aquinas was the amount of participation by parents. St. Thomas Aquinas wants and encourages parental involvement much more than they do in the public schools. I volunteer at St. Thomas once a week. Trinnietta's teacher meets with parents on Monday nights to give them teaching tools to use at home. Trinnietta's teacher, Mrs. Demasico, would sit down with me, one on one, to show me different techniques to help Trinnietta with her homework. That doesn't happen in the public schools. At St. Thomas, the teachers are more concerned with the learning process. They sit down with you and talk to you about your child's progress. They are always willing to let you know what is going on with your child. The public school doesn't inform parents on an individual basis.

7. The teachers were also an important reason for choosing St. Thomas Aquinas. My daughter had an excellent teacher, who was very devoted to the kids. The teachers want each child to go over and beyond her limits.

8. If the scholarship program is not allowed to continue, it will be an incredible struggle for me to keep both of my children in private school. I am trying to find full-time employment so that if the program is terminated, I still might be able to keep my children at St. Thomas Aquinas. I do not want my children to attend public school. I feel that they would not receive the level of education that St. Thomas can offer. I only want the best for my children, and I feel that St. Thomas Aquinas Elementary School is the best.

/s/ Johnnietta McGrady
Johnnietta McGrady

STATE OF OHIO)
) ss:
COUNTY OF CUYAHOGA)

Subscribed and sworn to me this 22 day of June, 1999.

Notary Public

My Commission Expires: 8/29/99

Appendix Y

AFFIDAVIT OF AMY HUDOCK

Amy Marie Hudock, being duly sworn, deposes and says:

1. I am the parent of one child who has received a scholarship from the Cleveland Scholarship and Tutoring Program. I make this affidavit based upon my personal knowledge of the facts set forth below.

2. I am a resident of Cleveland, Ohio, and live at 8313 Connecticut Avenue. I am a full time lab assistant.

3. I have one child named Amber Lee Angelo, who is eleven years old.

4. My child has been participating in the scholarship program for three years. Before entering the scholarship program, she attended elementary school in the Cleveland Public School system. She currently attends St. John Nepomucene. I want her to continue to participate in the scholarship program, because if she does not, she will be forced to return to public school.

5. I am using the program because I believe that Amber receives a better education at St. John's. Academic standards are higher at St. John's than at public schools. I know of students in public schools who were passed from one grade to another, even though the student did not meet the required academic standard, just because of their age.

6. I also want Amber to continue in the scholarship program because classes are smaller at St. John's. Students can get lost in the public schools, because there are so many students and too few teachers. Because the classes at St. John's are smaller, the teachers are able to spend more time with Amber, and pay personal attention to her. She is able to learn more because of this closer contact. The teachers at St. John's are able to notice each student because there are fewer of them in each class. For example, they call a parent immediately if the student is missing from school.

7. Amber also has more educational opportunities at St. John's. The school offers more academic courses and more extra-curricular opportunities, such as sports.

8. St. John's is also safer than the public school Amber would attend if she were not in the scholarship program. If she did not go to St. John's, she would be bused to a public school in another neighborhood. I don't think that the neighborhood is safe, and I feared for Amber's safety when she went to school there. I was even afraid to drive into the neighborhood of her public school.

9. If the scholarship program is struck down, my daughter will once again be bused to a public school. She will not have the opportunities that she receives at St. John's, and will not receive the quality of education she deserves.

/s/ Amy Hudock
Amy Hudock

STATE OF OHIO)
) ss:
COUNTY OF)

Subscribed and sworn to me this 27th day of July, 1999.

Notary Public

My Commission Expires: 11-4-2001

Appendix Z

AFFIDAVIT OF SHELIA BOLEK

STATE OF OHIO :
: ss.
COUNTY OF CUYAHOGA :

SHELIA BOLEK, first being duly cautioned and sworn, hereby states as follows:

1. My name is Shelia Bolek and I am the principal of Our Lady of Peace school and have held that position for nine years. I previously served as a teacher for eleven years at Our Lady of Peace and for twenty-two years at other inner-city schools.

2. Our Lady of Peace is located at 12406 Buckingham Avenue in an economically depressed neighborhood where most of the residents live in rental housing or apartments. If these residents reach a level of economic sufficiency which enables them to purchase a home, they typically move to a more economically affluent neighborhood.

3. Our Lady of Peace school is seventy-five years old and teaches students in grades K-8. Approximately 220 students will be enrolled for the 1999 school year. Approximately 100 of these students will be Pilot Scholarship enrollees.

4. 99% of our children are minority pupils. At least one-half of the families are at or below poverty level.

85% of the pupils are not of the Catholic faith. Our Lady of Peace School is sponsored by the Catholic Church. Approximately 50% of the teachers at our institution are not of the Catholic faith.

5. The Our Lady of Peace School buildings are made available for community use. Mayor White recently conducted a community meeting in our facility. Our gymnasium is used as a voting place and various community groups utilize the school for their meetings.

6. Even though we engage in extensive charitable solicitations to support our mission of helping educate economically disadvantaged children, we each year experience extreme difficulties in financing our operations. We are pleased to help the Scholarship pupils because this is part of our mission; however this presents an added financial burden. When the typical low-income Scholarship pupils arrive at our institution, we find that they are approximately two years behind grade level. Their major deficiencies are in math and reading and we must make appropriate adjustments to insure that these deficiencies are resolved.

7. The parents of the Scholarship pupils have already purchased their uniforms for the 1999 school year, paid their registration fee and a portion of their 10% pro-rata tuition payment.

8. Our standard tuition for regular enrollees is $1,995 per year. Our Lady of Peace teaches all of the secular education courses required by the State of Ohio and its pupils' achievements on standardized secular achievement tests reflect advancement equal to or far above scores achieved at other educational institutions.

9. Our Lady of Peace teaches a religion course, displays religious symbols and provides for religious worship. However, the $1,995 tuition does not cover the costs of the secular education provided to the children. Since the Pilot Scholarship Program calls for grants equal to 90% of regular tuition, the Scholarship Pilot Project children at our institution receive $1,795.50 per year. Needless to say, this does not cover the average cost of the secular education or the added cost incurred in addressing the special needs of Scholarship students.

10. The Scholarship pupils at Our Lady of Peace could receive higher Scholarship amounts if the tuition at our institution was higher. However, since our mission is to educate minority and economically disadvantaged children, any increase in our $1,995 per year tuition would prevent some of the non-Pilot Scholarship children from being able to participate in our program. We cannot charge a higher tuition for Scholarship pupils than the regular tuition-paying pupils.

11. Since the Pilot Scholarship amount does not equal the cost of providing the required secular education for Scholarship children and since large numbers of those children present special needs, many non-public schools in the Cleveland Public School District have refused to register to participate. However, the Pilot Scholarship pupils have done very well in our school and we are pleased to have the opportunity to provide this service and further advance our mission.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Shelia Bolek
Shelia Bolek

Sworn to before me and subscribed in my presence this 9th day of August 1999.

Notary Public

Appendix AA

AFFIDAVIT OF DELORIES JONES

STATE OF OHIO :
: ss.
COUNTY OF CUYAHOGA :

DELORIES JONES, first being duly cautioned and sworn, hereby states as follows:

1. My name is Delories Jones and I make this Affidavit based upon my personal knowledge.

2. I have the custody and care of my two grandchildren, Devon J. and James T. Jones. Both of my grandchildren have been awarded Scholarships for the 1999 school year. I am single and retired and could not afford to pay tuition.

3. James T. is registered at St. Jerome School to attend the first grade. I have purchased his uniforms and have arranged to make periodic payments to cover the 10% of tuition that is not paid by the Scholarship. James attended Hanna Perkins School last year because he was developmentally delayed. James received special treatment at Hanna Perkins which enabled him to successfully enroll at St. Jerome's. He would not have been able to enroll as a regular student at that school had he not received the special care at Hanna Perkins.

4. My grandson Devon J. is a kindergarten student at Hanna Perkins. He is more severely

developmentally delayed and has difficulty controlling his toilet needs.

5. I am African-American and not a member of the Catholic faith. I selected St. Jerome School because of the educational structure and philosophy which is consistent with that to which he was exposed at Hanna Perkins. Before registering James, I visited St. Jerome School and learned as much as I could about the academic and student behavior programs.

6. If the Scholarship Program ended, I would not be able to afford tuition for my grandchildren. Since both of them have very special needs, they would be lost if I tried to enroll them in the public school.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Delories Jones
Delories Jones

Sworn to before me and subscribed in my presence this 9th day of August 1999.

Notary Public

Appendix BB

AFFIDAVIT OF CYNTHIA L. FELDEN

STATE OF OHIO :
: ss.
COUNTY OF CUYAHOGA :

CYNTHIA L. FELDEN, first being duly cautioned and sworn, hereby states as follows:

1. The facts set forth in this Affidavit are based upon my personal knowledge.

2. I have been a school teacher for a total of eight years. Five years of my career were spent teaching in public schools in the State of North Carolina.

3. I have been employed by Metro Catholic elementary Schools since December 1997. Metro Catholic is affiliated with the Diocese of Cleveland and is registered to participate in the Cleveland Scholarship Program.

4. During the 1998-1999 school year, I taught math, science, English, reading and spelling to 22 fourth grade students at Metro Catholic.

6. Approximately 30% of the students that attend Metro Catholic are not of the Catholic faith.

7. I am not a member of the Catholic faith.

8. I have never been asked or encouraged by my principal or any of my colleagues to incorporate religion into the curriculum or to otherwise teach Catholic doctrine.

9. I have never been asked to present any materials incorporating Catholic doctrine or beliefs to my students and have never done so.

10. I am encouraged to teach basic morals applicable to all people and religions.

11. During the 1998-1999 school year, I had a student that was a Muslim from Africa. This student did not have any difficulty abiding by all the rules of Metro Catholic while also abiding by Muslim beliefs.

12. I find all people at Metro Catholic to be respectful of each others' religious beliefs.

13. I find all people at Metro Catholic make a concerted effort to work together creating a stable atmosphere united in caring for the whole child.

14. My teaching experience at Metro Catholic has been a great opportunity for me personally. My principal Sr. Ann Malene is supportive of all teachers regardless of their faith background.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Cynthia L. Felden
Cynthia L. Felden

Sworn to before me and subscribed in my presence this 9th day of August 1999.

Notary Public

Appendix CC

AFFIDAVIT OF DAWN CALL

STATE OF OHIO :
: ss.
COUNTY OF CUYAHOGA :

DAWN CALL, first being duly cautioned and sworn, hereby states as follows:

1. My name is Dawn Call and I make this Affidavit on the basis of my personal knowledge.

2. My daughter Bethann is enrolled to attend Westpark Lutheran School during the 1999 school year as a second grade student. I am disabled and received Social Security income. I could not afford to pay Bethann's tuition at Westpark Lutheran School. Bethann has been awarded a Scholarship during each of the past three school years.

3. I was quite happy when the Pilot Scholarship Program was announced. I attended public school in the Cleveland Public School District and my current disability is related to the unsafe conditions to which I was exposed in the Cleveland Public Schools. I want to ensure that my daughter is not exposed to the same unsafe environment.

4. When Bethann enrolled in Westpark Lutheran School for her kindergarten education, she was developmentally delayed in terms of social and emotional skills. She remained in the kindergarten class for a second year. However, the academic and social adjustment that she

has made in Westpark Lutheran School has been gratifying. Last year she excelled in her class and had all A's with the exception of two grades. She is happy with her school environment and enjoys the educational process.

5. Westpark Lutheran School presents a multi-cultural environment where children of differing racial backgrounds study and socialize well together.

6. I believe that Bethann would suffer a serious set back if the Scholarship Program ended and I had to withdraw her from Westpark Lutheran School. I really don't know how I would ensure Bethann's education if Westpark Lutheran School were no longer available to us.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Dawn Call
Dawn Call

Sworn to before me and subscribed in my presence this 9th day of August 1999.

Notary Public

Appendix DD

AFFIDAVIT OF ANGELA GRANDBERRY

STATE OF OHIO :
: ss.
COUNTY OF CUYAHOGA :

ANGELA GRANDBERRY, first being duly cautioned and sworn, hereby states as follows:

1. The facts set forth in this Affidavit are based upon my personal knowledge.

2. My son Byron has attended Luther Memorial School since the third grade. He will be in the sixth grade during the 1999-2000 school year. Luther Memorial School is registered to participate in the Cleveland Scholarship Program.

3. Prior to attending Luther Memorial School, Byron attended Marrotta Montessori School for Kindergarten and then attended Dike Montessori School, a part of the Cleveland Public School District for grades one and two.

4. I transferred Byron from Dike Montessori School for the 1996-1997 school year because I was awarded a Scholarship.

5. I qualified for Scholarship because my income falls within the 150%-200% of the poverty level.

6. Another reason for transferring Byron was because of the disturbances within his classroom at Dike. It was difficult for Byron to learn under these circumstances.

7. At Luther Memorial School, Byron is enjoying a multicultural experience. At Dike Montessori, Byron was one African American child among a total classroom of African American children.

8. Byron loves school. He is anxiously awaiting the beginning of the new school year. If the Scholarship Program is stopped, Byron and myself will be extremely disappointed. Without the Scholarship, I cannot afford to send Byron to Luther Memorial School.

9. If the Scholarship Program is ended and I am unable to raise the necessary financial resources, I will likely home-school Byron. Going back to a Cleveland Public School would destroy all of the good things that have been accomplished during the past three years. Not only will his academic progress be stunted, I would fear for the safety of my son.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Angela Grandberry
Angela Grandberry

Sworn to before me and subscribed in my presence this 9th day of August 1999.

Notary Public

Appendix EE

AFFIDAVIT OF THOMAS BARRETT

STATE OF OHIO :
: ss.
COUNTY OF CUYAHOGA :

THOMAS BARRETT, being first duly cautioned and sworn, hereby states as follows:

1. My name is Thomas Barrett. I serve as the Superintendent of the Hanna Perkins School which is located at 2084 Cornell Road in Cleveland, Ohio. Hanna Perkins has been attending to the needs of emotionally disabled and developmentally delayed children in the Cleveland community since 1951. It provides special child developmental services to children in pre-school and kindergarten and is designed to enable these special need children to enter the first grade as regular students and perform with their peers. Child development specialists meet regularly with the parents during the educational process and prepare them to, in effect, become the therapeutic agent for the child.

2. Hanna Perkins School has been a registered participant in the Scholarship Pilot Project during the past three school years. None of the Scholarship recipients would have been able to become regular students and participate on a par with their peers without receiving the therapeutic and educational assistance available at our institution. We are proud to report that all of the Scholarship students who have enrolled at Hanna Perkins during the past three years have

entered the first grade and participated as regular students after completion of our program.

3. One third of our enrolled children are Scholarship recipients. The nature of our mission dictates small classes and enrollment.

4. There are no other special need educational program equivalent to Hanna Perkins in the Cleveland Public School District and there are only three such institutions in this country. We provide a unique resource for the emotionally disabled or developmentally delayed children.

5. The Hanna Perkins School is a recipient of United Way funds and these funds contribute 11% of the total budget. The children enrolled in the program pay a sliding scale tuition based upon financial capabilities. The full cost of educating a child in our kindergarten program varies between $13,000 and $14,000 per year.

6. Hanna Perkins School is a non-profit 501(C)(3) corporation. It is not sponsored by or in any way related to any religious organization.

7. If the Pilot Scholarship Program were blocked for the 1999 school year, such would impair our efforts to meet the special needs of children in our school.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Thomas Barrett
Thomas Barrett

Sworn to before me and subscribed in my presence this 9th day of August 1999.

Notary Public

Appendix FF

AFFIDAVIT OF IVY T. CHAMBERS

IVY T. CHAMBERS, being first duly cautioned and sworn, hereby states as follows:

1. I am a parent of a child who is a recipient of a State Education Scholarship. My son Isaiah is registered to attend the second grade at Our Lady of Peace School.

2. I selected Our Lady of Peace because it has high academic standards and high expectations for its students. It stresses basic morals and family values and provides a broad range of extra-curricular activities.

3. I am a single parent and could not afford the tuition at Our Lady of Peace School if the State Scholarship Program were ended.

4. I am an African-American parent. Although Our Lady of Peace has primarily a minority enrollment, the school advances multi-cultural appreciation and understanding by sponsoring multi-cultural evenings. These programs are held in rooms where the differing cultures are explained and food, clothing and customs are identified and experienced. Members of different cultures are invited to these sessions.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Ivy T. Chambers
Ivy T. Chambers

Sworn to before me and subscribed in my presence this 9th day of August 1999.

Notary Public

Appendix GG

AFFIDAVIT OF CHINA WEAVER-BROWN

STATE OF OHIO :
: ss.
COUNTY OF CUYAHOGA :

CHINA WEAVER-BROWN, first being duly cautioned and sworn, hereby states as follows:

1. The facts set forth in this Affidavit are based upon my personal knowledge.

2. My child Chanelle is in second grade and attends Our Lady of Peace School in Cleveland. Our Lady of Peace School is affiliated with the Catholic Diocese of Cleveland and is registered to participate in the Cleveland Scholarship Program.

3. I qualify for Scholarships for my child because my income is at 150%-200% of the poverty level.

4. It is extremely important to me as a parent to be able to send my child to a school that teaches family values and morality. I demand a high quality secular education for my child, but as a matter of conscience want my child to attend a religiously sponsored school which teaches religion and offers worship opportunities.

5. Without the Cleveland Scholarship Program, I would be unable financially to send my child to the school of my choice. Cleveland families that have no religious

preference qualify for a State-financed, secular education for their children at the public school, or at new State-financed, semi-private community schools which are not governed by a public school board. They also are potential recipients of a State paid Scholarship at non-public schools without religious sponsorship. If Plaintiffs prevail, the only parent who would be disqualified for State-finance aid for the secular education of his child would be a family that elected to receive that education at a religiously sponsored school.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ China Weaver-Brown
China Weaver-Brown

Sworn to before me and subscribed in my presence this 9th day of August 1999.

Notary Public

Appendix HH

JOINT AFFIDAVIT OF SCHOOL PSYCHOLOGISTS

STATE OF OHIO :
: ss.
COUNTY OF CUYAHOGA :

Joseph Murray, Ph.D., Steven L. Rosenberg, Ph.D., Linda Grimm, Ed. S., Loren McKeon and Carol Weber, being first duly sworn, make the following Affidavit:

1. Affiants, at the request of the Hanna Perkins School, et al. Proposed Intervening Defendants interviewed the Intervenor families for the purpose of determining the psychological and educational impact of the threatened termination of the Ohio Pilot Scholarship Program.

2. The current positions of the five joint Affiants who comprise the examining panel are as follows:

Joseph Murray, Ph.D., Professor Emeritus, Department of School Psychology, Kent State University, 31 years of experience.

Steven L. Rosenberg, Ph.D., Director of PSI, Supervising 600 school psychologists, speech pathologists, teachers, health personnel in over 400 schools, School Psychologist, 25 years of experience.

Linda Grimm, Ed.S., Director of Psychological Services, School Psychologist,

previous position: School psychologist, Florida state, 22 years of experience.

Loren McKeon, PSI Director of Prevention Programs (185 schools), previous position: Secondary school teacher, Bedford, Ohio, 19 years of experience.

Carol Weber, PSI Drug Education Coordinator, previous position: Elementary school teacher, East Cleveland, Ohio, 17 years of experience.

3. Our examining panel met with parents and children from the three sample families to determine whether a potential sudden changing of schools in August of 1999 would pose a significant threat to the students' educational, psychological and emotional health.

4. The children of each family possessed multiple characteristics which clearly put them at-risk for developing serious educational and emotional handicaps. We observed the following conditions and were advised by the authorities at Hanna Perkins that these children were rather typical of the scholarship families that have elected to enroll in alternative schools:

- Each child was from a single parent home, either due to divorce or out of wedlock birth.
- Single mothers who were able to work often had two or three jobs to cover household expenses.
- One child is in the custody of the grandmother since the mother has been involved with illicit drugs.

- Each child has educational difficulties which typically lead to placement into a special education program.
- Some of the children had previously been retained in a primary grade for an additional year.
- Each child and family was enduring severe social and economic stresses.

5. The panel judged the sample families based upon fundamental principles accepted in educational and psychological literature. These fundamental principles and the findings of the panel are as follows:

a. Young students in urbanized settings who are at-risk for educational and developmental difficulties require stability and predictability in their educational environment. The foundation for every student's academic career begins during the important formative years, preschool through grade three. Each child's success or failure in school depends upon stability and consistency.

Each family has already suffered changes in their life's circumstances (e.g. divorce, abandonment). These children are now beginning to build bonds and ties with their school, teachers and school based friends. They are part of the culture of their school and are now thriving in their new educational surroundings.

b. Attachment to school is a key indicator of academic success. Students who are well integrated into their school environment become bonded with their school and perform better on measures of intellectual, cognitive and achievement abilities. These students are typically those who succeed educationally and emotionally in school and adulthood.

Each family indicated that the majority of friends and significant adults in their child's lives were at their child's school. Suddenly removing them from their schools without the ability to make other suitable arrangements, would leave them socially adrift; susceptible to new (and very different) social influences.

Additionally, most of the children are receiving a variety of individualized instruction meeting their educational handicapping conditions.

c. Research has shown that bonding with the school and/or community eventually inhibits alcohol, tobacco and other drug use (Hawkins, et al. 1992). The Earlier students become attached (i.e. bonded) to their school, the more probable they are to develop critical "protective factors" which serve to help insulate them from educational and emotional hardships and insults. These "protective factors" help students who are "at-risk" to develop resilient personalities.

It was abundantly clear in each case studied that these students were developing positive and constructive bonds with their school and with their teachers. Their school and teachers represented the primary source of attachment outside their families. Each talked of the "community" feeling at their school which would be abruptly lost if the child were prevented from attending.

d. In general, these children are not resilient to destructive influence and are therefore significantly more prone to engage in negative and destructive behavior patters. (Wonderly, 1991, 1996), (McKeon and Rosenberg 1998), (McNamara, in press), (Rosenberg, McKeon, Dinero, in press), (Rosenberg, Sept. 1999).

e. *The children studied have already experienced some of the most extreme changes in their young lives; changes that most others never have to endure: divorce, abandonment, multiple residential changes, grade retention, etc. Accommodating to their school is an important first step in adjusting to these severe circumstances.*

f. The most effective protective factors contributing to school success are stability, attachment to school and membership in a positive peer group. These three key protective factors include:

- Caring and supportive relationships with adults
- High expectations for the child
- Attachment to the child's educational environment (Bernard, 1991)

Each family emphasized that their children look forward to school in the morning, are becoming progressively better adjusted to their school, to their class and to their teachers. They feel cared for, supported and want to perform academically and behaviorally for their teachers.

6. Each sample family brought before us is surviving extremely difficult circumstances and doing their best to insure the positive academic, emotional and behavior adjustment of their children. In no case was religion or religious values mentioned as a reason for participation in the Scholarship Program. Each sample evaluated family member was completely convinced that participation in this Program benefited the vulnerable children and that a sudden disruption in the alternative education plan would severely damage their

academic, social and interpersonal development. The members of the panel agree with that conclusion.

FURTHER THE MEMBERS OF THE PANEL SAYETH NAUGHT.

/s/ Joseph Murray
Joseph Murray

Sworn to before me and subscribed in my presence this 9th day of August 1999.

Notary Public

Appendix II

The Racial, Economic, and Religious Context of Parental Choice in Cleveland

Jay P. Greene, Ph.D.
Research Associate,
Harvard Program on Education Policy and Governance
Assistant Professor of Government,
University of Texas at Austin

Prepared for the
Annual Meeting of the Association for Policy Analysis and Management in Washington, D.C.,
November 5, 1999
And for the Buckeye Institute

October 8, 1999

Abstract

Despite the claims of critics, school choice in Cleveland contributes to racial integration by providing families with access to private schools that, on average, are better racially integrated than are the public schools in the Cleveland metropolitan area. Nearly a fifth (19.0%) of recipients of a voucher in Cleveland attend private schools that have a racial composition that resembles the average racial composition of the Cleveland area (defined as having a proportion of minority students in the school that is within 10% of the average proportion of minorities in metropolitan Cleveland). Only 3.3% of public schools students in the Cleveland metropolitan area are in comparably integrated schools. More than three-fifths (60.7%) of public school students in metropolitan Cleveland attend schools that are almost entirely white or almost entirely minority in their racial composition. Half of the students in the Cleveland Scholarship Program are in comparably segregated schools. This better integration in private schools participating in the choice program is achieved without sacrificing the economic and religious heterogeneity of those schools. Of all the students who attend a publicly-financed school of choice in Cleveland, only 16.5% currently attend a religious school. Yet the evidence on racial integration suggests that access to a choice program that includes religious schools makes a significant contribution to promoting racial integration in Cleveland schools.

Introduction

Some people oppose school choice because they fear that it will foster racial segregation, cultural divisiveness and social fragmentation. As Secretary of Education Richard Riley has stated, public schools, built on the concept of the common school, teach "children important lessons about both the commonality and diversity of American culture. These lessons are conveyed not only through what is taught in the classroom, but by the very experience of attending school with a diverse mix of students."[1]

Private schools are often seen as antithetical to this ideal of the common school, as havens for homogenous groups of students. Expanding access to private schools via vouchers or other forms of publicly sponsored school choice,

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[1] "What Really Matters in American Education," U.S. Department of Education, published on the Web at http://www.ed.gov/Speeches/09-1997/index.html (September 23, 1997).

critics argue, would only exacerbate the problem of segregation created by private schools. David Berliner, former president of the American Educational Research Association, warned that "voucher programs would allow for splintering along ethnic and racial lines. Our primary concern is that voucher programs could end up resembling the ethnic cleansing now occurring in Kosovo."[2] The Harrisburg, Pennsylvania school superintendent was even more alarmist when he told a television audience that school choice would help create "Hitlerian regimes."[3]

Yet the evidence from the Cleveland Scholarship Program suggests that these critics are mistaken. Rather than contributing to segregation, school choice in Cleveland offers students an opportunity to attend schools that are better racially integrated than what the public schools offer. This improvement in racial integration is achieved without sacrificing religious and economic diversity. Earlier research has also shown that the Cleveland Scholarship Program (CSP) leads to improved academic achievement, expanded opportunities for poor and minority families, and higher levels of reported parental satisfaction and involvement.[4] The CSP is therefore a valuable addition to the range of publicly-funded choices already available to residents of Cleveland. Those publicly-funded choices include a

[2] "Experts Differ On Vouchers," *Albuquerque Journal*, May 8, 1999, p. A1.

[3] As quoted in "Pa. Voucher Plan Dies Amid 'Mean-spirited' Attacks," *School Reform News*, vol. 3, no. 8, August 1999, p. 4.

[4] Paul E. Peterson, William G. Howell, and Jay P. Greene, "An Evaluation if the Cleveland Voucher Program after Two Years," Harvard Program on Education Policy and Governance Working Paper 99-02, June, 1999; Kim K. Metcalf, "Evaluation of the Cleveland Scholarship and Tutoring Program, 1996-1999," Unpublished Manuscript, Indiana University, 1999.

community (or charter) school program, a magnet school program, as well as the CSP.

The information presented in this paper is a snapshot of the racial, religious, and economic composition of the CSP at the start of the 1999-2000 academic year and could change significantly in subsequent years. The participation of suburban school districts in the CSP, which is permitted by the law but has not yet occurred, could substantially alter the racial economic and religious characteristics of the scholarship program. In addition, the creation and expansion of the community school program in the last two years has significantly reduced the percentage of students attending secular schools in the scholarship program by drawing away the two largest scholarship schools. The Hope schools, which have now been re-established as community schools, educated nearly 15% of all scholarship students in past years. The removal of these secular schools from the scholarship program has also had a profound effect on the racial, economic, and religious composition of the CSP. If the relative attractiveness of the community school program were reduced in future years, it is likely that more secular schools would be drawn to the scholarship as opposed to the community school program.[5] It is important to bear in mind that dramatic changes in the broader set of choice programs that have occurred and are likelier to occur in the future limit our ability to describe the racial, economic, and religious characteristics of the CSP, since it is a program that is in a constant state of flux.

[5] The scholarship has a maximum value of $2,250 per pupil. The community school program currently offers schools nearly twice as much money per pupil. Community schools in Cuyahoga County received a minimum of $4,537 from the State of Ohio last year per child in grades 1-8 and $4,195 for full-day kindergartners.

Racial Integration

Public schools are hampered in their ability to offer racially integrated schools because they usually assign students to schools based on where they live. Attaching schooling to housing tends to replicate and reinforce racial segregation in housing. Private schools, however, can and typically do draw students from across political and neighborhood boundaries, allowing them to transcend segregation in housing. Analyses of a national sample of 12th graders collected by the U.S. Department of Education show that private schools students are, in fact, more likely to be in racially mixed classes than are public school students.[6] According to that sample, more than half of all public school 12th graders (55%) are in classes that have more than 90% or fewer than 10% minority students. In private schools, just 41% of students are in similarly segregated classrooms. And private school students are markedly more likely to be in classes that come close to resembling the nation's demographics. More than a third (37%) of private school students are in classes whose racial composition is within 10% of the national average. Just 18% of public school students are in classes that are similarly mixed.

Employing a similar methodology in examining racial integration in Cleveland we see a similar pattern of results. The percentage of white students in each elementary and middle school was obtained for the Cleveland City School District, the suburban Cleveland school districts, and private schools participating in the CSP.[7] Data on the public schools

[6] Jay P. Greene, "Civic Values in Public and Private Schools," in *Learning From School Choice* (Washington, D.C.: Brookings), 1998.

[7] Suburban schools were defined as those outside of the Cleveland City School District and in Cuyahoga or Lake counties. High schools were excluded because the CSP does not currently cover those grades.

were obtained from the Ohio Department of Education web site and the Office of Assessment and Information Services.[8] Data on the participating schools were obtained from the CSP office, the Catholic Archdiocese, and from the schools themselves. Complete information was available from private schools that educated 81% of scholarship students.

To assess racial integration we do not want to know who educates a higher percentage of minority students. Schools that had 100% minority students by law in the South had more minorities but were not well integrated. What we want to know is how well distributed students are across schools with different proportions of white and minority students in them. If a system were well integrated it would have virtually all of its students attending schools whose racial composition resembled the racial composition of the broader community in which those schools were located. A poorly integrated or segregated school system would have the vast majority of its students in schools that were almost entirely composed of one racial group.

The racial distributions of students in the city of Cleveland public schools, suburban Cleveland public schools, metropolitan Cleveland public schools (city and suburbs), and private schools participating in the CSP are presented in Figures 1-4 and in Table 1. The pictures tell the story very clearly. As can be seen in Figure 1, the bulk of students in Cleveland City public schools are in buildings that are almost entirely populated with minority students. Almost two-fifths (40.5%) of Cleveland City public school students attend schools that have fewer than 10% white students (which is the same as more than 90% minority

[8] http://www.ode.state.oh.us/; "Cleveland City School District Building Profiles," Office of Assessment and Information Services, September, 1996.

students). Another 18.3% of Cleveland City public school students attend schools that have slightly more white students, between 11 and 20% white students. Only 13.4% of Cleveland City public school students attend schools that have more than 50% white students.

In the suburbs we see almost a mirror image of the racial distribution found in the city of Cleveland (Table 1 and Figure 2). More than three-fifths (62.2%) of Cleveland suburban school students attend schools that have more than 90% white students. And when we combine all public schools in the Cleveland metropolitan area (Table 1 and Figure 3), we see that around three-fifths of all public schools students (60.7%) attend schools that either have more than 90% white students or fewer than 10% white students. The vast majority of public school students in the Cleveland metropolitan area attend schools that are almost entirely white or almost entirely minority in their racial composition.

It is also disturbing to note that very few public school students in the city of Cleveland, the suburbs, or the metro area attend schools that resemble the racial composition of the community as a whole. According to the data collected on elementary and middle public schools, 62.5% of all students in grades K-8 are white. Yet only 5.2% of public school students in the metropolitan area attend schools that have a racial composition that is within 10% of the average racial composition. In the city the percentage of students who attend a racially representative school is somewhat higher at 10.2%. But in the suburbs it is even worse, where only 3.3% of students attend schools that have a racial mix that resembles the racial composition of the broader community.

In short, public schools in the Cleveland area are remarkably segregated. Most students attend schools that are almost all white or almost all minority and very few students attend schools that resemble the racial proportion in the whole community. Families wishing to attend a racially integrated school in the public system in Cleveland have very few opportunities to do so.

The picture of racial integration among private schools participating in the choice program is not wonderful, but it is considerably better than what we see in the public schools (Table 1 and Figure 4). Less than two-fifths (35.9%) of choice students attending a private school go to a school that has fewer than 10% whites. And 14.1% of choice students attend schools with more than 90% white students. Half (50.0%) of choice students go to a school that is nearly all white or nearly all minority in its racial composition. This is somewhat better than the 60.7% of public school students who attend similarly segregated schools.

But the most striking difference between the racial integration found in the public and private systems is in the percentage of students who attend schools that resemble the community as a whole. Nearly a fifth (19.0%) of choice students attends private schools that have a racial composition that is within 10% of the average racial composition in the Cleveland area. This is considerably better than the 5.2% of Cleveland metro area public school students, the 10.2% of Cleveland City public school students, or the 3.3% of Cleveland suburban public school students who attend schools that are similarly racially mixed.

If a family wants to live in the Cleveland area and wants to send their children to a racially integrated school at public expense, they are more likely to do so by choosing a private school with a voucher than they are by attending a

public school. Despite court orders and political pressure to improve integration in the public schools, the Cleveland Scholarship Program offers families a better opportunity for a racially integrated school experience.

The Religious and Economic Profile of the Cleveland Scholarship Program

Are the private schools able to offer a higher level of racial integration because they are homogeneous in other respects? It is plausible that private choice schools in Cleveland are able to achieve better racial integration only by being homogenous in terms of the economic and religious characteristics of their students.

This is probably true of the Shaker Heights School District, which is arguably the best racially integrated public school district in the Cleveland metropolitan area. While Shaker Heights is able to offer schools whose racial composition more closely resembles the racial composition in the broader community, students in the district are relatively uniform in having high family incomes. Only 7.9% of Shaker Heights' students receive Aid to Dependent Children, compared to 29.4% for Cuyahoga County and 64.3% for the city of Cleveland. Perhaps the accomplishment of the Shaker Heights District in terms of racial integration is a little less impressive when one considers that it may be permitted only by the lack of economic diversity among its students.

The students at private schools participating in the CSP, however, are not homogenous in terms of their economic status. The average choice student is at a school that has 59.3% of its students with family incomes below the federal poverty level, right in line with the average figure for the city. And as one can see in Figure 5 and Table 2, very

few choice students are at private schools that are entirely populated by families below the poverty line or at schools entirely bereft of poor families.

Unfortunately, comparable data on a school by school basis were not available from the public schools, so it is not possible to compare how well economically integrated the different school systems are. Nevertheless, one can simply look at the distribution of the choice students by the economic status in their schools and see that the achievements in racial integration are not the result of homogeneity along class lines. A clear majority of choice students attend schools with a majority of low-income families, but not all choice students attend schools populated primarily with poor families.

The private schools that choice students attend are also not homogeneous in terms of their religious composition (see Figure 6 and Table 3). The average choice student attends a private school where 54.0% of the students are Catholic. Yet 43.1% of choice students attend schools with fewer than 50% Catholic students. Comparable data on the religious composition of each public school in the Cleveland metropolitan area are also not available, preventing a comparison of the religious diversity in public and private school systems.

While we do not have information on the distribution of students over schools with different economic and religious compositions, we do have information on the average demographic characteristics of CSP students and Cleveland City public school students. For example, we know that choice students, on average, have significantly lower family incomes than do Cleveland City public school students ($15,769 vs. $19,948), are significantly more likely to be raised only by their mother (68.2% vs. 40.0%), and are

significantly more likely to be African-American (68.7% vs. 45.9%).[9] Yet CSP mothers have a statistically significant advantage in the amount of education they received (13.2 vs. 12.5 years) and are more likely to attend religious services. The choice students are significantly less likely to have a learning disability (8.3% vs. 14.8%) but they are also significantly less likely to have been in classes for gifted or talented students (8.4% vs. 15.2%).

In short, an analysis of these average demographic characteristics does not suggest that choice students are a particularly elite group of students. On the contrary, choice students seem in many ways relatively disadvantaged. The advantage that CSP private schools offer in terms of racial integration does not seem to be a function of their having selected advantaged students nor does it seem to be a function of the economic or religious homogeneity of the students at those schools.

How Frequently are Vouchers used to Choose Religious Schools?

While the CSP offers a particular benefit in terms of racial integration, it is important to recognize that it is not the only type of school choice available to residents of the Cleveland metropolitan area. School choice in some form or another has existed for a long time in publicly financed education. For the past two years students have been able to choose community schools, as charter schools are known in Ohio. And for many years before that students have been

[9] Paul E. Peterson, William G. Howell, and Jay P. Greene, "An Evaluation if the Cleveland Voucher Program after Two Years," Harvard Program on Education Policy and Governance Working Paper 99-02, June, 1999, pp. 16-18.

able to choose among the magnet schools and programs offered by the Cleveland City school district.[10]

Programs like CSP only modify or regulate the existing choice environment. And the kinds of choices exercised with a voucher have to be viewed in the context of all of the other choices provided (See Table 4 and Chart 1). It is true that most (96.6%) of the 3,765 recipients of a scholarship currently attend a religious schools.[11] Yet one has to view the choices made with vouchers in light of other available choices, which themselves may be altered or abolished over time. If we were to consider community schools as a related part of the general choice environment, then there are a total of 5,852 choosers in Cleveland of whom 3,637 (62.1%) have currently chose a religious school. If we were to add the 16, 184 students enrolled in magnet schools and programs in Cleveland to the pool of total publicly-financed choosers, then only 16.5% of those choosers are currently enrolled in a religious school.[12]

All of these existing choice programs are related. Any change in one kind of choice program could have

[10] One could also note the fact that ever since there were school districts and attendance zones families have been able to exercise choice in education by choosing where to live in order to obtain desired schools, as long as they were not prevented by financial or racial barriers to housing.

[11] Some of these enrollment numbers have been estimated based on prior enrollments because this year's official attendance records are not yet available. Modest changes in the exact numbers have little effect on the essence of the argument being presented here.

[12] According to the U.S. Department of Education 39% of students have exercised "residential choice," where access to desired schools influenced where the family lives. (See http://nces.ed.gov/pubs97/97983.html) If we include the estimated 90,877 students in the Cleveland metropolitan area who may have "chosen" their school via residential choice, then only 3.2% of all publicly-financed choosers are currently enrolled in a religious school.

significant effects on the kinds of choices made in another program. For example, the creation of community schools as a type of choice drew the two largest secular CSP schools, the Hope Academies, from the CSP to the community school program. Prior to that change far more recipients of the scholarships attended secular schools. And in the future the community schools program could be abolished or altered, swelling the roles of the CSP once again with even more students who have selected secular schools.

It is also possible, in fact likely, that new, secular private schools will be established in the future to participate in the Cleveland Scholarship Program, although the extent to which this occurs depends on the relative attractiveness of establishing new community schools or magnet programs. In Milwaukee the number of secular private schools participating in the voucher program more than quadrupled between 1990 and 1999, from 7 to 30. The number of students enrolled in secular private schools in Milwaukee grew more than five-fold during that time, from 337 to approximately 2,100.[13] In short, the types of choices exercised in the CSP depend upon the existence and nature of other choice programs and have to be viewed dynamically over time and in the context of those other programs. When one looks at the broader system of choice in Cleveland, it is clear that a small percentage of publicly-financed choosers attend religious schools.

Conclusion

Whether the CSP exists as one of the choices available in Cleveland may have a significant effect on racial integration in schools. It is clear that not all choices that

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[13] See http://www.dpi.state.wi.us/dpi/dfm/sms/histmen.html and http://www.dpi.state.wi.us/dpi/dfm/sms/mpscfnf.html

people make help promote integration. The most common type of choice, residential choice, has produced Cleveland metropolitan area public schools that are highly segregated along racial and economic lines. Private schools, and perhaps particularly religious private schools, appear able to transcend resistance to integration in housing to provide schools that are racially, economically, and religiously integrated.

It is not entirely clear why families appear to be willing to send their children to integrated private schools when they may be reluctant to send their children to integrated public schools. Perhaps families trust the private schools to provide discipline and safety in an integrated environment more than they trust public schools to do the same. Perhaps families share in the stronger sense of mission offered by private, especially religious schools, reducing the salience of race as a factor in school selection. Whatever the reason for it, the evidence is clear that, contrary to the expectations of critics, school choice helps promote integration.

Appendix JJ

AFFIDAVIT OF CHRISTINE SUMA

Christine Suma, being duly sworn, deposes and says:

1. I am the parent of three children who have received scholarships from the Cleveland Scholarship and Tutoring Program. I make this affidavit based upon my personal knowledge of the facts set forth below.

2. I am a resident of Cleveland, Ohio and live at 3211 Natchez Street. I am a full-time homemaker. My husband is a corrections officer. He is a corporal at a local jail.

3. We have twelve children: Bonnie Squires, who is 23; Nathan Suma, who is 22; Grace Suma, who is 20; Carolyn Suma, who is 19; Maria Suma, who is 16; Anthony Suma, who is 14; Ann Suma, who is 12; Dominic Suma, who is 9; Gloria Suma, who is 8; Emeric Suma, who is 7; Emily Suma, who is 5; and Angelica Suma, who is 2.

4. Bonnie is married. Both Bonnie and Nathan graduated from college this past May. Two of our children currently attend Trinity High School. One is a sophomore at Syracuse University, and another is a junior at University of Detroit Mercy. Ann, Dominic, Gloria, Emeric, and Emily all attend Our Lady of Good Counsel, a private K-8 school. Ann was too old to participate in the scholarship program, and Emily is on the waiting list to receive a scholarship. Dominic, Gloria, and Emeric are currently participating in the scholarship program. I plan to have my children continue to participate in the scholarship program.

5. I am using the program because the academic standards at Our Lady of Good Counsel are higher than the standards at the public schools. My older children got on the dean's list in college and the honor roll in high school. I believe this is because they received an excellent education at Our Lady during grade school. I think it is essential to get a good education in grade school to succeed academically in college.

6. At Our Lady, the teachers care about the children. If one of my children does not show up for school, the school immediately notices and calls me within fifteen minutes. In addition to the teachers' genuine caring, I think that this type of attention is also due to Our Lady's small class sizes, which are between 18-25 students. The public schools, however, are very crowded, and it is easy for a child to get lost in the system. At Our Lady, my children are viewed as individuals, not as numbers like at a public school. I also like that the teachers know me. At public schools, the teachers do not have personal relationships with the students' parents like the teachers at private schools have.

7. I also am using the scholarship program to send my children to Our Lady because it is three blocks away from our home. My children's friends are fellow Our Lady classmates who live in our neighborhood. Moreover, my husband and I both attended Our Lady when we were children. I view attending Our Lady as a family tradition, and I believe tradition adds stability to families. I also believe that my children are getting a much better education at Our Lady than at a public school. The school has been educating students for over 100 years, and I believe this is because parents have been pleased with their children's education and hence have decided to keep sending their children there. I also sent my children to Our Lady because I

wanted the faith that we practice to be reinforced while my children are at school.

8. If the scholarship program ended, it would cause my family to have financial troubles. Because ensuring that my children receive a good education in grade school is so important to me, I would be basically forced to go into the workforce instead of being able to take care of my children myself. I am much more needed at home than I am needed in the workforce. My other option would be homeschooling which I would do before sending my children to the inadequate schools in Cleveland's public school system. The scholarship frees up money that would be used normally as a tuition payment. It allows us to be more financially solvent. The scholarship allows us to have a sense of control; it allows us to make hard-earned dollars stretch a lot further and, as parents, have more control of our basic responsibility to make decisions which directly involve the welfare of our children.

/s/ Christine Suma
Christine Suma

STATE OF OHIO)
) ss:
COUNTY OF CUYAHOGA)

Subscribed and sworn to me this 22 day of July, 1999.

Notary Public

My Commission Expires Oct. 20, 2002

Appendix KK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al., Plaintiffs,	: Case No. 1:99 CV 1740
vs.	: Judge Solomon Oliver, Jr.
SUSAN TAVE ZELMAN, Defendant,	:
and	:
SENEL TAYLOR, et al., Intervenors/Defendants.	:

SUE GATTON, et al. Plaintiffs	: Case No. 1:99 CV 1818
vs.	: Judge Solomon Oliver, Jr.
SUSAN TAVE ZELMAN, et al., Defendants,	: **DECLARATION OF DAVID P. ZANOTTI**
and	:
SENEL TAYLOR, et al., Intervenors/Defendants.	:

Declarant David P. Zanotti hereby states under penalty of perjury as follows:

1. I am an adult resident of Strongsville, Ohio, and make this declaration based upon my knowledge of the facts set forth herein.

2. Since 1986, I have been the President of the Ohio Roundtable. The Ohio Roundtable has been intimately involved in the Cleveland Scholarship and Tutoring Grant Program since its inception in 1995, as an aspect of our efforts to improve educational quality in Cleveland and throughout Ohio. The Roundtable actively supported the creation of the Scholarship Program in 1995, as well as the subsequent creation of Ohio's community school legislation in 1998. We regard both programs as vital steps in improving educational opportunities for Ohio families by giving parents a wider array of educational options and children more educational opportunity.

3. The Cleveland City School District has experienced severe and systemic problems in recent decades. This has led to the creation of multiple programs designed to expand educational options, particularly magnet schools, community schools, and the scholarship program.

4. The scholarship program and the other choice programs have begun to create a more dynamic environment for education in Cleveland. The creation of the scholarship program led to the creation of several new nonsectarian schools, created to offer new alternatives to the participating children. These schools include Ministerial Full Day Kindergarten, and the two HOPE Academies, HOPE Central Academy and HOPE Ohio City Academy.

5. Shortly after the program was founded, several lawsuits were filed in state court challenging its constitutionality. Although these lawsuits never resulted in suspension of the program, such a suspension was a constant threat hanging over the program's head. The uncertainty engendered by the lawsuits had a chilling effect on the creation of new schools and the expansion of existing schools, since we never knew whether the courts might halt the program. Particularly, by discouraging the creation of new nonreligious schools, which would have run a greater risk than religious schools that have the resources of their sponsoring denominations to fall back on, the ongoing litigation adversely affected the normal development of the program.

6. The two largest nonreligious schools in the program originally were the two HOPE Academies, which together enrolled approximately 15% of all children in the program, including approximately 25% of those students who transferred out of the Cleveland public schools. In June of 1997, Ohio passed a charter school law, establishing "community schools," which are independent public schools. Under the community school legislation, community schools in Cleveland receive $4,500 for every student they enroll. Under the Scholarship Program, the participating schools can receive a maximum of $2,250 per student. Since nonreligious schools have no religious affiliation to give up in order to become community schools, they have little reason not to establish community schools and receive a higher tuition payment. The two HOPE Academies, caught in the uncertainty of continued litigation, did in fact close. Two new HOPE community schools replaced the prior HOPE Academies. This action caused a substantial drop in the number of scholarship students enrolled in non-religious schools.

7. Both community schools and scholarship schools provide parents with taxpayer-funded alternatives to geographically-assigned public schools. As the example of the HOPE Academies demonstrates, there exist significant financial incentives for nonreligious schools to prefer to operate as community schools rather than as scholarship schools. From the perspective of the parents, however, there is little difference if any between a scholarship school and a community school. Each is a school of choice, which a family is free to choose for their child and free to leave if it fails to satisfy them.

8. Community schools now comprise a substantial component of the school choice universe in Cleveland. Including the two new HOPE community schools, there are ten community schools enrolling Cleveland students. All told these ten schools enroll 2,087 students. All of these schools are, of course, nonreligious schools.

9. With the departure of the two HOPE Academies, the nonreligious schools remaining in the scholarship program are all quite small. Two of them serve only kindergarten students: Ministerial Full Day Kindergarten and the Covenant Kindergarten School. Both schools are outgrowths of Head Start programs that began in churches, which is why they have names that appear to be church-related, despite their being nonreligious schools. Each school operates only one kindergarten class. Under the preliminary injunction that prevents the scholarship program from paying out the scholarships on which the parents and schools were counting, the financial viability of these schools is severely compromised, because the overwhelming majority of their students were scholarship students. Both schools are in danger of closing. The irony of this event should it occur would be devastating: this lawsuit challenging the constitutionality of the scholarship program

because it includes religious schools will have driven out of the program two of the remaining *nonreligious* schools about whose inclusion the plaintiffs have no basis for objecting.

10. I am confident that once the litigation is concluded and the uncertainty removed from the scholarship program, the number of schools participating in the program, both sectarian and nonsectarian, will grow.

I hereby declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of October 1999.

/s/ David P. Zanotti
David P. Zanotti

Appendix LL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, et al., Plaintiffs,	: Case No. 1:99 CV 1740
vs.	: Judge Solomon Oliver, Jr.
SUSAN TAVE ZELMAN, Defendant,	:
and	:
SENEL TAYLOR, et al., Intervenors/Defendants.	:

SUE GATTON, et al. Plaintiffs	: Case No. 1:99 CV 1818
vs.	: Judge Solomon Oliver, Jr.
SUSAN TAVE ZELMAN, et al., Defendants,	: **DECLARATION OF DR. HOWARD FULLER**
and	:
SENEL TAYLOR, et al., Intervenors/Defendants.	:

Declarant Dr. Howard Fuller hereby states under penalty of perjury as follows:

1. I am an adult resident of Milwaukee, Wisconsin, and make this affidavit based upon my knowledge of the facts set forth herein.

2. I have a bachelor's degree in sociology from Carroll College in Waukesha, Wisconsin. My minors there were in history and secondary education. I also have a master's degree in social administration from Case Western Reserve University in Cleveland, Ohio and a Ph.D. in Sociological Foundations of Education from Marquette University.

3. I am currently a Distinguished Professor of Education and the founder and Director of the Institute for the Transformation of Learning at Marquette University. The goal of the Institute is to create new community learning infrastructures that can prepare all children to acquire the knowledge and skills they need for success. I also served for two years as a senior fellow for the Annenburg Institute for School Reform at Brown University.

4. I have been involved in issues of education reform and improvement for over 20 years. When I was in graduate school in Cleveland, Ohio I was a member of the Congress of Racial Equality and was very much involved with the struggles surrounding school integration in Cleveland in the early 1960s. I am particularly interested in issues involving the education of urban minority youth in cities such as Milwaukee and Cleveland.

5. From June of 1991 to June of 1995, I was the superintendent of Milwaukee Public Schools. I took that job primarily to ensure that low-income African-American

children could get a quality education. For a significant number of these children, the public education system simply does not work in terms of providing them with an effective education.

6. Shortly before my tenure as superintendent, Wisconsin instituted the Milwaukee Parental Choice Program. The program is much like Cleveland's in that it allows low-income families to use a portion of state education funds to remove their children from failing schools and send them to the schools they think will best meet the needs of their children.

7. The Milwaukee and Cleveland pilot scholarship programs currently are the only two school choice programs aimed specifically at providing greater educational opportunities to students in urban school districts. These experimental programs have the potential for teaching us important lessons about improving educational opportunities in similar urban school districts, such as Detroit, Michigan, Chicago, Illinois, New York, New York, Washington, DC, and many others.

8. After I resigned as superintendent of Milwaukee Public Schools, I conducted a research project to provide a profile of students and schools eligible for the expanded Milwaukee Parental Choice Program. The expanded program permitted up to 15% of MPS students to attend any private school in the City of Milwaukee, including religious schools. My data showed that the students eligible for the program were concentrated in some of the poorest, most racially segregated areas of the city. It also showed that schools eligible to participate were scattered throughout the city and already served many students not of the same faith. In terms of academic results, the data showed that graduation rates are considerably higher at private schools where 88% of

freshmen graduate compared to about 45% of freshmen who attend MPS high schools. Based on these data and my experience as superintendent, I conclude that the Milwaukee Parental Choice Program offers educational opportunity to some of the most disadvantaged children in Milwaukee.

9. Other research in Milwaukee also points to positive results. Research for the State of Wisconsin and for PAVE, the privately funded scholarship program, shows that parents who exercise choice are more satisfied than public school parents and that they become more involved. For decades, educational research has linked parental involvement to improved academic outcomes. A study conducted by the Program on Education Policy and Governance shows significant gains in math and reading scores, gains that were they to continue could close the gap between minority and white achievement. Research by PAVE indicates school choice substantially reduces student mobility. In Milwaukee, student mobility in the public schools is about 30% (student mobility reflects the number of students who move from one school to another). PAVE's study showed that only about 6 percent of the parents who exercised choice moved their children from one school to another.

10. While the findings in the research noted above are specific to Milwaukee, the conclusions are equally applicable to Cleveland. The public school systems in both cities have been plagued with the same problems. In Milwaukee only 48% of students who entered ninth grade in 1990 managed to graduate on time. From what I understand, the situation in Cleveland is worse. A study conducted by the Cleveland Public Schools demonstrates that only 26% of students who entered ninth grade in 1991 graduated on time and that only 7% of the students could pass the 12th grade proficiency examination upon graduation. Cleveland Public

Schools, "Getting the Job Done: A Blueprint to Improve Student Performance and Achieve Financial Stability" (Nov. 1995).

11. The effects of Cleveland's failing educational system are particularly pronounced in the inner-city minority community. Slightly over 70% of the students in the Cleveland City School District are African-American and more than 7% are Hispanic. Many of the families of these children cannot afford to exercise choice by moving to another district or by sending their children to private schools, so their children remain trapped in an education system that fails to prepare them for the future.

12. Cleveland's Pilot Project Scholarship Program demonstrates a way to rectify this dismal situation by giving low-income families access to the same education opportunities that families with more resources use. A 1999 study conducted by the Program on Education Policy and Governance at Harvard University reveals that 68.7% of scholarship recipients in Cleveland are African-American and 70% come from single-parent homes. Program on Education Policy and Governance, "An Evaluation of the Cleveland Voucher Program After Two Years" (Jun. 1999). As in the case in Milwaukee, few of these children could have attended private schools without the help of the scholarship program.

13. The Harvard study also reveals that students who participated in the Cleveland Scholarship Program achieved substantial gains in mathematics and reading tests. After just two years of attendance in the Hope schools, brand new private schools created for scholarship students, these students, on average, gained seven percentile points relative to the national norm on the reading test and 15 percentile points on the math test. A similar Harvard study conducted

of participants in the Milwaukee Program showed that participants posted only modest, if any, gains after two years in the program, but that those gains accelerated and became increasingly significant by the third and fourth years in the program. Greene, Peterson, and Du, "School Choice in Milwaukee: A Randomized Experiment" in *Learning From School Choice* (Peterson and Hassel, eds.) (Brookings Institution Press, 1998).

14. As noted earlier, parents of scholarship recipients were more satisfied with the private schools to which they sent their children than were the parents of students in public schools. For example, roughly half of these parents reported being "very satisfied" with the academic program and safety of their children's school, as compared to less than 30% of public school parents. Similarly, about half of the scholarship parents were very satisfied with school discipline, versus only a quarter of public school parents. The differences in satisfaction rates were also large when parents were asked about teachers, the teaching of moral values, and student to teacher ratios.

15. The parents of scholarship recipients reported lower levels of disruption in their children's schools. For example, only 12% of these parents felt that fighting between students was a problem at their schools. In contrast, 27% of public school parents expressed concerns about student violence. Racial conflicts seem to be more prevalent at public schools where 10% of parents thought them to be a problem. Only 5% of scholarship parents expressed similar concerns. Similarly, 13% of public school parents reported that vandalism was a problem at their children's schools, as compared to only 3% of scholarship parents.

16. Opponents of school choice programs often claim that although scholarship recipients are benefited by

the programs, the students who remain in the public schools are hurt by a loss of finances. This has not proven to be true in Milwaukee. After the Milwaukee program went into effect, the data indicated that there was no unfair financial impact on the public schools. Per pupil spending increased because students who left public schools took with them less than total per pupil funding. Perhaps it would have been better if there had been an adverse effect. I firmly believe that in a situation where dollars follow students, there would be positive impact on the education system. Such a situation helps to shape a discussion about how to improve the public school system. Furthermore, this would force public schools to improve in order to compete for students – students that these schools could previously take for granted because they could not choose to go elsewhere.

17. The positive reaction of the public and private schools in Milwaukee shows that parental choice helps improve all schools. During the last year, the Milwaukee Public Schools have: 1) sought to encourage parents of young children to attend MPS by promising in radio ads that the district will hire private tutors if students are not able to read at grade level by third grade; 2) permitted a dozen schools to hire teachers outside the seniority system that stymies reform; 3) responded to longstanding requests by parents for more new schools that specialize in such popular programs as Montessori. Private schools are working to revamp their curricula, understanding that parents now have the power to choose. Moreover, last April, Milwaukee voters elected a slate of reform candidates to the MPS board who believe that parents deserve options. All of these actions suggest that all schools – public and private – can no longer take parents for granted.

18. For the entirety of its existence until 1998, the Milwaukee program suffered under a cloud of litigation that

inhibited its growth. Indeed, the 1995 expansion of the program to include religious schools was enjoined until the Supreme Court of Wisconsin declared the expansion constitutional in 1998. Since the litigation cloud was lifted, the growth of the program has been dynamic, in terms of both religious and nonreligious school participation. The program has grown from 6,200 students in the 1998-99 school year, the first year following the court's decision, to about 8,000 students and 99 schools in the 1999-2000 school year. Many schools have waiting lists. Nonsectarian schools have grown from 7 in the initial program to 30 last year.

19. The critical issue is not whether children go to private or public schools, to religious or nonsectarian schools, but whether they go to good or bad schools. More options for parents means that more families have more opportunities to choose schools best for their children. Cleveland's scholarship program increases educational opportunity.

19. Parents in Milwaukee and Cleveland have more options than low-income families that live in other urban areas. This addresses a serious inequity in education in America: the children of most families already exercise choice by choosing to live in a public school district that they believe provides a good education or by sending their children to private schools. Giving low-income parents an educational vote simply allows them to take advantage of educational opportunities that most parents in this country take for granted.

20. In Milwaukee and Cleveland, school choice programs add to an array of options available to urban parents. In Milwaukee, for example, parents may choose specialty – or magnet – schools. Students considered to be at-risk may attend alternative schools, including private

schools under contract to the public school district. Parents may choose charter schools or they may send their children to neighboring districts if such action integrates schools. In many respects, the school choice programs in Milwaukee and Cleveland simply continue efforts to expand options for urban parents whose children attend public districts that fail some children.

21. The Milwaukee Parental Choice Program has seen dynamic growth in the number of nonsectarian schools participating in the program. The increase in the number of nonsectarian schools has been accompanied by a substantial growth in the number of students enrolled in nonsectarian schools: from 337 in 1990-91, to 786 in 1994-95, to 1,320 in 1995-96, to 2,215 in 1998-99, to 3,025 (of a total of 8,066) in this school year.

22. The primary effect of parental choice programs like Milwaukee and Cleveland's is to expand educational choices for low-income families, which is good for the children and for their families, and also good for the educational system by fomenting institutional reform and improvement within the public schools. The inclusion of religious schools and the creation of community schools allow families greater options and give them greater leverage in the educational discussions and marketplace.

I hereby declare under penalty of perjury that the foregoing is true and correct. Executed this 26 day of October 1999.

/s/ Howard Fuller, Ph.D.
Howard Fuller, Ph.D.

Appendix MM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, *et al.*,	)	
	)	Case No. 1:99 CV 1740
Plaintiffs,	)	
	)	Judge Solomon Oliver, Jr.
v.	)	
	)	
SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, *et al.*,	)	
	)	
Defendants.	)	

SUE GATTON, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 1:99 CV 1818
	)	
v.	)	Judge Solomon Oliver, Jr.
	)	
DR. SUSAN TAVE ZELMAN, *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF ALICE O'BRIEN

ALICE O'BRIEN declares under penalty of perjury as follows:

1. My name is Alice O'Brien. I am over twenty-one years of age and am competent to make this declaration. I am an attorney with the firm of Bredhoff & Kaiser, P.L.L.C., counsel for Plaintiffs Simmons-Harris, *et al.*, in this matter and have personal knowledge of the facts stated herein.

2. Attached as Exhibit A is R.C. §§ 3313.974-3313.979, which establishes the Ohio Pilot Project Scholarship Program ("1999 Voucher Program").

3. In order to obtain information about the operation of the 1999 Voucher Program, on September 10, 1999, plaintiffs Doris-Simmons Harris, *et al.*, and Sue Gatton, *et al.*, served the State of Ohio ("State") with discovery requests. True and correct copies of the State's response to that request, and the documents produced therewith, are attached as Exhibits B(1-6) and are as follows:

Exhibit B(1) – State's Responses to Plaintiff's Request for Documents and Information

Exhibit B(2) – List of Schools Participating in the 1999 Voucher Program

Exhibit B(3) – List of Religious Affiliations of Participating Schools

Exhibit B(4) – Total Student Enrollment in Each Participating School as of the 1998-99 School Year

Exhibit B(5) – Number of Voucher Students Enrolled in Each Participating School Who Participated in the 1995 Voucher Program

Exhibit B(6) – Number of Voucher Students Enrolled in Each Participating School Who Did Not Participate in 1995 Voucher Program

4. The plaintiffs also requested information regarding the religious affiliations of schools participating in the 1999 Voucher Program from Intervenors/Defendants Hanna Perkins, *et al.*, ("Hanna Perkins"). On September 23, 1999, plaintiffs received a letter and two lists from the Hanna Perkins Intervenors/Defendants providing that information. A true and correct copy of that letter and those lists is attached hereto as Exhibit C.

5. Seeking to clarify certain minor discrepancies in the information provided by the State and the Hanna Perkins Intervenors/Defendants, plaintiffs sent letters to both parties and the parties responded to those letters. True and correct copies of that correspondence are attached hereto as Exhibit D.

6. The information provided by the State and the Hanna Perkins Intervenors/Defendants about the number and religious affiliation of the schools participating in the 1999 Voucher Program, as well as the number of voucher students enrolled in each school (*i.e.*, the information in Exhibits B-D), is summarized in a chart attached hereto as Exhibit E. As that chart shows, fifty-six schools are participating in the 1999 Voucher Program and, as of September 1999, voucher students were enrolled in fifty-three of those schools. According to the religious affiliation information provided by

the Hanna Perkins Intervenors/Defendants and the State, which is confirmed by the materials produced by the schools themselves, *see infra* at Exhibits H-I(1-41), forty-six of the participating schools in which voucher students are enrolled are sectarian, and thirty-five of those sectarian schools are affiliated with the Roman Catholic Church. Of the 3,761 students who are attending a school under the 1999 Voucher Program, 3,632 are enrolled in sectarian schools.

7. Seeking further information about the nature of the schools participating in the 1999 Cleveland Scholarship Program, on September 29, 1999, plaintiffs issued subpoenas duces tecum to those schools asking them to produce, *inter alia*, their mission statements and handbooks. The plaintiffs and the intervenors/defendants have stipulated that the documents produced by the schools in response to those subpoenas "are authentic, speak for themselves ... and are not false or misleading." That stipulation is attached hereto as Exhibit F.

8. The State declined to enter into the stipulation, but by letter dated October 6, 1999, represented that it "is in no position to contest the authenticity of" the materials produced by the schools. A true and correct copy of that letter is attached hereto as Exhibit G.

9. To facilitate the Court's review of the materials referenced in paragraph 7 above, excerpts from those documents are attached as Exhibit H. In addition, true and correct copies of all of the school handbooks and, if not included in the school handbooks, the mission statements, produced by the sectarian schools pursuant to the subpoenas are attached hereto as Exhibits I(1-41) in the following order:

Exhibit I(1) – Ascension School Materials

Exhibit I(2) – Archbishop James P. Luke – Materials for Schools of St. Catherine, St. Henry and St. Timothy

Exhibit I(3) – Blessed Sacrament School Materials

Exhibit I(4) – Corpus Christi School Materials

Exhibit I(5) – Holy Name Elementary School Materials

Exhibit I(6) – Holy Redeemer School Materials

Exhibit I(7) – Immaculate Conception School Materials

Exhibit I(8) – Metro Catholic Parish – Materials for Schools of Saint Boniface and Saint Stephen

Exhibit I(9) – Montessori School Holy Rosary

Exhibit I(10) –Our Lady of Good Counsel School Materials

Exhibit I(11) –Our Lady of Mount Carmel School Materials

Exhibit I(12) –Our Lady of Peace School Materials

Exhibit I(13) –Saint Adalbert School Materials

Exhibit I(14) –Saint Agatha – Saint Aloysius School Materials

Exhibit I(15) –Saint Francis School Materials

Exhibit I(16) –Saint Ignatius Elementary School Materials

Exhibit I(17) –Saint Jerome School Materials

Exhibit I(18) –Saint John Cantius School Materials

Exhibit I(19) –Saint John Nepomucene School Materials

Exhibit I(20) –Saint Leo the Great School Materials

Exhibit I(21) –Saint Joseph Collinwood School Materials

Exhibit I(22) –Saint Mark Catholic School Materials

Exhibit I(23) –Saint Mary Byzantine School Materials

Exhibit I(24) –Saint Mary School Materials

Exhibit I(25) –Saint Mel School Materials

Exhibit I(26) –Saint Patrick School Materials

Exhibit I(27) –Saint Rocco School Materials

Exhibit I(28) –Saint Stanislaus School Materials

Exhibit I(29) –Saint Thomas Aquinas – Saint Phillip School Materials

Exhibit I(30) –Saint Vitus School Materials

Exhibit I(31) –Saint Vincent DePaul School Materials

Exhibit I(32) –Villa Montessori Center

Exhibit I(33) –Luther Memorial School Materials

Exhibit I(34) –Saint John Nottingham Lutheran School Materials

Exhibit I(35) –Saint Mark Lutheran School Materials

Exhibit I(36) –West Park Lutheran Materials for Schools of Bethany, Holy Cross and Puritas

Exhibit I(37) –Ramah Junior Academy Materials

Exhibit I(38) –Calvary Center Academy Materials

Exhibit I(39) –Westside Baptist Christian School Materials

Exhibit I(40) –Second New Hope Christian Academy Materials

Exhibit I(41) –Cleveland Community Islamic School Materials

10. Plaintiffs also served a subpoena on the Roman Catholic Diocese of Cleveland ("Diocese"), seeking information regarding the directives and guidelines that the Diocese provides to Catholic schools within its jurisdiction. True and correct copies of several of the documents produced in response to said subpoena are attached hereto as Exhibits J(1-5) in the following order:

Exhibit J(1) – State of the Schools Report for 1998-99 and Mission Statement of the Office of Catholic Education of the Diocese

Exhibit J(2) – Kindergarten Guide by the Diocese

Exhibit J(3) – Handbook for Elementary Schools by the Diocese

Exhibit J(4) – Curriculum Guides by the Diocese for Language Arts, Religion, Science, Social Studies and Christian Formation in Sexuality

Exhibit J(5) – Article by Sister Carol Anne Smith describing mission of the schools within the Diocese

11. The plaintiffs and intervenors/defendants have stipulated that the documents produced by the Diocese of Cleveland "are authentic, [and] speak for themselves." That stipulation is attached hereto as Exhibit K.

/s/Alice O'Brien
ALICE O'BRIEN
Bredhoff & Kaiser, P.L.L.C.
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

Dated: October 27, 1999

Appendix NN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DISTRICT

DORIS SIMMONS-HARRIS, et al.,	:	
Plaintiffs	:	CASE NO. 1:99 CV 1740
v.	:	JUDGE OLIVER
DR. SUSAN TAVE ZELMAN,	:	
Defendant.	:	

SUE GATTON, et al.	:	
Plaintiffs	:	CASE NO. 1:99 CV 1818
v.	:	JUDGE OLIVER
DR. SUSAN TAVE ZELMAN, et al.,	:	(CONSOLIDATED CASES)
Defendants.	:	

DEFENDANT, DR. SUSAN ZELMAN'S RESPONSES TO PLAINTIFFS REQUEST FOR DOCUMENTS AND INFORMATION

Defendant, Susan T. Zelman (hereinafter referred to as "Defendant") responds as follows to Plaintiff's request for documents and information set forth as Attachment A to memorandum dated September 10, 1999:

1. General Objections – Defendant objects to Plaintiffs' definitions to the extent that Plaintiffs try to distinguish the "1995 Cleveland Program" from the "1999 Cleveland Program". Defendant asserts that there has been one program which has continued from 1996-97 to the present.

2. Defendant objects to producing any documents that are not relevant to the issues pending in this proceeding or that would not reasonably lead to the discovery of admissible evidence. By producing the information requested, Defendant does not concede the admissibility or relevance thereof.

3. Defendant objects to producing any documents protected from discovery by reason of the attorney-client privilege or work product immunity.

4. Defendant objects to any requests that imply that the State has classified or identified non-public school as being either sectarian or non-sectarian or religiously affiliated. To the extent that the State is producing information that identifies a school's religious affiliation such identification is based upon information provided to the State by the individual school and not based on any determination or evaluation performed by the State.

5. The data and information provided in response to this request changes on an ongoing basis when new information is received. Therefore, the figures and data are subject to change.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

/s/ Mary Lynn Readey
EDWARD B. FOLEY
State Solicitor
Mary Lynn Readey (0038591)
Roger F. Carroll (0023142)
Karen Lazorishak (0029587)
Assistant Attorneys General
Education Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-7250

Counsel for State Defendants

ATTACHMENT A

REQUESTED DOCUMENTS AND INFORMATION

1. Provide the name, address, and telephone number of each participating private school.

RESPONSE: The list of the 1999-2000 participating schools in the Cleveland Scholarship and Tutoring Program is provided.

2. For each participating private school, state whether said school is affiliated with a religious group, institution, or organization, and, if so, provide the name of the religious group, institution, or organization.

RESPONSE: The State objects to the extent that this request implies that the State has classified or made an independent determination of a non-public school's affiliation with a religious group, institution, or organization. Without waiving the objection, the State is providing a document entitled "Cleveland Scholarship and Tutoring Program Religious Affiliation", which is based on information provided to the State by the individual schools. The State has never independently verified this information.

3. If a participating private school that is not affiliated with a religious group, institution, or organization includes a religious component in its educational program or day-to-day operation, provide the name of said school, and describe the nature of the religious component.

RESPONSE: The State does not have any information responsive to this request.

4. For each participating private school, (a) provide the total number of pupils enrolled during the CCSD 1999-2000 school year, and (b) provide the total number of pupils who are enrolled in said school under the 1999 Cleveland Program.

RESPONSE: (a) With the exception of five non-chartered, non-public school, the State is producing a document which provides the total enrollment for the 1998-1999 school year for all schools participating in the voucher program for the 1999-2000 school year. The State does not yet have total enrollment figures for the 1999-2000 school year. The State does not collect any information about the enrollment figures of non-chartered, non-public schools;

(b) The State is producing a document which provides that as of September 13, 1999, 3,062 students have continued in the voucher program for the 1999-2000 school year and identifies the school they are currently attending. Defendant is also providing a document which identifies the schools for the 794 new students enrolled in the program for the first time in the 1999-2000 school year. These students were admitted in the program and placed in their schools prior to the District Court's decision on August 24, 1999.

5. For each participating private school, provide any mission statements, parent handbooks, informational brochures, and other written material in your possession that have been prepared by said school that in any way describe its goals and objectives,

educational program, financial operation, and/or affiliations.

RESPONSE: The State has no documents responsive to this request.

6.(a) Provide copies of any rules, regulations, operating guidelines, directives, and other written materials that the State has issued, or provided to participating private schools and/or parents of pupils that are participating in the 1999 Cleveland Program for the CCSD 1999-2000 school year, that deal with the structure and operation of the 1999 Cleveland Program, including the eligibility of private schools to participate in, and the evaluation of, said Program.

(b) To the extent any rules, regulations, operating guidelines, directives and other information that was issued or provided in connection with the 1995 Cleveland Program is applicable to the 1999 Cleveland Program, so state and provide copies.

RESPONSE: (a) and (b)

1. The State is producing the Program Administration Procedures manual for the Cleveland Scholarship and Tutoring Program dated March, 1999.
2. A Comparative Evaluation of the Cleveland Scholarship and Tutoring Grant Program year one: 1996-1997, dated, March 16, 1998 and prepared by Kim Metcalf, Ph.D. along with an executive summary.
3. Evaluation of the Cleveland Scholarship and Tutoring Program, second year report 1997-1998 dated, November 18, 1998 submitted by Dr. Kim Metcalf, with an executive summary.

4. Evaluation of Cleveland Scholarship and Tutoring Program 1996-1999, dated September 1, 1999, submitted by Dr. Kim Metcalf, with an executive summary.
5. Cleveland Scholarship and Tutoring Program special audit report, July 1, 1995 through June 30, 1998 with the Cleveland Scholarship and Tutoring Program responses to said report.
6. Cleveland Scholarship and Tutoring Program final management study dated, September 9, 1999 by KPMG, LLP.

Additional document produced in response to item 11 is also responsive to this request.

7.(a) Provide copies of any application forms (together with attachments) or other written materials that any participating private school submitted to the State in order to participate in the 1999 Cleveland Program.

(b) To the extent any application forms (together with attachments) or other written materials that we submitted in order to participate in the 1995 Cleveland Program are applicable to the 1999 Cleveland Program, so state and provide copies.

RESPONSE: (a) and (b) The Defendant is producing the Assurance of Compliance with attached documents submitted by the schools participating in the program for the 1999-2000 school year.

8. State the total number of pupils who were awarded vouchers/scholarships to attend participating private schools for the CCSD 1999-2000 school year. Of that number, how many, as of the date of your answer, (a) did not actually attend a participating private school during the CCSD 1999-2000 school

year, and (b) left the participating private school they were attending.

RESPONSE: 4,984 scholarships were awarded to students for the 1999-2000 school year, 1,316 new scholarships were awarded and of these, 794 students enrolled in the program. Defendant does not have any information regarding if any of the new students who enrolled in the program have subsequently left. The District court has preliminarily enjoined the continued operation with regard to new students.

3,058 previous recipients are stilled enrolled in the program, 381 students who were previously enrolled in the program have withdrawn and the status of 229 students who were enrolled in the program is unknown at this time.

9. Provide copies of any and all more recent versions of the documents included in Exhibit CC to the July 27, 1999 Affidavit of Donald Mooney in Case No. CV 1818.

RESPONSE: The only update was prepared on July 22, 1999 for the 1999-2000 school year. However, this information is accurate only as of the date it was prepared. The collection of data and information is an ongoing process. Therefore the July 22, 1999 report does not necessarily accurately reflect the status of the program on this date.

10. Provide copies of:

(a) any memoranda, letters, or other written correspondence between the State and the "Cleveland Catholic Diocese School Principals" or the

"Superintendent of the Cleveland Diocese Schools." See Exhibits Z to the May 6, 1996 Affidavit of Donald Mooney in the state court litigation.

(b) any "legal opinion[s]" of the type referenced in Exhibit Z, supra, that have been reduced to writing and shared with third parties;

(c) the mailing list used by the State in correspondence with "Cleveland Catholic Diocese School Principals," or, in lieu thereof, a list of participating private schools that are affiliated with the Cleveland Catholic Diocese; and

(d) any documents in your possession prepared by the Cleveland Catholic Diocese, that describe the mission, objectives, education programs, and/or financial operation of schools that are affiliated with the Diocese or of the Diocese itself.

RESPONSE: (a), (b), (c) and (d) The State has no documents responsive to this request.

11. Have any "information sessions" of the type referenced in Exhibit N to the March 15, 1996 Affidavit of Donald Mooney in the state court litigation been held by the State in connection with the operation of the 1995 or 1999 Cleveland Program during the CCSD 1999-2000 school year? If the answer is "yes", provide copies of any documents that were made available in connection with such sessions, and any documents describing the purposes and objectives of such sessions.

RESPONSE: The State is producing an agenda with attachments for an information meeting which occurred on April 26, 1997. The State is producing a notice of a meeting that took place on March 26, 1998. The State cannot locate any documents concerning this meeting. The State is producing an agenda with attachments for parent/guardian information session dated April 17, 1999.

12. State the total number of pupils who were awarded vouchers/scholarships to attend participating private schools for the CCSD 1999-2000 school year who attended a private school during the school year prior to the first school year that they received a voucher/scholarship.

RESPONSE: The July 22, 1999 report total 1999-2000 enrollment, public, private, existing under response 9 provides information on where the voucher recipients attended schools before enrolling in the scholarship program. Any new information received after July 22, 1999 would not be reflected in this report.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

/s/ Mary Lynn Readey
EDWARD B. FOLEY
State Solicitor
Mary Lynn Readey (0038591)
Roger F. Carroll (0023142)
Karen Lazorishak (0029587)
Assistant Attorneys General
Education Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-7250

Counsel for State Defendants

[Exhibits B(2), B(3), B(4), B(5) and B(6) are omitted by agreement of the parties.]

Squire, Sanders & Dempsey
L.L.P.
Counsellors at Law
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215

September 23, 1999

David G. Latanick, Esq.
Cloppert, Portman, Sauter, Latanick & Foley
225 East Broad Street
P.O. Box 1810
Columbus, Ohio 43215

Re: Sue Gatton, et al. v. Zelman, et al. and Doris Simmons-Harris, et al. v. Zelman, et al.
Case Nos. 1:99CV1818 and 1:99CV1740
(Judge Oliver)

Dear Dave:

Sorry that, when I provided the Mission Statements, I did not include a list reflecting the religious affiliation of participating schools. I am faxing herewith two separate lists. The first list reflects the religious affiliation of all participating schools other than the Catholic schools. However, there is one caveat. It was our understanding that Birchwood had a Christian affiliation. We will try to investigate that matter further and, if we obtain any more definitive information, we will let you know. The Mission Statement we obtained reflected Christian affiliation.

The second list is simply a itemization of all of the participating schools that have Catholic sponsorship.

If you have any further questions, please let me know.

Very Truly Yours,

David J. Young

DJY:jfg
Enclosure

cc: Andrew Roth, Esq.

CLEVELAND SCHOLARSHIP AND TUTORING PROGRAM
1999-2000 PARTICIPATING SCHOOLS
RELIGIOUS AFFILIATION OF SCHOOLS
(other than Catholic schools)

Name of School	Religiously affiliated?	Affiliation
1) Birchwood ES	Y	Christian
2) Calvary Center Academy ES	Y	Christian; member: Association of Christian Schools International (ACSI); sponsorship: Cleveland Apostolic Ministerial Fellowship
3) Cleveland Community Islamic School	Y	Islamic
4) Covenant Kindergarten School	Y	Christian
5) Hanna Perkins School	N	
6) Hough Brooks Academy	N	
7) Lewis Little Folks, Inc.	N	

8) Luther Memorial School	Y	Lutheran, member: Lutheran Schools of Ohio (LSO); supported by area Lutheran churches
9) Marotta Montessori Schools (3)	N	
10) Ministerial Full Day Kindergarten (2)	Y	Christian (Board of Directors composed of area clergy)
11) Ramah Junior Academy	Y	Seventh Day Adventist
12) St. John Nottingham	Y	Lutheran, member: LSO
13) St. Mark Lutheran ES	Y	Lutheran, member: LSO
14) Second New Hope Christian School	Y	Christian
15) West Park Lutheran School	Y	Lutheran, member: LSO; sponsored by 4 Lutheran congregations
16) Westside Baptist Christian	Y	Christian, member: ACSI; sponsorship: 5 Madison Avenue Baptist churches

CATHOLIC AFFILIATION OR SPONSORSHIP

School Name
Archbishop—St. Catherine
Archbishop—St. Henry
Archbishop—St. Timothy
Ascension
Blessed Sacrament
Corpus Christi
Holy Name
Holy Redeemer
Immaculate Conception
Metro Catholic
Our Lady Good Counsel
Our Lady Mt. Carmel
Our Lady of Peace
St. Adalbert
St. Agatha/Aloysius
St. Francis
St. Ignatius
St. Jerome
St. John Cantius
St. John Nepomucene
St. Joseph Collinwood
St. Leo the Great
St. Mark
St. Mary Byzantine
St. Mary Collinwood
St. Mel
St. Patrick
St. Rocco
St. Stanislaus
St. Thomas/Phil
St. Vincent de Paul
St. Vitus
Villa Montessori

BREDHOFF & KAISER, P.L.L.C.
Attorneys & Counselors
1000 Connecticut Avenue, NW
Washington, D.C. 20036-5398
(202) 833-9340
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September 24, 1999

By Facsimile & Regular U.S. Mail

Edward B. Foley
State Solicitor for Ohio
Office of the Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428

Re: **Simmons-Harris, et al. v. Tave Zelman, Case No. 1:99 CV 1740**

Dear Mr. Foley:

On Wednesday, September 22, 1999, we received Defendant's Responses to Plaintiffs' Request for Documents and Information ("Responses") in the above-referenced matter. The documents that the State produced with the Responses appear to respond in full to plaintiffs' requests, and we appreciate your cooperation during this informal stage of the discovery process. There are, however, a few minor points on which we seek clarification from you:

1. There are two schools – Hough Brooks Academy and Lewis Little Folks, Inc. – which are included on the list the State produced entitled "Cleveland Scholarship & Tutoring Program 1999-2000 Participating Schools,"

but not on the lists of participating schools showing current enrollment in the school voucher program (*i.e.*, the lists produced in response to Plaintiffs' Request No. 4(b)). We assume this is because no students are currently attending these two schools under the 1999 Cleveland Program. Please confirm that this is the case or, if it is not, explain the apparent inconsistency between the lists.

2. There are two other schools – Ascension School and Islamic School of Oasis – that are included on the lists of participating schools showing current enrollment in the 1999 Cleveland Program but which are not included on the list entitled "Cleveland Scholarship & Tutoring Program 1999-2000 Participating Schools." As the documents reflect that students are now attending these two schools under the Program, we assume that they inadvertently were omitted from the list of participating schools. Please confirm that this is the case or, if it is not, explain the apparent inconsistency between the lists.

3. In response to Plaintiffs' Request No. 4(b) – asking for the "total number of pupils who are enrolled [in a participating private school] under the 1999 Cleveland Program" – the State stated it was producing "a document which provides that as of September 13, 1999, 3,062 students have continued in the voucher program." The list that the state produced, however, is dated September 22, 1999, and reflects a total enrollment of 3,058 pupils in participating private schools. Please confirm

that this list is the one that was mistakenly identified as the list of September 13, 1999. In addition, please confirm that this list reflects the total number of pupils now enrolled in participating private schools under the 1999 Cleveland Program, who previously attended those schools under the program that was in effect during prior school years.

4. Enclosed are copies of the various documents that David Young has provided to us regarding the religious affiliations and missions of the participating private schools. We are forwarding these documents to you because it is unclear whether they were previously provided to you. We understand, based on your prior representations, that the State will not contest the accuracy of the list provided by Mr. Young regarding the religious affiliations of the participating private schools. To prevent any future misunderstandings, we ask that you confirm that understanding by way of a letter to us.

As we previously have indicated to you, in the coming weeks we will be pursuing limited formal discovery against the participating private schools. We will, of course, provide you with appropriate notice of that discovery when it occurs.

Sincerely,

Robert H. Chanin
Andrew D. Roth
Counsel for Plaintiffs
Doris Simmons-Harris, *et al.*

Enclosure: Documents provided by David Young
on behalf of the Hanna Perkins' Intervenors

cc (by mail w/o enclosures):
Counsel for Plaintiffs Sue Gatton, *et al.*
Counsel for Taylor Intervenors
Counsel for Hanna Perkins' Intervenors

Attorney General
Betty D. Montgomery

September 29, 1999

VIA FAX & REGULAR MAIL

Robert H. Chanin
Bredhoff & Kaiser, PLLC
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036

Re: ***Simmons-Harris, et al. v. Dr. Zelman***

Dear Bob:

I am responding to your letter dated September 24, 1999, regarding the State's response to your request for information:

1. You are correct in assuming that there are no Cleveland Scholarship students attending Hough Brooks Academy and the Lewis Little Folks, Inc.

2. After initially participating in the scholarship program, the Ascension School decided that it did not want to take any new scholarship students. Ascension also asked the scholarship office not to list it as a participating school. However, it agreed to allow the scholarship students who originally enrolled in their school to continue at the school. Accordingly, the scholarship office

complied with Ascension's request and took it off the list of schools participating in the program, even though it still has scholarship students attending their school.

The Islamic School of the Oasis is no longer participating in the program. Accordingly, there are no scholarship students attending the Islamic School of the Oasis. The Scholarship office is still verifying whether the students listed as attending the Islamic school have enrolled in other participating schools or have simply left the program.

3. As of September 22, 1999, the enrollment of students continuing in the scholarship program was 3,058. This is the most current information available. However, as mentioned in our written response this is subject to change as the office continues to update its data base.

4. You are correct in stating that the State will not contest the accuracy of the list provided by Mr. Young regarding the religious affiliation of the participating private schools. However, in the information provided to the scholarship office, Birchwood and the Ministerial Full Day Kindergarten Schools identified themselves as being non-denominational. It is my understanding that Mr. Young will pursue this issue further to determine if these schools have a religious affiliation. To the extent that the intervenors contest the religious affiliation of any participating private school, the state will simply abstain from this dispute.

If you have any further questions regarding the foregoing, please feel free to contact me.

Very truly yours,

Betty D. Montgomery
Attorney General

Roger F. Carroll (0023142)
Assistant Attorney General
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Telephone: (614) 644-7250
Fax: (614) 644-7634

RFC:gsz

cc: Marvin E. Frankel
David Young
Clint Bolick

BREDHOFF & KAISER, P.L.L.C.
Attorneys & Counselors
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October 12, 1999

By Facsimile & Regular U.S. Mail
Roger F. Carroll
Assistant Attorney General
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

Re: **Simmons-Harris, et al. v. Tave Zelman, Case No. 1:99 CV 1740**

Dear Roger:

Thank you for your letter dated September 29, 1999 clarifying the points raised in our letter to your office dated September 24, 1999. Upon further review of the material and data that you have provided to us, we seek clarification regarding three additional – and relatively minor – points, in order that the record for purposes of the summary judgment motion in these cases will be complete and fully accurate.

1. There is one additional school – the Ministerial Full Day Kindergarten – Brackland – that is included on the list the State produced entitled "Cleveland Scholarship & Tutoring Program 1999-2000 Participating Schools" but not on the lists of participating schools showing current enrollment in the school voucher program (*i.e.*, the lists produced in response to Plaintiffs' Request No. 4(b)). We assume this is because no students are currently attending

that school under the 1999 Cleveland Program. Please confirm that this is the case or, if it is not, explain the apparent inconsistency between the lists.

2. On the list of participating schools showing the enrollment of voucher students in those schools who did not attend those schools under the prior version of the voucher program (*i.e.*, "new voucher students"), Saint Mel is listed twice, once showing an enrollment of one new voucher student, and once showing an enrollment of 16 new voucher students. We assume that the actual number of new voucher students enrolled in the school is 17. Please confirm that this is the case or, if it is not, explain the apparent inconsistency in the list.

3. Because the Islamic School of Oasis is no longer participating in the school voucher program, we assume that the total number of students enrolled in participating schools should be reduced accordingly bringing the total number of students enrolled in school voucher program to 3,798 students.

Sincerely,

Robert Chanin
Andrew Roth
Alice O'Brien

cc: Clint Bolick, Esq.
Marvin Frankel, Esq.
David Young, Esq.

Attorney General
Betty D. Montgomery

October 19, 1999

Robert H. Chanin
Bredhoff & Kaiser, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036

VIA FAX 202-833-5588
and Regular Mail

Re: ***Simmons-Harris, et al. v. Zelman***

Dear Bob:

I am responding to your letter dated October 12, 1999, seeking additional clarification regarding the State's production of documents:

1. There are no students presently attending the Ministerial Full Day Kindergarten, Brackland.

2. At the time the data was generated, St. Mel had 17 new voucher students.

3. You assumption regarding the current status of the students who attended the Islamic School of the Oasis, is not necessarily correct. These students may have enrolled in another scholarship school. Such information may not yet have been provided to the scholarship office at the time the data was generated. It is also possible that these students have withdrawn from the program. Therefore, it would not be appropriate to simply reduce the students who

formerly attended the Islamic school from the total number of students enrolled in the program.

If you have any additional questions, please feel free to contact me.

Very truly yours,

Betty D. Montgomery
Attorney General

Roger F. Carroll
Assistant Attorney General
Education Section

cc: Clint Bolick
Marvin Frankel
David Young

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1000 Connecticut Avenue, NW
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October 12, 1999

By Facsimile & Regular U.S. Mail

David Young
Squire, Sanders & Dempsey, L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215

Re: **Simmons-Harris, et al. v. Tave Zelman, Case No. 1:99 CV 1740**

Dear Mr. Young:

We are writing to seek written confirmation from you that the attached list entitled "Participating Schools in the 1999-2000 Cleveland Scholarship Showing Religious Affiliation of Each School" accurately reflects the religious affiliations of those schools that are now participating in the 1999 Cleveland Scholarship Program and in which school voucher students are now enrolled.

The attached list was compiled from the information provided by the State regarding the schools participating in the program and in which voucher students are now enrolled, and from the information provided by you regarding the religious affiliation of each participating school. In those few instances in which the data that you provided does not

precisely match that provided by the State, we have made the following adjustments in the list to account for those discrepancies.

1. We have omitted from the list those schools that are participating in the program but in which no voucher students are currently enrolled – *i.e.*, Hough Brooks Academy, Lewis Little Folks, and Ministerial Full Day Kindergarten – Brackland.

2. We have listed as separate schools those schools that have two or more different locations – *i.e.*, the three West Park Lutheran Schools (Bethany, Holy Cross and Puritas) and the three Marotta Montessori Schools (Stokes, Fruitland and Glenville) – as the State did on their lists.

3. Two schools – Montessori School – Holy Rosary and the Golden Christian Academy – were included on the State's lists of participating schools but were omitted from your list showing the religious affiliations of participating schools. We have included those schools on the attached list with the religious affiliation information that was provided by the State.

4. We have included on the list the religious affiliation information that you provided to us for Birchwood Elementary School and the Ministerial Full Day Kindergarten – Superior, although we understand based on subsequent correspondence from both the State and the Institute for Justice that there may be some

question with respect to the religious affiliations of these schools.

After you have had an opportunity to review the attached, please let us know if it accurately reflects the religious affiliations of each of the schools participating in the school voucher program. If not, please identify the discrepancies so that we will have a fully accurate record for purposes of the summary judgment motion in these cases.

Sincerely,

Robert Chanin
Andrew Roth
Alice O'Brien

Enclosure List of Participating Schools Showing Religious Affiliation of Each School

cc: Clint Bolick, Esq.
Edward Foley, Esq.
Marvin Frankel, Esq.

Participating Schools in the 1999 Cleveland Scholarship Program Showing Religious Affiliation of Each School

School	Religious Affiliation
1. Ascension	Catholic
2. Archbishop James P. Lyke – St. Catherine	Catholic
3. Archbishop James P. Lyke – St. Henry	Catholic
4. Archbishop James P. Lyke – St. Timothy	Catholic
5. Blessed Sacrament School	Catholic
6. Corpus Christi E S	Catholic
7. Holy Name Elementary	Catholic
8. Holy Redeemer	Catholic
9. Immaculate Conception	Catholic
10. Metro Catholic Parish – Saint Boniface	Catholic
11. Metro Catholic Parish – Saint Stephen	Catholic
12. Montessori School – Holy Rosary	Catholic
13. Our Lady of Good Counsel	Catholic
14. Our Lady of Mount Carmel	Catholic
15. Our Lady of Peace	Catholic
16. Saint Adalbert	Catholic
17. Saint Agatha – Saint Aloysius	Catholic
18. Saint Francis	Catholic
19. Saint Ignatius Elementary	Catholic
20. Saint Jerome	Catholic
21. Saint John Cantius	Catholic
22. Saint John Nepomucene	Catholic
23. Saint Leo the Great	Catholic
24. Saint Joseph Collinwood E S	Catholic
25. Saint Mark Catholic	Catholic
26. Saint Mary Byzantine	Catholic
27. Saint Mary Collinwood E S	Catholic
28. Saint Mel	Catholic
29. Saint Patrick W.P.	Catholic
30. Saint Rocco	Catholic

31.	Saint Stanislaus	Catholic
32.	Saint Thomas Aquinas – Saint Phillip	Catholic
33.	Saint Vincent De Paul E S	Catholic
34.	Saint Vitus School	Catholic
35.	Villa Montessori Center	Catholic
36.	Calvary Center Academy E S	Christian (Apostolic)
37.	Westside Baptist Christian	Baptist
38.	Golden Christian Academy	Christian
39.	Ministerial Full Day Kindergarten - Superior	Christian
40.	Second Hope Christian	Christian
41.	Covenant Kindergarten School	Christian
42.	Birchwood E S	Christian
43.	Luther Memorial School	Lutheran
44.	Saint John Nottingham Lutheran	Lutheran
45.	Saint Mark Lutheran E S	Lutheran
46.	West Park Lutheran School – Bethany	Lutheran
47.	West Park Lutheran School – Holy Cross	Lutheran
48.	West Park Lutheran School – Puritas	Lutheran
49.	Ramah Junior Academy	Seventh Day Adventist
50.	Cleveland Community Islamic School	Islamic
51.	Hanna Perkins School	Non-Denominational
52.	Marotta Montessori – Carl B. Stokes	Non-Denominational
53.	Marotta Montessori – Fruitland	Non-Denominational
54.	Marotta Montessori – Glenville	Non-Denominational

Squire, Sanders & Dempsey
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Counsellors at Law
1300 Huntington Center
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Columbus, Ohio 43215

October 19, 1999

Robert Chanin, Esq.
Bredhoff & Kaiser, P.L.L.C.
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Simmons-Harris, et al. v. Zelman, et al.,
Case No. 1:99 CV 1740
Gatton, et al. v. Zelman, et al.,
Case No. 1:99 CV 1818

Dear Mr. Chanin:

We of course will attempt to agree upon a list reflecting the religious affiliation of the schools registered to participate in the Pilot Scholarship.

I have received a communication from Clint Bolick's office indicating that Ministerial Full Day Kindergarten, Covenant Kindergarten School and Birchwood are not religiously sponsored or affiliated. We could either list them as not religiously affiliated or we could place them in a category which would reflect a dispute as to whether they were or were not.

In any event, I would not want to list the private schools without religious affiliation under a religious affiliation caption with the designation non-denominational.

There should be two separate captions, one for religiously affiliated schools and the other for schools without religious affiliation.

I believe that the list should include all schools that are registered to participate regardless of whether parents have chosen them. The extent of available choice may be relevant. Thus, we should not eliminate these schools. When we include them, we could either put them under a separate caption or have an asterisk reflecting that there are no Scholarship students currently enrolled at those schools.

I am checking the two schools you indicated were not on our list to confirm their affiliation and will be in touch as soon as that confirmation is received.

As indicated previously, if there is any dispute concerning the extent of religious affiliation with respect to a specific school, that difference could be reflected in the list. This should not stand as a barrier to your having an appropriate list when you submit your Motion for Summary Judgment.

Very truly yours,

David J. Young

cc: Clint Bolick, Esq.
Ned Foley, Esq.
Marvin Frankel, Esq.
Donald Mooney, Esq.
David Latanick, Esq.
Stephen Williger, Esq.

Squire, Sanders & Dempsey
L.L.P.
Counsellors at Law
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215

October 27, 1999

Robert Chanin, Esq.
Bredhoff & Kaiser, P.L.L.C.
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Simmons-Harris, et al. v. Zelman, et al.,
Case No. 1:99 CV 1740
Gatton, et al. v. Zelman, et al.,
Case No. 1:99 CV 1818

Dear Mr. Chanin:

I responded earlier to your request about an agreed list reflecting religiously sponsored schools. You listed two schools that weren't included before. One of them, Golden Christian Academy, has since closed. The other, Holy Rosary, is operated on property leased from a Catholic parish and does not speak in its Mission Statement of a "Catholic atmosphere." However, it is not sponsored by or affiliated with a religious organization. Thus, we would not want to categorize it as such. Again, if you believe you would want to retain the right to argue that it is religiously affiliated or sponsored, we could put it along with the others where there is a difference of view.

Sincerely,

David J. Young

cc: Clint Bolick, Esq.
Ned Foley, Esq.
Marvin Frankel, Esq.
Donald Mooney, Esq.
David Latanick, Esq.

EXHIBIT E·
1999 Voucher Program
Information Regarding Participating Schools, Religious Affiliation and Student Enrollment

Participating Schools[1]	Religious Affiliation[2]	"Continuing" Voucher Enrollees[3]	New Voucher Enrollees[4]	Total Voucher Enrollees
1. Ascension School	Catholic	28	0	28
2. Archbishop James P. Lyke-St. Catherine School	Catholic	58	52	110
3. Archbishop James P. Lyke-St. Henry School	Catholic	185	25	210
4. Archbishop James P. Lyke-St. Timothy School	Catholic	74	12	86
5. Blessed Sacrament School	Catholic	68	12	80
6. Corpus Christi School	Catholic	22	11	33
7. Holy Name Elementary School	Catholic	62	6	68

8.	Holy Redeemer School	Catholic	69	24	93
9.	Immaculate Conception School	Catholic	46	18	64
10.	Metro Catholic Parish-Saint Boniface School	Catholic	48	22	70
11.	Metro Catholic Parish-Saint Stephen School	Catholic	146	18	164
12.	Montessori School-Holy Rosary School	Catholic	8	3	11
13.	Our Lady of Good Counsel School	Catholic	107	12	119
14.	Our Lady of Mount Carmel School	Catholic	45	14	59
15.	Our Lady of Peace School	Catholic	90	22	112
16.	Saint Adalbert School	Catholic	110	24	134
17.	Saint Agatha-Saint Aloysius School	Catholic	84	26	110
18.	Saint Francis School	Catholic	89	21	110
19.	Saint Ignatius Elementary School	Catholic	101	18	119

20.	Saint Jerome School	Catholic	53	21	74
21.	Saint John Cantius School	Catholic	16	1	17
22.	Saint John Nepomucene School	Catholic	21	7	28
23.	Saint Joseph Collinwood School	Catholic	61	26	87
24.	Saint Leo the Great School	Catholic	52	7	59
25.	Saint Mark Catholic School	Catholic	13	0	13
26.	Saint Mary Byzantine School	Catholic	33	2	35
27.	Saint Mary Collinwood School	Catholic	73	22	95
28.	Saint Mel School	Catholic	66	17	83
29.	Saint Patrick School	Catholic	62	8	70
30.	Saint Rocco School	Catholic	51	15	66
31.	Saint Stanislaus School	Catholic	107	29	136
32.	Saint Thomas Aquinas-Saint Phillip School	Catholic	146	31	177
33.	Saint Vincent De Paul School	Catholic	79	27	106

34.	Saint Vitus School	Catholic	89	44	133
35.	Villa Montessori Center School	Catholic	0	3	3
36.	Calvary Center Academy School	Christian	38	16	54
37.	Second New Hope Christian Academy	Christian	168	38	206
38.	Westside Baptist Christian School	Baptist	40	4	44
39.	Luther Memorial School	Lutheran	72	12	84
40.	Saint John Nottingham Lutheran School	Lutheran	35	7	42
41.	Saint Mark Lutheran School	Lutheran	36	11	47
42.	West Park Lutheran School-Bethany	Lutheran	10	1	11
43.	West Park Lutheran School-Holy Cross	Lutheran	23	6	29
44.	West Park Lutheran School-Puritas	Lutheran	5	1	6
45.	Ramah Junior Academy	Seventh Day Adventist	57	23	80

46.	Cleveland Community Islamic School	Islamic	59	8	67
47.	Birchwood School	Non-Denominational	17	0	17
48.	Covenant Kindergarten School	Non-Denominational	2	3	5
49.	Hanna Perkins School	Non-Denominational	1	3	4
50.	Marotta Montessori School-Carl B. Stokes	Non-Denominational	0	4	4
51.	Marotta Montessori School-Fruitland	Non-Denominational	1	7	8
52.	Marotta Montessori School-Glenville	Non-Denominational	57	12	69
53.	Ministerial Full Day Kindergarten-Superior	Non-Denominational	7	15	22
54.	Ministerial Full Day Kindergarten-Brackland	Non-Denominational	0	0	0
55.	Hough Brooks Academy	Non-Denominational	0	0	0

56. Lewis Little Folks School	Non-Denominational	0	0	0
TOTAL		2990	771	3761

Source Notes for Exhibit E

1. Participating Schools

The List of schools participating in the 1999 Voucher Program is taken from the list produced by the State of those schools (see Exhibit B(2)), as modified in two respects. First, one school – the Ascension School – has been included as a participating school on the basis of the State's representation that the school is currently participating in the Voucher Program. See Exhibit D, Letter of Roger F. Carroll to Robert H. C[illegible]n dated September 29, 1999. Second, two schools – th[illegible]ic School of the Oasis ("Islamic School") and the Golden Christian Academy – have been omitted from the list of participating schools based on the State's representation that the Islamic School is no longer participating in the Voucher Program, see id., and the representation of the Hanna Perkins Intervenors/Defendants that the Golden Christian Academy has been closed. See id., Letter of David Young to Robert H. Chanin dated October 27. 1999.

2. Religious Affiliations

The religious affiliations of participating schools is taken from the lists reflecting those affiliations produced by the Hanna Perkins Intervenors (see Exhibit C) as modified in three respects. First, the religious affiliation of schools with multiple campuses – e.g., Metro Catholic Parish at Saint Boniface and Saint Stephen – has been listed separately for

each school campus. Second, the Montessori School Holy Rosary, which the Hanna Perkins Intervenors/Defendants contend is not religiously affiliated, see Exhibit D, Letter of David Young to Robert H. Chanin dated October 27, 1999, has been listed as a Catholic school based on its self-identification as such in its mission statement, see Exhibit I(9), as well as to the State, see Exhibit B(1) and B(3). Third, four schools initially identified by the Hanna Perkins Intervenors as religiously affiliated – Ministerial Full Day Kindergartens at Brackland and Superior, Covenant Kindergarten School, and Birchwood School – have been listed as non-denominational schools based on the documents received from those schools as well as subsequent correspondence received from the Hanna Perkins Intervenors/Defendants and the State. See Exhibit D, Letter of David Young to Robert H. Chanin dated October 19, 1999; id., Letter of Roger Carroll to Robert H. Chanin dated September 29, 1999.

3. "Continuing" Voucher Enrollees

The number of students attending a participating school under the 1999 Voucher Program who previously attended that school under the 1995 Voucher Program is taken from Exhibit B(5).

4. "New" Voucher Enrollees

The number of students attending a participating school under the 1999 Voucher Program who did not participate in the 1995 Voucher Program is taken from Exhibit B(6).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DISTRICT

DORIS SIMMONS-HARRIS, et al.,	:	
Plaintiffs,	:	Case No. 1:99 CV 1740
	:	
v.	:	Judge Oliver
	:	Magistrate Judge
DR. SUSAN TAVE ZELMAN,	:	Perelman
Defendant,	:	
	:	
and	:	
	:	
HANNA PERKINS SCHOOL, et al.,	:	
Intervening Defendants.	:	

SUE GATTON, et al.,	:	
Plaintiffs,	:	Case No. 1:99 CV 1818
	:	
v.	:	Judge Oliver
	:	Magistrate Judge
DR. SUSAN TAVE ZELMAN, et al.,	:	Perelman (CASES)
Defendants,	:	
	:	
and	:	
	:	
HANNA PERKINS SCHOOL, et al.,	:	
Intervening Defendants.	:	

STIPULATION

The parties stipulate as follows:

1. The Plaintiffs and Intervenor/Defendants stipulate that the handbooks, mission statements and Scholarship Program brochures produced by the schools participating in the Cleveland Scholarship Program are authentic, speak for themselves, have been made available to the parents of the Scholarship students and are not false or misleading. Some of these documents, however, may not accurately reflect admission standards that had to be revised to comply with **R.C. § 3313.977**.

2. The Defendants reserve the right to produce evidence concerning the students and teachers, demographics, secular educational mission and achievements and Scholarship pupil enrollment at these schools.

3. In lieu of stipulating to these facts, counsel for Defendant Zelman has provided the attached correspondence.

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Attorney General
Betty D. Montgomery

October 6, 1999

VIA FACSIMILE

Honorable Marvin E. Frankel
Kramer, Levin, Naftalis & Frankel, L.L.P.
919 Third Avenue
New York, NY 10022

Robert H. Chanin, Esq.
Bredhoff & Kaiser, P.L.L.C.
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Dear Judge Frankel and Mr. Chanin:

We are in receipt of Mr. Mooney's proposed Stipulation between Plaintiffs and Intervenor/Defendants. In lieu of our signing this Stipulation, we hope that you will find the following representations satisfactory to avoid the need for depositions in this case:

1. The State is in no position to contest the authenticity of Mission Statements provided by Defendant/Intervenors.

2. Nor is the State in a position to know whether or not a private school's Mission Statement accurately reflects the internal operations of the school, except to the extent that a Mission Statement may contradict information that a

school provides to the State pursuant to its legitimate and secular regulation of the school.

3. The State also is in no position to know whether or not a school provides its Mission Statement to parents of students who participate in the Scholarship Program, except to the extent that a school may provide its Mission Statement as part of any obligation the school might have to provide information about itself to Program participants.

That said, we should let you know that we consider it inappropriate to invoke the coercive power of the federal judiciary to inquire into the extent to which a religiously affiliated private school engages in religious practices or religious instruction. As long as any private school (whether religiously affiliated or otherwise) serves the secular purposes of the State's compulsory education laws and its Scholarship Program – teaching students reading, math, civics, and so forth – it should be no business of the State's (or the federal judiciary's) whether or how much religious activity or instruction also occurs at the school. Any such official inquiry into private religious affairs seems out of keeping with the spirit of the "No Religious Test" clause of the Constitution, as well as the First Amendment.

We look forward to your response to this letter.

Sincerely,

Edward B. Foley
State Solicitor

cc: Clint Bolick
David Young

Appendix OO

ASCENSION SCHOOL

Excerpts from Ascension Family Handbook 1999-2000

Philosophy of Ascension of Our Lord School

We, the members of Ascension School, believe that every child is a unique gift created by God, redeemed in Jesus, and filled with the Holy Spirit. We believe each child has an eternal destiny as invited by a loving God, and that as part of the community of faith, we are called to nurture growth and development in that child. The entire school community, in communion with the full cooperation of the parents, parish leadership and staff, and all involved in the educational process, do everything in their power to provide the children with a well-planned instructional program which brings alive the love of God and the love of learning in each one. We believe it is by proclaiming, celebrating, and living the message of Jesus that children discover meaning and direction in life; that they are enabled to face the multiple challenges of life; that they develop those virtues and habits of the heart and mind required to be of effective service to others. In this way they are encouraged to have a faith that is "living, conscious, and active."

We endeavor to provide each child with a well-rounded curriculum that touches all aspects of the human person. We encourage in each a desire to excel to one's highest potential, to love the Lord and His teachings, and to serve others. We strive to form an authentic Christian community that models those virtues and characteristics we hope to affirm in others.

(Page 4 of Handbook)

Religious Instruction

The religious instruction of the children is the major focus of the curriculum at Ascension. Religion classes are taught on a daily basis. The National Catechetical Directory is the norm for this instruction along with the curriculum guidelines from the Office of Catholic Education/Office of Catechetical Services. Students attend Mass as a school religious function. Parents are invited to participate in these liturgies as they are able. Mass is celebrated with various levels or the whole school on Wednesdays at 8:30 A.M. During those weeks in which there is a holy day of obligation, the students attend 8:30 A.M. holy day Mass instead of the Wednesday Mass.

Prayer is an important part of each day and is encouraged throughout the day. In addition to daily religious lessons that teach the basics of faith, students participate in special projects during liturgical seasons in order to increase their understanding and love of our Catholic traditions and provide them with opportunities to reach out to others in service and care.

(Page 22 of Handbook)

ARCHBISHOP JAMES P. LYKE – SCHOOLS OF ST. CATHERINE, ST. HENRY, AND ST. TIMOTHY

Excerpts from Archbishop Lyke School Handbook
For St. Catherine, St. Henry, and St. Timothy Schools

Mission Statement

Archbishop Lyke School, founded on the heritage of the Catholic faith and the spirit of Archbishop James Patterson Lyke, will, with the help of parents and community, educate our children in Gospel and moral values by developing their academic, spiritual, and emotional potential in a safe and caring environment that fosters faith, respect, responsibility, and challenge.

(Page 1 of Handbook)

Educational Objectives

1. Providing religious instruction and opportunities for participation in prayer and the liturgy.
2. Assisting each student to reach academic potential appropriate to his/her age, grade and God-given abilities.
3. Imparting the message of Jesus Christ in such a way so as to enable all to live the Gospel message.
4. Aiding the students to become competent in their decision-making and assisting them in the development of a sense of a responsibility to self and others.
5. Creating in each child a Christian awareness of his/her responsibility to serve others through involvement in a diversified society.
6. .....

(Page 2 of Handbook)

Christian Formation

Religion classes focusing on the Catholic Faith are taught daily for at least thirty minutes in all grades. A Christian attitude and response is expected of all students, and weekly worship at the Church of their professed faith is expected. Students are involved in service projects throughout the year. Students are exposed to prayer throughout the day, and they participate in prayer services and Liturgies in Church.

(Page 12 of Handbook)

BLESSED SACRAMENT SCHOOL

Blessed Sacrament School Handbook

Mission Statement for Blessed Sacrament School

Be it known to all who enter here that Christ is the reason for this school. The unseen, but ever present, teacher in its classes, the model of its faculty, the inspiration of its students.

All who enter here will use their lessons of love, peace, and understanding to reach their individual academic potential and become responsible citizens within their community.

Religious Program

In keeping with the philosophy of our school, the truths of Catholicism are presented daily in many and varied ways:

- Formal religion classes are held daily.
- Children plan and participate in worship services.
- Prayer is said daily in the classroom.
- Mission projects and contributions designed to help those less fortunate (both in our country and foreign nations) are encouraged.
- Where appropriate and relevant, the academic program reference is made to Christian teaching.
- Motivation for proper conduct and interpersonal relationships finds its reference in the example of Christ.
- The discipline code is rooted in a respect for the rights of each individual as a unique and special child of God.
- Christianity cannot be lived only five days a week! We are only partners with you, the parents, in all educational endeavors, including the spiritual development of your children. You are urged to be an example for your

children in Christian living and be active members of your religious community.

(Page 3 of Handbook)

Mass

By the celebrating of the Eucharist, all members of the parish are made one in Christ. An appreciation and understanding of the Mass grows through participation. Therefore, it is expected that all students attend a weekly school Mass and attend special Masses on Holy Days. Students may be asked to plan and participate in the school liturgies during the school year as part of their religious understanding of the Catholic faith.

(Page 18 of Handbook)

CORPUS CHRISTI SCHOOL

Excerpts from Parent/Student Handbook 1999-2000 School Year

School Philosophy

The primary purpose of Corpus Christi is to teach the Gospel message of Our Lord, Jesus Christ, to build a Catholic Christian community and to prepare the students for Christian service.

With this in mind, Corpus Christi School, in cooperation with the Parents, the community and the Church, strives at the total development of the student's spiritual, intellectual, moral, social and physical growth. It endeavors to promote Christian attitudes and practices which will enable the students to adapt to our ever-changing society.

Goals

1. To communicate the Gospel message of Jesus Christ through students' prayer life, Sacramental life, moral leadership and active participation in the worshipping Community.
2. To assist students in their priorities in living a Christ-centered life.
3. To empower students to participate as Disciples of Jesus' Mission of transforming our world into a place of peace, justice and love.
4. To provide opportunities for students to develop responsibility, leadership and service based on Gospel principles.
5. To promote respect for self, others and the environment.
6. To motivate students to develop their knowledge and skills in the prescribed academic subject areas of the Curriculum.

7. To encourage and promote life-long skills.

(Page 1 of Handbook)

Religious Education

Because the family is the first to provide an atmosphere of love of God and neighbor by following the teachings of the Church, the School aims to continue and nurture these same values.

Formal Religion classes are taught in all Grades K-8. One half hour is given daily to Catholic Doctrine instruction or liturgy. Kindergarten has a shorter time period daily. Students in grades 5, 6, 7, and 8 will participate in the 8:00 a.m. daily mass beginning October 1st unless a school mass is scheduled.

(Page 8 of Handbook)

Prayer

Besides the Mass, the children will participate in other paraliturgical services. These prayer services enable the students to participate in different types of prayers. Prayer will be offered daily in the classroom in a variety of ways.

(Page 8 of Handbook)

HOLY NAME ELEMENTARY SCHOOL

Excerpts from Handbook for Parents and Students

Philosophy

Holy Name Elementary School Philosophy is based in the Catholic Philosophy of Education. We consider the whole child in the educational program as we follow the directive "To Teach as Jesus Did."

(Page 1 of Handbook)

Curriculum

The school follows the Diocesan Curriculum for all subjects including Religion.

Religion

Holy Name is a Catholic School. Parents who choose to have their children enrolled here must realize that Religion is part of their ordinary day.

(Page 6 of Handbook)

HOLY REDEEMER SCHOOL

Excerpts from Parent-Student Handbook

Mission Statement

Holy Redeemer Parish School is a Catholic School committed to sharing the good news with all people while instilling a sense of knowledge and love of the Catholic faith and traditions. Together we strive for excellence in education.

Goals and Objectives

Holy Redeemer Catholic School educates students to:
Strengthen and develop personal love for Christ by...

- Growing in a meaningful prayer life and understanding of Catholic beliefs, worship and moral teaching
- Forming a Christian conscience and developing decision-making skills based on Gospel values
- Developing positive attitudes of concern and respect for others
- Becoming involved in opportunities for Christian Service

(Page 1 of Handbook)

Curriculum

Religious Education Program

Religious classes are taught on Monday through Thursday for at least thirty minutes. On Friday of each week, students attend Mass at 8:00, as well as on Holy Days and special occasions. Parents are invited to celebrate these liturgies with us.

(Page 9 of Handbook)

IMMACULATE CONCEPTION SCHOOL

Excerpts from Parent Handbook

Philosophy of Catholic Education

Immaculate Conception School is an urban Catholic elementary school located in the city of Cleveland holding the following beliefs:
WE BELIEVE that we exist to proclaim and empower those we touch with the Gospel of Jesus
WE BELIEVE that because our greatest richness is our diversity of religious and cultural backgrounds, we strive to develop a sensitivity to and a recognition of the unique gifts that form us.

(Page 2 of Handbook)

Philosophy

To show that the message of Christ as proclaimed in the Gospel is accepted, we believe that the student should:

1. Learn the Christian doctrines and truths.
2. Commit himself/herself to the values of the Gospel.
3. Develop an appreciation of the worth and dignity of every person, including himself/herself.
4. Use religious truths to access the worth of other knowledge.
5. Give witness to the truths of the Gospel in his personal life.

To foster Christian community among the people with whom the student comes in contact, we believe that the student should:

1. Work to create an atmosphere of love within the students family.
2. Develop Christian fellowship with peers and teachers.
3. Participate actively in liturgical celebration.
4. Participate in the community life of the parish.

(Page 20 of Handbook)

Educational Goals

The student should:

1. Deepen personal awareness of God through directed experience.
2. Develop an appreciation of the personal worth and dignity of every person and the purpose of all creatures in the scheme of creation.
3. Commit oneself to a set of Christian values.
4. Acquire and use knowledge to make sound and independent judgements based on Christian principles.
5. Be a witness for Christ through growth in home life, in the parish community, in participation in the sacramental life of the Church and service to humanity.

(Page 21 of Handbook)

Religion

In order to instill in the students a greater awareness of their spiritual life, religion is incorporated into all areas of the curriculum. Various liturgical services are held both in the classroom and in the Church. In addition, students attend Mass once each Month and on all Holidays. Provision is made for Confession at stated times.

(Page 24 of Handbook)

METRO CATHOLIC PARISH – SCHOOLS OF SAINT BONIFACE & SAINT STEPHEN

Excerpts from Family Handbook revised 1999

Mission Statement

Sharing in the mission of Jesus: that all may be one, Metro Catholic Parish School is a family-oriented school that strives to educate the whole child, to evangelize and bring hope to families of the near west side through education and related family programs.

(Page 1 of Handbook)

Philosophy of Metro Catholic Parish School

We, the members of Metro Catholic Parish School, believe that every child is a unique creation of God, our loving Father, is redeemed through Jesus, is filled with the Holy Spirit and has an eternal destiny. We are committed to each child's total education: in spirit, in body, in mind, in morals and value, in emotions, in social interactions. We believe that by proclaiming, celebrating, and living the message of Jesus, we can lead each child to a deeper sense of self-acceptance, and acceptance of God and others. We aim in Metro Catholic Parish School to integrate religious truths and values with the rest of life so that our children develop a sense of commitment to parish community, peace and justice, and respect for life in a very distinctly and obviously Catholic way. Therefore, the educational program at Metro Catholic Parish School is directed toward:

1. Aiding the student in becoming a knowing and loving Christian by:

a. Providing religious instruction in keeping with the child's intellectual capacity.
b. Providing opportunities for meaningful participation in the liturgy and for frequent reception of the sacraments.

c. Providing an environment of peace and justice that fosters growth of the Christian community.
d. Providing motivation and opportunity for Christian service in the home, school, and world community.
e. Providing motivation and opportunity for parent involvement to insure that continuation and development of spiritual growth in the total life experience of the child.
f. Providing motivation for the deepening involvement of the parish community to which the student belongs.

(Page 1 of Handbook)

Instructional Program

The religious instruction of the child is the major focus of the curriculum of Metro Catholic. Prayer is an important part of each day and is encouraged throughout the day. In addition to daily religious lessons that teach the basics of faith, each child has the opportunity to attend Mass and receive the sacraments. During liturgical seasons other projects are undertaken to increase understanding and love of our traditions and faith.

(Page 3 of Handbook)

MONTESSORI SCHOOL – HOLY ROSARY

Excerpts from Operational Handbook

The Mission Statement of the Montessori School at Holy Rosary

The Montessori School at Holy Rosary is dedicated to providing outstanding educational instruction by discovering and awakening children's emerging potential and carefully cultivating the development of their innate talents and abilities. We are vitally committed to providing excellence in education to the children of Greater Cleveland through the philosophy and techniques of the Montessori method, provided in a Catholic atmosphere, enriched by the values of love, respect, and justice. The Montessori School at Holy Rosary is established to serve all children, regardless of race or creed, and is uniquely devoted to enhancing the vitality of Holy Rosary Parish and the Little Italy community.

(Page i of Handbook)

OUR LADY OF GOOD COUNSEL SCHOOL

Excerpts from Our Lady of Good Counsel School Student – Family Handbook 1996-1997

PHILOSOPHY

Our Lady of Good Counsel School is a Roman Catholic School in the tradition of the Missionaries of the Precious Blood. It shares the mission of the Church to reveal Christ to the world through evangelizing, participating, caring and celebrating the Gospel of Jesus.

Recognizing that each student is a unique individual, made in God's image, and worthy of respect, we strive to create an environment that is conducive to the spiritual, moral, intellectual, emotional, social, and physical development of each student committed to our care.

As an educational community, we strive to present a challenging curriculum that will help the students reach their full potential as Christian individuals and prepare them for living in the parish and other communities.

Our Lady of Good Counsel School believes that the students are the center of its educational mission.
This belief calls forth from the students the following responses:

1. A willingness to develop a personal relationship with Jesus Christ.
2. An active participation in the learning process so as to develop his/her own talents.
3. A growing acceptance of and sense of care and concern for others.
4. A developing sense of responsibility within various community: family, school, parish, city, nation, Church and world.

5. An openness to live the gospel values

(Page 3 of Handbook)

RELIGIOUS EDUCATION PROGRAM:

The Religious Education Program at Our Lady of Good Counsel School follows the principles and guidelines put forth in the 1979 National Catechetical Directory SHARING THE LIGHT OF FAITH. Pope John Paul II's letter CATECHESIS IN OUR TIMES, and the GUIDELINES FOR RELIGIOUS EDUCATION by the Diocesan Office of Catholic Education.

Total Religious instruction is the major focus of the educational program at Our Lady of Good Counsel School. All students participate in the daily Religion classes that stress both the Doctrinal elements and the age-appropriate learning experiences for each grade level. This learning is reinforced by the Pastoral Staff when they visit the classrooms. Lessons learned in the formal Religion classes are purposefully carried over into all subject areas.

Prayer is a very important element intertwined within the teachings at every level. Throughout the program, students will not only be exposed to our traditional Catholic prayers, but will also be taught different methods of praying in order to deepen their own relationship with God as they mature in their faith.

(Page 12 of Handbook)

OUR LADY OF MOUNT CARMEL SCHOOL

Excerpts from Our Lady of Mount Carmel Parish School
Parent – Student Handbook 1999-2000

Mission Statement

Our Lady of Mount Carmel Parish School is a community dedicated to the Christian and academic development of the child. In light and spirit of Christ the redeemer, we promote the Christian family life according to the Roman Catholic and Mercedarian Tradition.

Our School emphasizes high expectations for spiritual and academic excellence as well as the social and physical well-being of each child. Catholic morals and ethical values are paramount in their holistic development.

Our Lady of Mount Carmel Parish School believes that the Redeeming presence of Christ in the Eucharist is the center and reflection of our lives. Our mission as Catholic educators is to guide our students to live their lives according to the example of Mary, our Mother of Mercy, and her son, Jesus Christ. We strive to ensure that this mission transcends the classroom and is reflected in our lifestyles.

Our Lady of Mount Carmel Parish School recognizes that differences exist in each child in the areas of development, motivation, aptitude, and achievement. Therefore, we commit ourselves to developing programs, learning theories and instructional strategies that will be effectively utilized to maximize learning time. It is our goal to develop leaders who will contribute theirs talents to the Church, the community, the country, and the family of nations.

(Page 4 of Handbook)

Religious Education

Roman Catholic Doctrine is an essential part of Our Lady of Mount Carmel Parish School. Catholic Doctrine is presented as a living experience of knowledge and belief rather than just another subject. Students enjoy the opportunity to participate in weekly school Masses, Eucharistic Devotions, and the Sacrament of Penance as part of their religious education. This is in support of the parents'/guardians' privilege and responsibility of sharing the Faith. Our Lady of Mount Carmel Parish School requires family participation at special Liturgical Events celebrated throughout the school year. Attendance is part of the student's integral spiritual education. A special Family/School Mass is celebrated every First Sunday of the month at 11:30 a.m. Roman Catholics are expected to take active participation, while Non-Catholics participate by their very presence.

(Page 13 of Handbook)

OUR LADY OF PEACE SCHOOL

Excerpts from Parent Handbook 1999-2000 School Year

Mission Statement

Our Lady of Peace School is a Catholic elementary school serving the Cleveland community for over seventy years. Parents, teachers, students and parishioners work together in a loving, supportive family environment.

We provide the finest education by using proven academic techniques rooted in the teaching of Jesus Christ.

Our goal, under the guidance and protection of Mary, the mother of God, is to continue to develop courageous and committed Christian leaders.

(Page 1 of Handbook)

Statement of Philosophy

We the faculty of Our Lady of Peace School believe that as professional educators, we are here in a joint venture with the parents, who are the primary educators, and the community, in preparing each child to become mature, educated Christians.

This education should be a harmonious development of the spiritual, moral, physical, aesthetical, social and intellectual qualities. Under our guidance we hope that each child will develop a spirit of reverence for God, self, family, associates and all mankind; that each child will be inspired with a personal love for, and the need of God and will make this love for God more effective through the practice of religion in word and deed and especially through participation in his or her own faith community.

It is our goal to guide each child in the attainment of a knowledge of self. Talents will be nurtured, developed and used for the honor and glory of God and the physical well-being of the environment and the community.

(Page ii of Handbook)

Religious Formation

All students attending Our Lady of Peace Catholic School participate in religion lessons and liturgies including Mass, prayer services and other religious gatherings. Students have the opportunity to plan the liturgies and participate in them according to their abilities. ALL students MUST attend.

(Page 4 of Handbook)

SAINT ADALBERT SCHOOL

Excerpts from Student Handbook 1999-2000

The Philosophy of St. Adalbert School

St. Adalbert is a Christ-centered educational institution, a "Jesus School." All work consistently to promote an atmosphere wherein children can feel relaxed, loved, aware of Christ's presence, and are able to grow in the ability to cope with life as mature, responsible individuals. It is a place "to be," a place of peace which will enable students to build self-appreciation, responsible behavior, and get to know a personal loving God. It is a community which cares, understands, and gives. Therefore, it is continually growing in Christianity, the Catholic Faith, and Black awareness. As family, we witness the present of Christ among us, the message of Jesus is taught, and service to others is shown here. The school working with the family builds on gospel values and principles. St. Adalbert is a place where children are free to develop physically, spiritually, psychologically and emotionally, and become open to all the possibilities within them.

(Page 1 of Handbook)

SAINT AGATHA – SAINT ALOYSIUS SCHOOL

Excerpts from St Agatha – St. Aloysius School Parent Student Handbook

MISSION STATEMENT

It is the purpose of St Agatha – St. Aloysius School to proclaim the message of the Gospel, to foster the growth of Christian Community, and to involve students in service to other. The school integrates religious truths and values with knowledge and skills during instruction and its activities in order to provide a quality education for its students.

The Catholic School exists to serve the educational mission of Christ and the Catholic Church through its evangelizing and catechizing ministry. As a Community of Faith, the school is called to impart the message of Jesus, form community, and to inspire service to our sisters and brothers.

Students in our school have the opportunities for the integration of faith, life and culture. We are committed to providing the environment and the program in which our students learn:

- Faith which they can relate to their life in the world and which affirms belief in the meaning of life and our relationship to God and to the world;
- Catholic teaching, tradition and spirituality;
- Deep respect for the intellectual values of knowledge, truth and wisdom;
- Appreciation and sensitivity for the gifts, culture and environment from which they come and respect the culture of others;

- Social awareness that impels to action on behalf of justice;
- Skills for community building;
- Personal growth in an atmosphere that fosters self-discipline;
- Responsibility for being contributing members of the local, national, and world community.

Both learning and growing in faith are essential activities in a Catholic school. Each student has the opportunity to develop their gifts and to become a more profoundly religious person because of education in our school.

(Page 2-3 of Handbook)

RELIGIOUS PROGRAMS

RELIGION

A 30 minute religion lesson is taught to each class daily. Lessons include content reading to traditional Catholic doctrine, moral behavior, devotions, scripture, prayer and liturgy. Prayer together begins each morning and ends each day. Children learn from the example of fine Catholic and Christian teachers the value of faith, community and respect of life. All students attending St Agatha – St. Aloysius School must participate in these religious activities.

(Page 10 of Handbook)

SAINT FRANCIS SCHOOL

Excerpts from Parent-Student Handbook 1999-2000

MISSION STATEMENT

St. Francis Parish School
is a Catholic school
which promotes Catholic values, traditions
and morals.
We exist for Catholics
and for those seeking Gospel-centered
education.

We are a Catholic School which promotes Catholic values, traditions and morals. We exist for Catholics, for others seeking an alternative way of education, and as an evangelizing agent of the Church.

(Page 1 of Handbook)

RELIGIOUS EDUCATION POLICY

Students are required to participate in religion classes, prayer, and worship held during the school day. We model mutual respect for all religions and expect the students to do the same. We encourage all students to be active members of their churches. All students are encouraged to live according to the teachings of Jesus.

(Page 4 of Handbook)

SAINT IGNATIUS ELEMENTARY SCHOOL

Excerpts from Home-School Handbook

"All those involved in a Catholic School, parents, pastor, teachers, administrators and students, must earnestly desire to make it a community of faith which is indeed living, conscious and active."

(Page 1 of Handbook)

Mission Statement

St. Ignatius Elementary School exists for the development of the whole person – the social, emotional, physical, cognitive and spiritual person. It is the mission of our school to nurture and guide our students in faith, beliefs, knowledge, and skills, so that the community as a whole may benefit from the students' moral guidelines, responsibility and knowledge instilling a sense of hope for the future while striving for excellence in education.

(Page 2 of Handbook)

Philosophy

The staff and administration of St. Ignatius desire that all student experience success in their academic pursuits in a climate of love and Christian community. We wish to inspire within each child the desire to become what he/she is potentially capable of being and to provide opportunities for understanding of self, others, the world, and our Creator. This goal requires combined home/school effort. In order to achieve this goal, we must have standards and procedures which provide the framework for maximum learning to occur.

(Page 2 of Handbook)

SAINT JEROME SCHOOL

Excerpts from Saint Jerome School Parent and Student Handbook 1999-2000

Saint Jerome School Philosophy

At St. Jerome School, we are educating God's noblest creation toward choosing a Christian life. In order to accomplish this end, we believe that:

FAITH must dominate the entire educational process so that the child can make decisions according to Catholic values and choose to lead a Christian life.

(Page 1 of Handbook)

Educational Goals

Catholic education is intended to make faith become living, conscious, and active through the light of instruction...To teach as Jesus did.

We believe that:

- The Gospel message is at the core of our educational program, and as Catholic educators, we are to transmit the values of the Gospel message to those we serve
- The teaching of academic studies and skills is fully integrated with Catholic religious values and truths.
- The moral training of the child is begun at home by the parents and further guided within the Catholic school and gradually leads to a mature self-discipline.

We believe that:

- A Catholic community should foster in each child a sense of responsibility to others
- As each child grows in respect for self, that child will manifest by words and actions, respect for others

We believe that:

- Serving others is really sharing our time, talents and ourselves
- Catholic leadership grows through responsible service

(Page 1-2 of Handbook)

Religion

St. Jerome School is a Catholic School. <u>All students</u>, regardless of religious background, receive an average of 30 minutes per day of religion instruction in the Catholic faith, inclusive of class or school Masses. Prayers begin and end each day. Weekly Masses are arranged in which students participate and share in the planning. Other penance and prayer services are provided. Parents are invited to share in these celebrations with their children.

<u>Parents should consider it a grave responsibility to see that their children attend Church regularly on Sunday</u>. Church envelopes are given to the children to help them develop the habit of supporting their Church.

(Page 6-7 of Handbook)

SAINT JOHN CANTIUS SCHOOL

Excerpts from St. John Cantius School Student-Parent Handbook

<u>Philosophy of Saint John Cantius School</u>

St. John Cantius School, being an integral part of the Church of the Roman Catholic Diocese of Cleveland, strives to integrate the knowledge and practice of religious truths and values with the knowledge and skills of academic education.

Catholic Education at St. John Cantius School shares the Church's four-fold mission

1. Message
2. Community
3. Service
4. Worship

St. John Cantius School hopes to enable the students to learn to creatively exchange their experience and ideas, to think critically, and be responsible and accountable for their own actions.

St. John Cantius Schools aims to maintain and strengthen Christian moral and social values; to guide the students' individual, religious, psychological, intellectual and physical growth and development, with the help and cooperation of the parents who are the primary educators in the formation of these children.

In short, St. John Cantius School aims, with the help of Almighty God, to prepare real Christians, free and

responsible citizens, and socially mature individuals who will strive to:

1. Proclaim the message of the Gospel
2. Build a Parish-School community
3. Give of themselves to the service of others with Joy, Hope and Love.

(Page 2 of Handbook)

SAINT JOHN NEPOMUCENE SCHOOL

Excerpts from 1999-2000 Handbook

St. John Nepomucene School Mission Statement

We are committed to giving students the opportunity to grow in faith and academic excellence by their participation in liturgical and sacramental programs and by the development of their individual abilities and talents through diversified learning and extra-curricular activities which enables them to assume responsibility to family, Church and community.

(Page 1 of Handbook)

St. John Nepomucene School Philosophy

St. John Nepomucene School, in partnership with the Church, the St. John Nepomucene Parish community, our state and the family, provides a Catholic-Christian education through which the Gospel values are presented, lived and fostered.

The administration, faculty, and staff strive to:

- Provide a community and curriculum which meets the needs of the whole child,
- Model and develop leadership and service,
- Help students integrate religion through the values in their daily lives,
- Continue the tradition of academic excellence.

Objectives

St. John Nepomucene Catholic School educates students to:

Strengthen and develop personal love for Christ by...

- Growing in meaningful prayer life and understanding of Catholic beliefs, worship, and moral teaching,
- Forming a Christian conscience and developing decision-making skills based on Gospel values,
- Developing positive attitudes of concern and respect for others,
- Becoming involved in opportunities for Christian service.

(Page 2 of Handbook)

Curriculum

Religious Education Program:

Religion classes are taught daily for at least 30 minutes in all grades.

(Page 11 of Handbook)

SAINT JOSEPH COLLINWOOD SCHOOL

Excerpts from Parent Handbook

Objectives

The role of our school is based upon these fundamental beliefs. The mission of our Catholic School serving the African-American community is a mission shared with all of our Catholic schools. Catholic education is a missionary of our local Catholic parishes. The Catholic School exists to serve the education mission of Christ through its evangelization and catechizing ministry. As a Community of Faith, the school is called to impart and nurture the message of Jesus, form community and inspire service to our sisters and brothers.

WE BELIEVE THAT ST. JOSEPH SCHOOL IS:

An INSTRUMENT

- By which WE AWAKEN the child's awareness of his relationship to God,
- By which WE DEVELOP faith values in the child through the teachings of Catholic/Christian doctrine based on Gospel values;
- By which WE PREPARE the child to successfully attain his destiny in the world to come, and to achieve success in growing and working toward a harmonious existence within a pluralistic society,
- By which WE COMMIT ourselves to create a setting within which both academic and moral education can occur.

(Page 1 of Handbook)

ST. LEO THE GREAT SCHOOL

Excerpts from Handbook

Philosophy of Saint Leo the Great School

Our philosophy begins with faith; faith in God, our Creator, faith in Jesus Christ, His Son; and faith in the Holy Spirit, our guiding light. The development and nurturing of this faith are brought about by following Christ's teachings and sharing His message through our daily actions.

We believe education begins with the family and is supported by the school and the parish community. The school shares in the family's responsibility of education by providing the structure for the student to grow in the love of God, to develop the unique talents that he/she possesses, and to learn the importance and responsibility of contributing and sharing as a member of the community.

We believe it is important for the students to develop a sense of self-worth and self-discipline, as well as a respect and love for others. Included with this respect and love is an awareness of the cultural differences among people, and a willingness to appreciate these differences in the light of oneness in God's family.

We believe that through the cooperation of the family and the school, each student may be able to realize a deep concerning for his/her brothers and sisters, thereby forming a personal response in truth, justice, and love that will guide him/her throughout life.

(Page 1 of Handbook)

Faculty and Curriculum

All members of the faculty of St. Leo the Great are properly certified by the state of Ohio. The curriculum includes all subjects that are mandated by the state as well as religious instruction and regular participation in religious activities including attendance at Mass.

(Page 4 of Handbook)

SAINT MARK CATHOLIC SCHOOL

Excerpts from Handbook 1999-2000

Philosophy

St. Mark Catholic School, in partnership with the Church, the St. Mark parish community, our state and the family, provides a Catholic-Christian education through which Gospel values are presented, lived and fostered.

We believe each child is a unique person, a child of God, with individual traits and characteristics. The child has a right to a Christian education which helps develop a positive self-image, growth in the ability to make strong moral judgments, and a spirit of respect and generosity toward others.

(Page 1 of Handbook)

Our Mission

Therefore, in our school the administration, faculty, and staff will work together to:

- Create a climate of learning in which each individual child can progress and mature spiritually, intellectually, psychologically, and physically, at his or her own rate while integrating faith into their daily life.

(Page 1 of Handbook)

Administration Procedures

Admissions

St. Mark School is a Catholic elementary school intended to provide a quality Catholic education to children of families who are registered and active members of St. Mark parish. Non-active members and non-parishioners will be considered for admission if space and financial considerations permit. Applications for St. Mark School will be considered on the basis of the following guidelines.

(Page 7 of Handbook)

SAINT MARY BYZANTINE SCHOOL

Excerpts from St. Mary Byzantine Catholic School
Handbook of School Policies and Guidelines
1999-2000

Philosophy and Goals:

We believe that St. Mary Byzantine Catholic School is an expression of the mission to teach entrusted by Jesus to the Church he founded.

Through education we strive to prepare our students to hear the message of hope contained in the Gospel and to base their love and service of God and others upon this message.

Students are instructed in human knowledge and skills as well as in religious truths and values. Learning and living are integrated in the light of faith as experienced by our Byzantine Catholic traditions in order to permit each student to become a mature and responsible Christian fully utilizing his/her God-given capabilities.

We proclaim the teachings of Christ in order to build a life of faith in each student, to promote a spirit of Christian community in order to strengthen a sense of belonging, and likewise, to lead students to realize the need they have to serve their fellow human beings.

We respect the individuality of each child and accept the responsibility to develop each child's intellectual faculties according to his/her abilities insofar as we are capable of doing so.

In order to respond to and proclaim the Gospel message, our students should:

1. Develop a sense of religious values
2. Grow in personal prayer life
3. Form Christian attitudes
4. Develop a love and appreciation of the practices and spirituality of our Byzantine Catholic Tradition

(Page 1 of Handbook)

Religious Instructions:

In keeping with our intention of developing religious and moral values in accordance with Christian Catholic teachings, every student participates in daily religion classes. Likewise, in order to make our students more aware of their obligation to show concern for others, they are sometimes asked to give their time and efforts in service for others through various works and projects. They are also called upon to worship at Liturgy on feast days and other special occasions. Each student participates in daily prayer within the classroom community. Opportunities to share in penance services and receive the sacrament of reconciliation are provided at intervals throughout the year. All student enrolled in our school must participate in our religious instruction program.

(Page 5 of Handbook)

SAINT MARY COLLINWOOD SCHOOL

SCHOOL PHILOSOPHY

We, the faculty and staff at St. Mary School, affirm the dignity and worth of each child. We believe each child is created by God in His Image, is redeemed by Jesus Christ, and is called by Baptism into his family, the Church. We also affirm the role of parents in the formation and education of their children.

With the mission entrusted to us through education, we seek to prepare our students by hearing the message of hope contained in the Gospel, by proclaiming that message to others, and translating that proclamation into action. The educational mission of our school is an integrated mission encompassing these three basic dimensions, and the following specific objectives:

1. To provide excellence in the quality of education; to support a curriculum that is flexible enough to embrace all of life and life's experiences, and to employ a variety of techniques and processes to address the needs of different learning styles.

2. To model as staff members the virtues of justice, peace, and mercy in relationship with one another, so as to help our students live justly, mercifully, and peacefully as individuals; to help implant these virtues for use in adult life.

3. To establish the value of Christian truth and assist the student to approach this truth.

4. To install self-discipline and the ability to make appropriate decisions.

5. To establish and nurture a real relationship with Jesus through sacramental life, prayer, study, and serving others through everyday school life.

(Page 2 of Handbook)

SAINT MEL SCHOOL

Excerpts from Saint Mel School Handbook 1999-2000

St. Mel School Mission Statement

In partnership with our parents, parish and neighboring community, the faculty, staff and priest(s) of St. Mel School, believe that our students can achieve high academic, social and moral standards. Our school exists to educate our students to grow spiritually and intellectually to become committed Christians who will recognize the dignity and worth of every human being. Through our curriculum, we will reflect the faith and knowledge needed to ensure that every student receives the opportunity to achieve. We, the staff and school community of St. Mel are eager to provide our students with a total educational experience which is centered in the principles and values of our Catholic Faith. We will develop young people who will be responsible, caring citizens who will face the future with confidence.

(Page 4 of Handbook)

St. Mel Vision Statement

We, the staff and school community of St. Mel, are eager to provide our students with a total educational experience which is centered in the principles and values of our Catholic Faith. We will develop young people who will be responsible, caring citizens who will face the future with confidence.

(Page 5 of Handbook)

SAINT PATRICK SCHOOL

Excerpts from Family Handbook

Mission Statement

St. Patrick School is a Catholic School in the Diocese of Cleveland, Ohio. The mission of St Patrick School is to live and teach the Gospel message. We are dedicated to the formation of youth according to our Catholic Traditions within an innovative academic environment which provides students with the opportunity to develop spiritually, academically, and socially to the best of their abilities.

Objectives of Education

1. To communicate the gospel message of Jesus.
2. To provide opportunities to build and experience a faith community.
3. To orient students to the responsibility and experience of service because of their membership in the Christian community.
4. To provide students with opportunity for growth in prayer.
5. To provide instruction in religious truths and values in such a way that they become an integrated part of the school program.
6. To develop a faculty and staff who by their presence and teaching express an integrated approach to learning and living in their lives.
7. To provide an academic program and environment conducive to the optimal development of each student.

(Page 1 of Handbook)

Curriculum
Religious Education

Religion classes are taught daily. The National Catechetical Directory is the norm. The basic text used is Loyola Press, "Christ is Our Life" series.

Throughout the year there are several opportunities where the entire student body celebrates the Mass and other liturgical celebrations together. Parents are invited to attend these liturgies which are planned by the children.

In addition to attending Mass, the children pray together in their classrooms, and participate in other para-liturgical celebrations such as Eucharistic Devotions, Stations of the Cross, and May Crowning. Children are also given opportunities for the reception of the Sacrament of Reconciliation during Advent and Lent.

Religious education in school is supplemental to the faith witness and example given by the parents at home. All students are required to participate in religion classes and all religious, liturgical, and para-liturgical celebrations.

Preparation for the parents and students of Grade Two occurs for the Sacraments of Reconciliation and Holy Eucharist. Grade Eight students and their parents prepare for the Sacrament of Confirmation. Parent meetings are held in the evening and one parent is required to attend.

(Page 10 of Handbook)

SAINT ROCCO SCHOOL

Excerpts from Saint Rocco School Parent-Student Handbook
1999-2000

Mission Statement

Saint Rocco School is a Faith Community built upon the beliefs of the Catholic Church. We believe that respect for God, others, and self forms a family-like environment. We are committed to quality Catholic education to all elementary students. This mission is based on the Gospel values.

Philosophy

The Faculty of St. Rocco School, believes that "Catholic schools afford the fullest and best opportunity to realize the threefold purpose of a Christian education among children and young people. Thus motivated, we strive to make people's faith become living, conscious, and active through the light of instruction: Thus instruction is offered to all God's children no matter their race, color, creed, or sex. Understanding that not all children have been endowed with the same talents and abilities an atmosphere of openness and understanding will be provided and maintained for those students who have special education needs.

An integral part of the school program is instruction in religious truths and values. These values permeate the whole atmosphere of the school. Building on this foundation, a curriculum is offered which strives to prepare the students to develop intellectually, morally, emotionally and socially. Instruction in human skills and knowledge will hopefully enable students to reflect the gospel values and to discern the significance of God's plan for His creation.

(Page 1 of Handbook)

Curriculum

Religious Education Program

All students, whether Catholic or not, participate in religion classes, mass, religious activities and receive a religion grade. Only Catholic students may receive the sacraments. Participation of religious activities during school time may be part of the religion and/or music grade.

(Page 11 of Handbook)

SAINT STANISLAUS SCHOOL

Excerpts from Handbook

Mission Statement

St. Stanislaus School is an integral part of the St. Stanislaus community whose shared mission with parents is to facilitate Christian values within the context of the core curriculum. We commit ourselves to the formation of a faith-filled Catholic community, preparing students for spiritual development, and future roles as responsible, knowledgeable, productive Christian individuals.

Philosophy

St. Stanislaus School strives to create a Community of Faith which is living and active. We aim to provide instruction in the Catholic faith, and opportunities to practice that faith in an atmosphere rooted in Christian values, principles, ideals, and traditions with an emphasis on the dignity of the person.

Through instruction, example, and guidance, the spiritual, academic, psychological, social, cultural, and physical development of each child is fostered in order to provide a quality education for all.

We believe that the school is in partnership with parents in pursuit of our ultimate goal which is the formation of the whole person in order to prepare him/her to meet the challenges of today's world.

(Page 2 of Handbook)

SAINT THOMAS AQUINAS – SAINT PHILLIP SCHOOL

Excerpts from Parent/Student Handbook

Mission Statement

As a Catholic School serving in the African-American Community our Mission at St Thomas Aquinas-St. Phillip Neri School is to introduce, develop and reinforce spiritual, moral and Catholic Christian values to educate the mind, body and soul, to develop and lift self-esteem. We promote programs which teach positive multi-cultural awareness. We prepare our students to be among the best and instill in them the importance of striving for excellence.

(Page 1 of Handbook)

Mass

There will be a weekly mass for all students. The lower grades will attend mass on Wednesday morning and the upper grades on Friday morning. It is also expected that all students will actively participate in masses.

(Page 12-13 of Handbook)

SAINT VINCENT DE PAUL SCHOOL

Excerpts from St. Vincent de Paul School Parent Handbook
1999-2000

Mission Statement

The faculty, staff, students, and parents of St. Vincent de Paul School are committed to modeling Christian values and principles to bring about Catholic faith formation in each individual student through the development of quality academic, social, cultural, spiritual and aesthetic programs which will be integrated and nurtured in their daily lives. Our hope and purpose is that our students will become compassionate and productive members of a global society.

School Philosophy

At St. Vincent de Paul School we join in the educational ministry of the Church as we teach the Gospel message, build a community of faith and love, and serve the human family through prayer, worship, and social action. The administration, faculty and staff of St. Vincent de Paul School are dedicated to spiritual growth, quality education and academic excellence. They are concerned with the growth and development of the total child. In cooperation with the parents, the teachers strive to integrate religious truths and values with academic knowledge and skills so that students achieve their highest intellectual and moral potential. As members of the school community, students are prepared for responsible Christian living, a respect for self and others and an awareness of the privileges and responsibilities of American and global citizenship.

(Page 1 of Handbook)

Religious Educational Sacramental Programs

The Prime purpose for the existence of our school is the teaching of religion and the practical application of the Christian social principles. In a Catholic school, all learning can take place in an atmosphere of religious ideals.

(Page 11 of Handbook)

School Goals

St. Vincent de Paul School strives to develop responsible Christian attitudes which will grow and develop as our students mature and assume their Christian role in society. As partners with the parents in the total education of each child, the faculty and staff strive —

- To assist our students in being open to the message of the Good News in order to experience a loving relationship with the Lord through instruction, prayer, community, worship and service.

(Page 1 of Handbook)

SAINT VITUS SCHOOL
Excerpts from Parent and Student Handbook 1999-2000

Saint Vitus School Mission Statement

St. Vitus School draws its reason for existence from the mission of the Church. It strives to assist parents in developing Catholic men and women who demonstrate their faith by love of God and neighbor and respect for the dignity of each individual.

Respecting the heritage and history of its people, the school integrates religious truths and values with contemporary knowledge and skills. The school exists for the education of Catholic children and for the education of non-Catholic children who hold these same values.

Philosophy and Goals of Saint Vitus School

Saint Vitus School works with parents who are the first educators of their children. The St. Vitus community sees the worth of its school in its potential to develop young Catholic men and women whose spiritual and educational foundation should result in totally committed Christians who demonstrate their faith by love of God and respect for the dignity of each individual.

The school community, through its integrated curriculum, liturgical services, and the good example of priests, parents, faculty and students, strives to develop an atmosphere in which these aims may be reached.

The school integrates religious truths and values with knowledge and skills in order to provide quality education for all students. Guided by eternal truths, the school endeavors to be contemporary in its approach to the problems and challenges of modern life.

In accord with this philosophy, our school community emphasizes the following goals:

KNOWLEDGE OF FAITH
Realize and internalize the primary place of faith in one's life
Grow in the knowledge of the truths of our faith as taught by Christ through His Church
Express our faith through our actions
Participate in community worship and in the sacraments
Seek a relationship with God through prayer

CHARACTER: MORAL RESPONSIBILITY
Develop a commitment to a Catholic philosophy of values intellectually and in life's situations through mutual example and support in living according to Christian values
Be of service to others in the family, school and community

SELF-DISCIPLINE
Develop the self-direction required to follow the actions and attitudes of Jesus Christ
Assume personal responsibility for one's actions
Grow in the self-discipline needed to attain personal and social goals

QUALITY ACADEMIC EDUCATION
Develop knowledge and skills
Stimulate a desire for knowledge and a search for truth

(Page 1-2 of Handbook)

CALVARY CENTER ACADEMY

Calvary Center Academy Parent-Student Handbook 1999-2000

Mission Statement

The mission of Calvary Center Academy is to promote academic excellence in secular and religious studies, and to facilitate both intellectual understanding and practical applications of Apostolic Christian values in the daily lives of our students.

(Page 1 of Handbook)

Philosophy

The Governing Board of Education of Calvary Center Academy is composed of members from the Cleveland Apostolic Ministerial Fellowship elected by the Fellowship. The Board takes the following position regarding all academic programs:

1. The pursuit of truth is a basic commitment of the Academy and it will seek to discover, apply and communicate truth.
2. The entire personality develops and grows through Commitment to the Lord Jesus Christ and search for truth.
3. Biblical truth should be at the center and integrated into all curricular and extracurricular experiences of the student.
4. Faith and reason are viewed as complementary. The Academy will pursue the integration of faith and learning in all subjects.

To fulfill these objectives, Calvary Center Academy seeks to provide a learning environment in the Apostolic-Judaic Christian tradition which brings fulfillment of the whole person through the Lord Jesus Christ.

(Page 4 of Handbook)

WESTSIDE BAPTIST CHRISTIAN SCHOOL

Excerpts from Parent-Student Handbook

Statement of Purpose

It shall be the purpose of Westside Baptist Christian School to provide a quality Christian education in an atmosphere where Godly moral values, as taught in the Word of God, are practiced.

W.B.C.S. believes that Christ is the basis of all learning. All subjects will be taught from the Biblical perspective that all truth is God's truth. The educational process is seen as a channel used by the Holy Spirit to bring the student to a personal faith in Jesus Christ and to train the student in godly living.

The student will be taught Biblical principles so he may understand God's plan for his life spiritually, mentally, emotionally, physically, and socially. We wish each student to realize his fullest God-given potential for God's glory.

It shall be the school's purpose to work in harmony with the home as W.B.C.S. believes that a student's success is dependent upon the home sharing and upholding the same principles as the school. The reinforcement of these principles by Bible preaching churches will provide a solid foundation for life.

(Page 7 of Handbook)

SECOND NEW HOPE CHRISTIAN ACADEMY

Excerpts from Student Handbook

Code of Conduct

A unique characteristic of Second New Hope Christian Academy is that its discipline goals and procedures are rooted in the Scriptural understanding of discipleship. Growth in discipleship is the result of the activity of the Holy Spirit working through God's word.

(Page 1 of Handbook)

Chapel/Daily Devotions

A children's chapel service is held every Monday and parents are welcome to attend. Chapel services should not be thought of as taking the place of Sunday Worship Services but only as supplemental to those.

Each classroom begins and ends the school day with devotions led either by the teacher, individual students or small groups.

(Page 3 of Handbook)

Student Pledge

The student pledge describes ten rules that form the basis behavior standards at Second New Hope Christian Academy.

AS A STUDENT OF SECOND NEW HOPE CHRISTIAN ACADEMY, I WILL:

- Show love and respect for the Lord

(Page 5 of the Handbook)

LUTHER MEMORIAL SCHOOL

Excerpts from Parent Handbook

Our Mission

Luther Memorial School provides a quality, Christ-centered education in a structured environment that nurtures and challenges students to achieve their God-given potential in partnership with home and church.

(Cover Page of Handbook)

The School Motto

"EVERY DAY WITH GOD'S WORD" is the motto of Luther Memorial School. Only by that means can a child be led to love God, be received into the Kingdom of Christ our Savior, learn to honor his fellow man, live a God-pleasing life, and gain eternal happiness.

Prayer for our School

Lord, God, Heavenly Father, who has blessed us much more than we deserve with a fine school, faculty, staff, and student body, make us truly grateful for this blessing, and grant Thy Holy Spirit to teachers, students, and parents that this coming school year may prove a real blessing to us all. Give the teachers wisdom to teach the children that Jesus Christ is their Savior and loves them, and help us all be strengthened in our faith and to love Him in return who has said "Suffer the little children to come unto Me and forbid them not, for of such is the Kingdom of God." Trusting that we will heed this request in the best possible way by operating this, our school we ask your divine blessing upon our efforts and your

protection upon all for the sake of our Savior, Jesus Christ. AMEN.

(Page 22 of Handbook)

SAINT JOHN NOTTINGHAM LUTHERAN SCHOOL

Excerpts from Parent Handbook 1999-2000

Our Philosophy of Education

It is our belief that the one cardinal objective
of education to which all others point
is to develop devotion to God as our Creator,
Redeemer, and Sanctifier, whose love for us
moves us to show in our every act, thought,
word and desire, our love for Him.

"THE FEAR OF THE LORD IS THE BEGINNING OF KNOWLEDGE."

Proverbs 1:7

To bring about such development, it is our constant aim to provide in each and every pupil his or her – FAITH-GOOD WORK-PERSONAL LIFE ADJUSTMENT, which includes training for maximum physical, intellectual, and emotional capabilities of each child, with all due recognition for individual difference through various development stages of growth.

This basic philosophy determines the curriculum, content of the course of study, and the environment making up the total teaching-learning situation at St. John.

(Page 2 of Handbook)

<u>What is Education in a Christian School</u>?

In education, we are concerned with the development of knowledge, ability, skill, attitude and character by means of teaching, training, study and experience. Christian education

has precisely the same general aims, but it is based on the Bible and has three specific goals:

1. To lead the individual to faith in Christ and to keep him in that faith.
2. To help the individual to develop into an even better and more perfect Christian in all of life's relationships, both secular and religious.
3. To keep before the individual the goal of every child of God - Eternal Life.

The Lutheran Day School is the best agency for such Christian education because it provides for the total growth and development of the child. The Bible describes such a complete education in Luke 2:52: "And Jesus increased in wisdom and stature and in favor with God and man."

(Page 3 of Handbook)

Objectives of a Christian Education

In the development of his SPIRITUAL potentialities, Christian education guides the child to:

1. Acquire a thorough knowledge of God and His Word.
2. Recognize his sin and the need for salvation.
3. Accept Jesus as his Savior through the working of the Holy Spirit.
4. Rely upon God for both temporal and spiritual blessings.
5. Desire to live according to God's law.
6. Utilize the means of grace, namely, the Word and Sacraments.
7. Lead a sanctified life.
8. Desire to lead others to the Savior.
9. Serve the church through the proper stewardship of time, talents, and treasures.

(Page 3 of Handbook)

SAINT MARK LUTHERAN SCHOOL

Excerpts from St. Mark Lutheran School 1999-2000 Parent-Student Handbook

Current Mission Statement

It is our mission of St. Mark Lutheran School to provide the quality of Christian education that keeps the Light of Christ first and foremost.

Welcome to St. Mark Lutheran School

The primary focus of St. Mark Lutheran School is on our Lord and Savior, Jesus Christ. In all of our goals, Jesus Christ must be preeminent. Because of our commitment to that focus and to our beliefs and philosophy, it is highly inconsistent for any parents to send a child to this school if they:

- Are not a Christian and/or not interested in learning about Jesus Christ
- Are not living a Christian life or willing to learn how to lead such a life
- Are not a supporting part of a Christian congregation through worship and sharing of time and talents

(Page 2 of Handbook)

Religious Instruction

All students, regardless of their religious background, are expected to participate in daily religion class and to be instructed in the basic teachings of God's Word through an organized program of Christian education. The process of

religious instruction is directed toward the goal of a stronger, more mature faith in our Lord and Savior Jesus Christ.

St. Mark Lutheran School begins each school day with a classroom devotion and prayer. The school day is also ended with classroom prayer. As appropriate for each grade, students are provided with time for personal reading of the Word of God and for prayer to strengthen their personal relationship with God.

(Page 28 of Handbook)

WEST PARK LUTHERAN SCHOOLS OF BETHANY, HOLY CROSS AND PURITAS

Excerpts from Parent Handbook 1999-2000

Purpose of West Park Lutheran School

West Park Lutheran School's main objectives are:
1) the leading of its children to know Christ as their Lord and Savior; and
2) To foster academic excellence

Specifically, our aims are the following:
I. To provide thorough instruction In God's Word in order that:
A. Pupils may learn to trust In Jesus Christ as their living Savior and the only way to heaven.
B. Pupils may know what the Lord expects of them as children of God.
C. Pupils may willingly do that which is right and God-pleasing and avoid that which is evil.

II. To cooperate with the Christian home and the children that they might be a credit to their parents, an asset to the church and worthy citizens of the community

III. To provide thorough instructions in all the required elementary and junior high school subjects so that knowledge, when taught in harmony with the Holy Scriptures, may help boys and girls to live successfully and in accord with the Word and will of God.

(Page 4 of Handbook)

Curriculum

Since our philosophy and purpose are to provide a sound religious education, it is natural that children attending our school receive regular courses in religious instruction in addition to that provided in church and at home. Some of the primary subjects in the religion courses are Bible history, catechism, memorization and Bible reading. We consider these as the foundation upon which the Lutheran school curriculum as a whole is built.

(Page 8 of Handbook)

RAMAH JUNIOR ACADEMY

Statement of Mission

Ramah Junior Academy is an organizational unit of the world-wide Seventh-Day Adventist educational system.

Its mission is:

(1) To provide quality Christian education consistent with Seventh-day Adventist standards, and meeting the State Minimum Standards Act, as well as the current needs of our times.

(2) To motivate students to commit their lives to God in preparation for active service in the home, school, church, and community; and for higher service in the world to come.

(Mission Statement)

CLEVELAND COMMUNITY ISLAMIC SCHOOL

Excerpts from Cleveland Community Islamic School Handbook 1999/2000

Mission Statement

Bismillah (In the Name of Allah)
Our mission at the Cleveland Community Islamic School (C.C.I.S.) is the mission of discharging our sacred duty to humanity. The sacred duty prescribed to us by Allah (The Almighty God). The sacred and incumbent duty of providing meaningful and useful knowledge to all. In line with our Islamic beliefs, knowledge and its applications are not a privilege, a pastime or a hobby, rather it is incumbent and a must upon every male and female. Furthermore, it is the absolute fundamental right of every child to be well grounded with the best knowledge and training there is.

Subhana Allan (Glory be to Allah)
In keeping with these, it is the goal of C.C.I.S. to provide knowledge and training in moral and academic excellence to each student in the school. This knowledge and training by the grace of Allah, will be planned in a conducive Islamic environment to fully equip each student with the wisdom and the understanding that will enable him or her to skillfully, efficiently and successfully face the challenges of this life and to have a very strong hope of success for the eternal life.

Insha Allah (God Willing)
It's also the hope of C.C.I.S. that this knowledge and training by the power the authority and the will of Allah, will give the student the upper hand to be: (1) a believer (a logical and a rational thinker, and morally and ethically conscious person); (2) an executor of good deeds (such as a peacemaker, a tolerator, an organizer, a leader, a follower, a trainer, a

respector, a contributor, an appreciator, a grateful and thankful person, a caretaker, a responsible and an honest person, a compassionate and loving person, a visionary, a pioneer, an inventor, a producer, a designer, a builder, an establisher of a civilization and a middle nation that is just and fair to all); (3) a leader and an adviser in the truthfulness; and (4) above all, a very patient, decent, righteous, God-fearing person.

(Page 2 of Handbook)

DIOCESE OF CLEVELAND
OFFICE OF CATHOLIC EDUCATION

Excerpts from Kindergarten Guide 1999

Diocese of Cleveland Philosophy of Catholic Education
Sources

WE BELIEVE that a philosophy of Catholic education begins with faith that God, in creating, gifted us with life, became one of us in His Son Jesus, and in the person of His Spirit awaits our response to His unconditional overture of love. Jesus remains with the community He formed, witnessing and sharing the Good News in every age and with all people, ever yearning for a return of love either by a sincere response to conscience or by membership in His Church. It is from this perspective that the educational ministry of the Catholic community flows.

Catholic Education

WE BELIEVE that education which is Catholic begins, with life, in the heart of the family. Parents, the primary educators, seed nourish values deeply human, deeply spiritual. Affirmed, treasured, and supported by the loving witness of Christian faith communities, the child continues a life-long response to God's love in growing and excelling through responsible involvement in the academic, cultural, and civic concerns of daily life.

Catholic Schools

WE BELIEVE that the Catholic school is sensitive to the mandate of Jesus: "Love one another as I have loved you" as the goal toward all Catholic education tends. The school community, in sharing this vision within an atmosphere designed to celebrate and practice love of God and neighbor, is the most effective means available to the Church for the education of youth. This vision motivates students to grow

academically, culturally, and socially. Among the values prized in the Catholic school are self-worth, self-discipline, in the search for a moral way of life. and appreciation for our American heritage. With deep concern for their brothers and sisters, young people in our Catholic schools form their personal response to truth, justice and love to God their Maker.

(Page iv of Guide)

Goals for Catholic Schools in the Diocese of Cleveland

1. To communicate the Gospel message of Jesus.
2. To provide opportunities to build and experience a faith community.
3. To orient students to the responsibility and experience of service because of their membership in the Christian community.
4. To provide students with the opportunity for growth in prayer.
5. To provide instruction in religious truths and values in such a way that they become an integrated part of the school program.
6. To develop a faculty and staff who by their presence and teaching express an integrated approach to learning and living in their lives.
7. To provide an academic program and environment conducive to the optimal development of each student.

(Page v of Guide)

DIOCESE OF CLEVELAND
OFFICE OF CATHOLIC EDUCATION

Excerpts from Handbook for Elementary Schools 1997

Mission Statement of the Office of Catholic Education

We are a Faith Community in Formation.
We are committed to the educational mission of the Catholic Church
in the elementary and secondary schools.
Therefore, our mission is to lead, assist, and support
Catholic schools in providing quality education
infused with Gospel values.

(Page 3 of Handbook)

District Plan for Catholic Schools August 1998

Goal I

Our CATHOLIC IDENTITY will permeate every aspect of the school climate and program and will guide staff selection and professional development.

A. Administration and faculty will engage in study and reflection on the core documents and core values of the Catholic faith.
B. Appropriate certification as catechists and catechetical leaders will be maintained by teachers and administrators according to the guidelines of the diocesan Religious Education Office.
C. Schools will show tangible evidence of being Catholic through their expression of community, message, service and worship.
D. Eucharist will be revered as the center of our lives, and thus liturgy will receive appropriate attention in its preparation and celebration.

E. School communities will strive to form a faith community with its foundation in the parish and the diocese.
F. The school administration will ensure that a Catholic philosophy of education permeates instruction by providing faith formation opportunities for faculty; engaging with staff in regular review of the curriculum; and performing regularly scheduled class visitation.
G. The religious heritage strand in each subject area curriculum will receive appropriate emphasis to ensure that Catholic values and social justice principles are essential elements in student learning.
H. The school administration will review hiring practices and orientation programs to ensure that religion is taught by practicing Catholics.
I. Parents and families will receive support from the school as integral members of the school's community of faith for the enrichment of their faith lives.

(Page 7 of Handbook)

I-3

Blesssed Sacrament School

Materials

SCHOOL HOURS

8:20	FIRST BELL
8:30	SECOND BELL
11:45-12:30	LUNCH (See LUNCH SCHEDULE)
2:45	REGULAR DISMISSAL

DIOCESE OF CLEVELAND
PHILOSOPHY OF CATHOLIC EDUCATION

WE BELIEVE that a philosophy of Catholic education begins with faith that God, in creating, gifted us with life, became one of us in His Son Jesus, and in the person of His Spirit awaits our response to His unconditional overture of love. Jesus remains with every age and with all people, ever yearning for a return of love either by a sincere response to conscience or by membership in His Church. It is from this perspective that the educational ministry of the Catholic community flows.

WE BELIEVE that education which is Catholic begins with life, in the heart of the family. Parents, the primary educators, seed and nourish values deeply human, deeply spiritual. Affirmed, treasured, and supported by the loving witness of Christian faith communities, the child continues a life-long response to God's love in growing and excelling through responsible involvement in the academic, cultural, and civic concerns of daily life.

WE BELIEVE that the Catholic school is sensitive to the mandate of Jesus: "love one another as I have loved you" as the goal toward which all Catholic education tends. The school community, in sharing this vision within an atmosphere designed to celebrate and practice love of God and neighbor, is the most effective means available to the Church for the education of youth. This vision motivates

students to grow academically, culturally, and socially. Among the values prized in the Catholic school are self-worth, self-discipline in the search for a moral way of life, and appreciation for our American heritage. With deep concern for their brothers and sisters, young people in our Catholic schools form their personal response to truth, justice and love of God, their Maker.

BLESSED SACRAMENT SCHOOL PHILOSOPHY

Blessed Sacrament School aims to educate each child spiritually, culturally, socially and intellectually by providing a religious and academic climate in which to grow and learn. The school attempts to gear its programs to the development of the highest intellectual and moral potential of the child in order to meet the immediate goal of eternal salvation. It aims to teach self discipline, which encourages creative thinking and intellectual activity. Blessed Sacrament School strives to develop Catholic values within each child. As a member of the school community, students are prepared for responsible Christian living with contributions to make and responsibilities to share with being of service to others. The school endeavors to instill in each student a respect for self and others, as well as an awareness of the privileges and responsibilities of American Citizenship.

STATEMENT OF GOALS

We, the faculty and staff of Blessed Sacrament School, feel that our enthusiasm, interest and sincere efforts help to inspire each child in our classes to bring about a real community of faith through participation in the sacramental and liturgical life of the Church.

It is our hope to develop the hearts and minds of our students so as to prepare them spiritually, intellectually and morally. The following list of goals supports these values:

1. To provide an educational program that meets the need of each student and to evaluate the program according to criteria established for competency.

2. To encourage students to recognize and reach their full intellectual potential through the utilization of educational technology and media.

3. To teach responsibility for the rights and needs of others.

4. To encourage each student to form Christian values and morals and to follow these teachings through Christlike examples.

5. To encourage the concept of self-discipline in each student in order to provide the ability to better control his/her life and destiny as adults.

6. To show, by example, the Christian virtues of reverence, devotion and prayerfulness.

MISSION POLICY

MISSION STATEMENT FOR BLESSED SACRAMENT SCHOOL

Be it known to all who enter here that Christ is the reason for this school. The unseen, but ever present, teacher in its classes, the model of its faculty, the inspiration of its students.

All who leave here will use their lessons of love, peace, and understanding to reach their individual academic potential and become responsible citizens within their community.

RELIGIOUS PROGRAM

In keeping with the philosophy of our school, the truths of Catholicism are presented daily in many and varied ways:

- Formal religion classes are held daily.
- Children plan and participate in worship services.
- Prayer is said daily in the classroom.
- Mission projects and contributions designed to help those less fortunate (both in our country and foreign nations) are encouraged.
- Where appropriate and relevant, the academic program reference is made to Christian teaching.
- Motivation for proper conduct and interpersonal relationships finds its reference in the example of Christ.

- The discipline code is rooted in a respect for the rights of each individual as a unique and special child of God.

Christianity cannot be lived only five days a week! We are only partners with you, the parents, in all educational endeavors, including the spiritual development of your children. You are urged to be an example for your children in Christian living and be active members of your religious community.

HOLY REDEEMER SCHOOL
MISSION STATEMENT

CELEBRATING GOD'S BLESSING

Holy Redeemer Parish School is...

...a Catholic School

...committed to
sharing the Good News
with all people

...while instilling
a sense of knowledge
and love of the Catholic faith
and traditions.

Together
we strive for
excellence in education.

HOLY REDEEMER SCHOOL

Parent-Student Handbook

15720 Kipling Ave.
Cleveland, Ohio 44110
(216) 486-0935

TABLE OF CONTENTS

Mission Statement 1
Goals and Objectives 1
School Personnel 2
Parent Responsibilities 2
Parent Groups 2
Administration Procedures 3
Admissions 3
Admission Policy. 3
School Hours 3
Attendance 3
Tardiness 4
Reporting Absence 4
Appointments 4
Emergency Closing 4
Office House 4
Family/Custodial Situations Relations with the School 5
Finances – Tuition and Fees 7
Curriculum 8
Religious Education Program 8
Instructional Program 8
Homework 8
Student Evaluations 8
Report Cards 9
Parent Conferences 9
Progress Reports 9
Testing Program 9
Field Trips 9
After School Program 9
School Policies and Procedures 10
Student Behavior Code 1
Suspension 1
Situations with Specific Consequences 12
Gum Chewing 12
Materials Brought to School 12

Lunch Program 12
Birthday Treats 12
Pregnancy Policy 14
Diocesan Policy Regarding Possession, Sale
Use or Abuse of Drugs and Alcohol 15
Youth Gangs 15
Weapons Policy 17
Sexual Harassment and Sexual Violence Policy 18
Dress Code 20
Gym Uniforms 22
Dress Down 22
Cold Weather Clothing 22
Care of Books and Property 22
Health and Accident Procedures 22
Health Services 22
Contagious Diseases 23
Medication 23
Transportation and Safety 24
School Yard 24
Parent Drivers or Drivers 24

Parent's Request for Administration or Medication by School

Physician's Request for the Administration
of Medication by School Personnel

MISSION STATEMENT

Holy Redeemer Parish School is a Catholic School committed to sharing the good news with all people while instilling a sense of knowledge and love of the Catholic faith and traditions. Together we strive for excellence in education.

GOALS AND OBJECTIVES

Holy Redeemer Catholic School educates students to strengthen and develop personal love for Christ by...

- Growing in a meaningful prayer life and understanding of Catholic beliefs, worship and moral teaching
- Forming a Christian conscience and developing decision-making skills based on Gospel values
- Developing positive attitudes of concern and respect for others
- Becoming involved in opportunities for Christian Service

Develop a wholesome self-image by...

- Recognizing, developing and respecting the God-given talents in oneself and others
- Developing self-discipline and assuming personal responsibility for one's attitudes and behavior
- Developing leadership skills

Assume personal responsibility for learning by...

- Developing those study skills which promote life-long learning
- Developing and applying critical thinking and problem solving skills in all areas of the curriculum

- Acquiring proficiency and clarity in oral and written communication
- Exploring basic concepts of science and social science
- Achieving math competency and computer literacy
- Increasing awareness and appreciation of our multicultural heritage
- Experiencing and appreciating aesthetic value in art, music, and literature
- Developing habits of healthful living and skills for physical fitness, sportsmanship and recreation
- Becoming aware of career options and leisure pursuits and seeking guidance in the application of one's talents

SCHOOL PERSONNEL

Together our staff seeks to provide a total school program for the students. Every teacher and staff member is fully qualified, state certified and dedicated to Catholic Education. Through Federal and State funding, we have assisting personnel who provide services such as speech therapy, nursing, psychology and tutoring. Volunteers also work within the school to provide assistance by being teacher aides or assist in supervision.

PARENT RESPONSIBILITIES

The primary responsibility for the education of the children belongs to parents. However, this responsibility is shared with the school as a matter of practical necessity. The greatest single factor in building a child's intellectual, cultural, and moral and spiritual attitude is the example you provide in your home. Parents are responsible for:

- Supporting school policy and the authority of the administration and teachers.
- Modeling and supporting your children's practice of the Catholic Faith if you are Catholic or of the Christian faith of the denomination of your choice.
- Encouraging your child to complete all assignments
- Insisting that your children obey the regulations and principles of good behavior
- Following the policies and procedures stated in the handbook
- Paying all fees on time
- Reimbursing any property destroyed if this is necessary

PARENT GROUPS

Women's Guild

All women of the parish and school families are encouraged to join the Women's Guild and attend monthly meetings.

MISSION STATEMENT

Our Lady of Good Counsel Catholic School,
serving the community of Old Brooklyn for over 100 years,
as an integral part of Our Lady of Good Counsel Parish,
promotes the total education of our children.
The School, Family and Parish Communities work together
to guide children to grow in the Catholic Faith
develop academic skills and improve social well-being.

1996-1997
STUDENT – FAMILY HANDBOOK

OUR LADY OF GOOD COUNSEL SCHOOL
1894-1994

"ONE HUNDRED YEARS OF CATHOLIC EDUCATION"

TABLE OF CONTENTS

Abuse	31	Medical Appointments	8
Admission Policy	3	Medication	29
AIDS Policy	37	Mission Statements	2
Attendance	4	Philosophy	3
Auxiliary Services	18	Pregnancy Policy	35
Awards	15	Promotion	17
B.A.S.E.	19	Registration	5
Behavior Code	19	Religious Education	12
Car Riders	31	Report Cards	15
Conferences	16	Retention	17
Curriculum	14	Sacraments	13
Discipline	19	Safety	29
Domestic Relations	6	Searches	31
Dress Code	25	Service Hours	10
Drills	30	Sexual Harassment	32
Emergency Closing	8	Tardiness	7
Field Trips	19	Testing	16
Gangs	33	Transfer	5
Grading Scale	15	Tuition	9 & 11
Health Policies	28	Uniforms	25
Homework	16	Vacations	8
Immunization	28	Visitors	30
Injuries	31	Walkers	30
Legal Issues	31	Weapons Policy	34
Lunch Program	27	Withdrawls	5

OUR LADY OF GOOD COUNSEL PARISH

MISSION STATEMENT

Our Lady of Good Counsel Parish of Old Brooklyn, established in 1873, is a Roman Catholic Faith Community of the Diocese of Cleveland. We are a people with diverse cultures, needs and gifts, who come together as part of the Body of Christ to live and share the Gospel message of Jesus. We value family life, and our participation together in worship, education and spiritual growth, service to human needs and social life.

We seek to:

- Become a more welcoming and caring community, communicating new ideas integrated with traditional values.
- Promote harmony, reconciliation and healing among our members.
- Form a more enthusiastic faith-filled community.
- Establish responsible stewardship of our time, talents and resources.
- Build the kingdom of God while on our mutual spiritual journey to eternal life with Jesus.

In the security of God's unconditional love and empowered by the Resurrection, we will achieve these goals through wisdom of the Gospel and with the guidance of the Holy Spirit.

OUR LADY OF GOOD COUNSEL SCHOOL

MISSION STATEMENT

Our Lady of Good Counsel School is an integral part of the Community of Our Lady of Good Counsel Parish. Our mission is to promote the total education of our children; helping them to the best of their abilities to develop their basic skills, improve their social well-being, and grow in their faith. Through the cooperation of the school, the family and the parish community, we will guide our children to become knowledgeable, productive, faith-filled Christians.

OUR LADY OF GOOD COUNSEL SCHOOL

PHILOSOPHY

Our Lady of Good Counsel School is a Roman Catholic School in the tradition of the Missionaries of the Precious Blood. It shares the mission of the Church to reveal Christ to the world through evangelizing, participating, caring and celebrating the Gospel of Jesus.

Recognizing that each student is a unique individual, made in God's image, and worthy of respect; we strive to create an environment that is conducive to the spiritual, moral, intellectual, emotional, social, and physical development of each student committed to our care.

As an educational community, we strive to present a challenging curriculum that will help the students reach their full potential as Christian individuals and prepare them for living in the parish and other communities.

Our Lady of Good Counsel School believes that the students are the center of its educational mission. This belief calls forth from the students the following responses:

1. a willingness to develop a personal relationship with Jesus Christ.
2. an active participation in the learning process so as to develop his/her own talents.
3. a growing acceptance of and sense of care and concern for others.
4. a developing sense of responsibility within various communities: family, school, parish, city, nation, Church and world.
5. an openness to live the gospel values.

Our Lady of Good Counsel School believes that the educator is a person of faith, committed to the task of guiding the students. The educator's commitment includes:

1. seeking personal growth in faith and a relationship with Jesus Christ.
2. serving as a model of moral living and of the integration of life, learning and faith.
3. stimulating, guiding and facilitating the student's learning.
4. expressing care and concern for each other and for the students.
5. dedicating himself/herself to professional growth and commitment to the mission of the Gospel values.

ADMISSION POLICY

STATEMENT OF NON-DISCRIMINATION:

Our Lady of Good Counsel School admits students of any race, color, national or ethnic origin to all the rights, privileges, programs and activities generally accorded or made available to students. We do not discriminate on the basis of race, color, national or ethnic origin in administration of our educational and admission policies. Furthermore, it is the policy of Our Lady of Good Counsel School not to discriminate on the basis of sex in its educational programs or employment as required by Title IX of the Educational Amendments Act of 1972.

ENTRY LEVEL:

Our Lady of Good Counsel School was founded and is maintained by parishioners for sharing the Catholic faith and traditions with our Catholic Children. The usual entry grade is Kindergarten. Students will be accepted in Grades 1 through 6 if class size permits. It is the policy not to accept students in Grades 7 and 8 unless they are transfers from another Catholic school and the family has moved into the parish and registers as parishioners. Class size is limited to 25 students in Kindergarten and 30 students in Grades 1 through 8.

Admission to O.L.G.C. school is made through formal registration. Students are accepted only if there is room. When class size reaches the limit, student names are put on a waiting list. Parishioners will be placed on a waiting list ahead of non-parishioners. Under no circumstances will a child be admitted to O.L.G.C. school if it seems that the motive is to avoid racial integration in the public schools. All students admitted to Our Lady of Good Counsel School

are considered to be conditional for the first semester. It is during this time period that a determination will be made as to whether the needs of the child can be met by the school.

ADMISSION OF PARISHIONER:

A parishioner is understood to be one who is registered, attends and contributes to the parish. All Catholic students who live within the boundaries of O.L.G.C. Parish are eligible for admission to the school provided that:

1. The family is registered in O.L.G.C. Parish
2. The parents/guardians understand that they have an obligation to foster a Catholic atmosphere in the home and set a good example as Catholics by regular participation at Mass on Sundays and Holydays and by regular reception of the Sacraments.
3. In addition to the current tuition payments, parents and guardians are expected to contribute weekly to the support of the parish according to their means. The weekly envelope will also be an indication of the family's Mass attendance.
4. The parents/guardians agree to uphold and follow to the best of their ability the policies of the school as stated in the school handbook and other communications and bulletins.
5. The parents/guardians take part in the Service Hour program.

ADMISSIONS OF NON-PARISHIONER:

Any student whose family lives outside the Parish boundaries is considered to be a non-parishioner. Any student whose family lives within the boundaries of the parish, but chooses not to follow the Parishioner guidelines is also considered a non-parishioner. Non-parishioners pay a higher tuition rate and are also expected to support the educational programs of the school through financial support and attendance at meetings.

I – 11

Our Lady of Mount Carmel School
Materials

Our Lady of Mount Carmel
Parish School

Parent-Student
Handbook

1999-2000

1355 W. 70th Street
Cleveland, OH 44102-3093
Telephone: (216) 281-7146
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Table of Contents

MISSION STATEMENT 5

PASTOR'S WELCOME 6

PRINCIPAL'S WELCOME 7

PARENTAL RESPONSIBILITIES 8

GENERAL INFORMATION: 9
..... Hours of Operation
..... Emergency School Closings
..... Telephone Usage

ADMISSION POLICIES: 10
..... Admission
..... Re-registration
..... Transferred Students
..... Proof of Child Custody
..... Withdrawal Policy

ATTENDANCE: 11
..... Arrival & Dismissal Procedure
..... Early Dismissal
..... Absences
..... Tardiness

CURRICULUM: 14
..... Religious Education
..... Sacramental Program
..... Homework Policy
..... Field Trip Policy
..... Books

DRESS CODE: 15
..... Early Childhood Uniform
..... Girl's Uniform
..... Boy's Uniform
..... Gym Uniform
..... Dress-up Days

TUITION and FEES and PARENT LIABILITY: 18
..... Registration & Program Fees
..... Fund-raisers & Credits

MISSION STATEMENT
OF
OUR LADY OF MOUNT CARMEL PARISH SCHOOL

Our Lady of Mount Carmel Parish School is a community dedicated to the Christian and academic development of the child. In the light and spirit of Christ the Redeemer, we promote the Christian family life according to the Roman Catholic and Mercedarian Tradition.

Our School emphasizes high expectations for spiritual and academic excellence as well as the social and physical well-being of each child. Catholic morals and ethical values are paramount in their holistic development.

Our Lady of Mount Cannel Parish School believes that the Redeeming presence of Christ in the Eucharist is the center and reflection of our lives. Our mission as Catholic educators is to guide our students to live their lives according to the example of Mary, our Mother of Mercy, and her son, Jesus Christ. We strive to ensure that this mission transcends the classroom and is reflected in our lifestyles.

Our Lady of Mount Carmel Parish School recognizes that differences exist in each child in the areas of spiritual development, motivation, aptitude, and achievement. Therefore, we commit ourselves to developing programs, learning theories and instructional strategies that will be effectively utilized to maximize learning time. It is our goal to develop leaders who will contribute their talents to the Church, the community, the country, and the family of nations.

Our Lady of Mount Carmel School
1355 West 70th Street ♦ Cleveland, Ohio 44102-3093

August 1999

Dear Parents and Students,

Welcome and welcome back! We, the faculty, parents, and administration have prepared this handbook in an attempt to draw us all together in a common understanding of our mission here at Our Lady of Mount Carmel Parish School.

You will find that the rules and regulations written in this handbook are established to create the best possible atmosphere for everyone. Having chosen Our Lady of Mount Carmel Parish School as the primary educational entity for the formation of your child/children implies your support to our educational programs, cooperation with the administration and teachers, and involvement in the parish and school activities. The best way for our students to live the guidelines here is for everyone of us to model them in our lives. Whether it is dropping off children at the right place or checking to make sure uniforms are worn correctly, parents and guardians shape the students adherence to our expectations by giving good example.

If at any time you have any questions, suggestions or concerns, meet with your child's teacher or with me. We will be glad to listen to you or to find answers to your questions. God bless you always, and have a great year!

Yours in Christ and Our Lady of Mercy,

Sister M. Rosano Vega-R, HMSS
Principal

PARENTAL RESPONSIBILITIES

The cooperation of the parents/guardians represents one of the major factors in the success of the students, the teachers, and the school. By choosing Our Lady of Mount Carmel School to be your partners in education, you become an integral part of our ministry and spirituality. More specifically, a positive and supportive attitude on the part of the parents/guardians toward the policies, instructional programs, faculty, staff, and administrators is necessary for the accomplishments of all objectives. The role that you play in the school as a parent/guardian is crucial in following and supporting the policies and programs of our school.

Parents are responsible for:

- Modeling and supporting your child's practice of the faith by being an active member of the faith community and bringing your son/daughter to Mass on Sunday on a regular basis.
- Supporting school policies and the authority of the administration and teachers.
- Encouraging your son/daughter to complete all assignments on time and monitoring their progress.
- Insisting that your son/daughter obeys the regulations and principles of good behavior.
- Making sure your son/daughter arrives at school on time and avoid unnecessary absences.
- Discussing problems with the person(s) concerned and avoiding criticism of teachers and school policy.

- Paying all fees (tuition, lunch, milk, etc.) on time.

Parental/guardian cooperation is essential for the welfare of the students. *If, in the opinion of the administration, parent/guardian behavior seriously interferes with the teaching/learning process, mission or philosophy of Our Lady of Mount Carmel Parish School, the school will not tolerate such infringement and will exercise the right to dismiss the family from the school.*

ADMISSION AND ENROLLMENT POLICIES

Our Lady of Mount Carmel Parish School does not discriminate on the basis of sex, race, religion, social level or ethnic origin in the administration of its admission policies, scholarship policies, or other programs.

In order to enter the early childhood program, a child must be three years of age by September 30th for admission in the three year-old class. In order to enter Pre-Kindergarten, a child must be four years of age by September 30th. Correspondingly, a child must be five years of age by September 30th in order to enter Kindergarten.

Admission is made through formal registration. At that time, the following materials are required:

- A completed OLMC Parish School Registration Form.
- Non-refundable registration fee.
- Birth Certificate.
- Baptismal Certificate/sacramental information
- Current Immunization Record.
- Report Card (Transfer students).
- Custody Information if applicable.

- Parent or guardian signature on *Agreement of School Policies Form* before admission is accepted.

Prior to the first day of school the following forms must be submitted:

- Physical Examination Record (New students).
- Emergency Medical Authorization Form.
- Emergency Transportation Authorization Form.
- Authorized Pick-up List (Early childhood & after care students).
- Federal Lunch Program Form.

PLEASE NOTE: If there are any changes in information, it is the parent's/guardian's responsibility to notify the school office immediately IN WRITING. It is extremely important that this information is accurate in case of illness, medical emergency or accident.

RE-REGISTRATION

Before the end of the school year, every family is to re-register for the following year. The administration reserves the right in some cases not to invite or accept re-registration. This includes but is not limited to, instances of extreme, persistent, or unresolved discipline problems, and/or inability of the school to provide for the special educational needs of the student. If philosophy and/or policies are not observed, or if tuition is outstanding or financial obligations have not been cleared.

Elementary and Junior High students who arrive before 8:20 a.m. will be instructed to report to the Extended Day Care, located on the campus. Remember that school begins at 8:30. There is no supervision before school. Students should report to their class lines no earlier than 8:20 a.m.

For the safety of all, cars are to enter down the hill by the Rectory on Detroit Avenue to drop off students in the morning. Cars are to drive up to the front of the Convent for unloading and exit via West 70th Street.
No students are to be dropped off in front of the school on West 70th Street.

Ball playing is not permitted before school or at dismissal because of the number of students and cars present at these times. Tough play, pushing, swinging book bags, throwing snowballs, and other potentially dangerous activities are never permitted.

Dismissal Procedure

First bell: Grades five through eight are dismissed.
Second bell: Grades kindergarten through four are dismissed.

At dismissal, *cars are to enter from Detroit down the hill* to the school parking lot. Parents/guardians must park along the perimeter of the parking lot when waiting in the parking lot to pick up their child. It is the driver's responsibility to prevent students from darting out from behind stopped cars. Drivers should also be conscious of the flow of traffic behind their cars. After the students are safely in the cars you may drive to exit through West 70th street. PLEASE DO NOT EXIT UP THE HILL TO DETROIT AVENUE DUE TO POOR VISIBILITY.

Any student that needs to cross the parking lot must wait for a faculty member or a cross guard to cross them in front of the seventh grade room.

Students are not allowed to ride bikes or drive to or from the school.

Absences

In the interest of safety, when a student is to be absent from school, parents/guardians must call the school office before 9:00 a.m. When the student returns to school, the parents/guardians must submit a signed, written excuse to the homeroom teacher explaining the reason for the absence. A student who has been absent three or more consecutive days must submit a doctor's excuse before he/she will be allowed to return to school. A student who has been absent for five or more days per quarter without a doctor's excuse will not be permitted to participate in any athletic or extracurricular activity leaving this open to the discretion of the principal.

Education Office and is licensed by the Division of Early Childhood Education of the Ohio Department of Education.

The OLMC Kindergarten through Eighth grades follow the Graded Course of Study prepared by the Curriculum Department of the Cleveland Diocesan Education Office. This course of study has the approval of the Ohio Department of Education. The basic curriculum includes but is not limited to Religion, English/Language Arts, Reading, Social Studies, Math, Science/Health, Physical Education, Music, Art, Foreign Language, and Computers.

Religious Education

Roman Catholic Doctrine is an essential part of Our Lady of Mount Carmel Parish School. Catholic Doctrine is presented as a living experience of knowledge and belief rather than just another subject. Students enjoy the opportunity to participate in weekly school Masses, Eucharistic Devotions, and the Sacrament of Penance as part of their religious education. This is in support of the parents'/guardians'

privilege and responsibility of sharing the Faith. Our Lady of Mount Carmel Parish School requires family participation at special Liturgical Events celebrated throughout the school year. Attendance is part of the student's integral spiritual education. A special Family/School Mass is celebrated every First Sunday of the month at 11:30 a.m. Roman Catholics are expected to take active participation, while Non-Catholics participate by their very presence.

Sacramental Program

Preparation for the reception of the sacraments of Confirmation, Eucharist, and Penance require the *parents' participation in an Adult Program of Roman Catholic Doctrine as set by the Cleveland Diocesan Education Office.*

Homework Policy

Homework is assigned to develop initiative, responsibility, and self-direction in the student. There is no minimum or maximum length of time per evening, as each student is different. Homework may not always take the form of written assignments. *Parents should assist by providing quiet time and a place conducive to study, by checking for neatness and accuracy and by listening to oral recitation.* Parents should not do their child's homework.

If a student fails to complete or submit homework without a valid excuse, the student will not receive any credit. However the work will need to be done twice, and the student may be detained after school to finish the work. If a student ...

ST. AGATHA ST. ALOYSIUS SCHOOL

PARENT STUDENT HANDBOOK

PRINCIPAL'S LETTER

Dear Parents & Students.

St. Agatha-St. Aloysius School invites you to join with us in accomplishing our goal of educating and developing the whole child – spiritually, mentally, morally, physically and socially. No results will be lasting unless the school and home work together in a spirit of trust, understanding, harmony and support, stressing the same essentials in the training of the child.

The primary purpose of every school is to assist the parents in educating their children. The school, however, cannot hope to accomplish its desired end without the full co-operation of the parents. It is during the time spent in his/her home that the child learns his/her first basic lessons of respect, obedience, truthfulness and self-control. If the child has been taught that obedience to his/her parents is important because they are visible representatives of God in the family, then he/she can easily understand why it is important to be obedient to the teachers in the classroom. In short, the foundation work of establishing good habits and healthy attitudes is that of the home. It is upon that foundation that the school builds.

We here at St. Agatha-St. Aloysius School present to you a well-equipped school with a faculty which is both professionally prepared and personally dedicated to a Catholic Christian education. You have an opportunity which few others enjoy: that is, to be prepared for life in this world and, at the same time, to be prepared for the life to come. In keeping with this goal and in order to facilitate the collaboration and cooperation of all involved: parents, teachers, students, we present this HANDBOOK of rules, regulations and policies of St. Agatha-St. Aloysius School.

Please study it carefully, familiarize yourself with the contents, and keep it on hand for easy reference. AFTER YOU HAVE READ THE CONTENTS OF THIS HANDBOOK CAREFULLY, PLEASE GO OVER THEM WITH YOUR CHILDREN SO THAT THEY WILL ALSO HAVE THE INFORMATION. We ask your cooperation in upholding the guidelines set forth. By adhering to this handbook, we will be better able to make our school the educational institution that can best serve you. We request that you do not seek exceptions from the regulations for your child.

Supplements to this HANDBOOK may be given throughout the school year as the need arises.

Yours in Christ.
SR.SANDRA SABO,SSJ
Principal

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PHILOSOPHY

It is the purpose of St. Agatha-St. Aloysius School to embrace and promote the aims of Catholic education as defined by the Bishops of the United States in their pastoral message, TO TEACH AS JESUS DID: to proclaim the message of the Gospel, to foster the growth of Christian community, and to involve students in service to others.

St. Agatha-St. Aloysius School strives to integrate religious truths and values with knowledge and skills in order to provide a quality education for all its students. The goals of St. Agatha-St. AloySius School are as follows:

To cooperate with and educate parents so as to assist, guide, inspire and form their children in accordance with Gospel values.

To take the child as he/she is and meet his/her needs educationally, socially & emotionally.

To strive to perfect all good intellectual habits so that the child will be able to think independently and use his/her religious values to assess the world around him/her.

To strive to make students aware of their own culture & dignity as well as that of others, and to develop a sense of Christian fellowship with peers and teachers.

To encourage students to participate and become involved in their neighborhood community of Glenville and in the world around them so that they may take an active part in solving the racial and social problems of today.

To motivate and encourage students to appreciate and celebrate their unique cultural heritage and gifts.

To impart basic knowledge, understanding, appreciation, and skill in other subjects needed for life in a dynamic world; in the fine arts of music and art, in health, science and family living and in physical education and safety.

To teach Christian, Catholic doctrine, truth and prayer and to encourage an ongoing relationship with God and church participation. (Revised 8.22.95)

As a religious school, the path that we choose to travel involves the GOOD NEWS OF JESUS CHRIST. For us, His path is the Way, the Truth, and the Light.

Built into this path are seven Principles which we hope will also serve as the pillars of our school - pillars of strength for us all. These are principles which have traditionally been a part of Black Christian Culture and Community. These principles are:

Nguzo Saba

UMOJA (Unity) - To work for and maintain unity in the family, community, nation and race.

KUJICHAGULI (Self-Determination) - To define ourselves, name ourselves and speak for ourselves, instead of being defined and spoken for by others.

UJIMA (Collective Work & Responsibility) - To build and maintain our community together and to make our brothers and sisters problems our problems and to solve them together.

NIA (Purpose) - To make as our collective vocation the building and developing of our community in order to restore our people to their traditional greatness.

KUUMBA (Creativity) - To do always as much as we can, in the way we can in order to leave our community more beautiful and beneficial than when we inherited it.

IMANI (Faith) - To believe with all our heart in our parents, our teachers, our leaders, our people and the righteousness and victory of our struggle.

UJAMAA (Cooperative Economics) - To build and maintain our own stores, shops, and other business, and to profit together from them.

If we as a family (school, home and community) can embrace these principles and pass them on through the education we provide, then we will truly be fulfilling our responsibility: "TO TEACH AS JESUS DID."

MISSION STATEMENT

IT IS THE PURPOSE OF ST. AGATHA-ST. ALOYSIUS SCHOOL TO PROCLAIM THE MESSAGE OF THE GOSPEL, TO FOSTER THE GROWTH OF CHRISTIAN COMMUNITY, AND TO INVOLVE STUDENTS IN SERVICE TO OTHERS; THE SCHOOL INTEGRATES RELIGIOUS TRUTHS AND VALUES WITH KNOWLEDGE AND SKILLS DURING INSTRUCTION AND ITS ACTIVITIES IN ORDER TO PROVIDE A QUALITY EDUCATION FOR ALL ITS STUDENTS.
(Revised 9-21-98)

ST. PATRICK SCHOOL

FAMILY HANDBOOK

INTRODUCTION AND PHILOSOPHY

PHILOSOPHY OF CATHOLIC EDUCATION

We believe that a philosophy of Catholic education begins with faith that God, in creating, gifted us with life. He became one of us in His Son Jesus, and in the person of His Spirit awaits our response to His unconditional overture of love. Jesus remains with the community He formed, witnessing and sharing the Good News in every age and with all people, ever yearning for a return of love either by a sincere response to conscience or by membership in His Church. It is from this perspective that the educational ministry of the Catholic community flows.

We believe that education which is Catholic begins, with life, in the heart of the family. Parents, the primary educators, seed and nourish values deeply human, deeply spiritual. Affirmed, treasured, and supported by the loving witness of Christian faith communities, the child continues a life-long response to God's love in growing and excelling through responsible involvement in the academic, cultural, and civic concerns of daily life.

We believe that the Catholic school is sensitive to the mandate of Jesus: "Love one another as I have loved you" as the goal toward which all Catholic education tends. The school community, in sharing this vision within an atmosphere designed to celebrate and practice love of God and neighbor, is the most effective means available to the Church for the education of youth. Among the values prized in the Catholic school are self-worth, self-discipline in the search for a moral way of life, and appreciation for our American heritage. With deep concern for their brothers and sisters, young people in our Catholic schools form their

personal response to truth, justice and love to God their Maker.

MISSION STATEMENT

St. Patrick School is a Catholic School in the Diocese of Cleveland, Ohio. The mission of St. Patrick School is to live and teach the Gospel message. We are dedicated to the formation of youth according to our Catholic Traditions within an innovative academic environment which provides students with the opportunity to develop spiritually, academically, and socially to the best of their abilities.

Objectives of Education

1. To communicate the gospel message of Jesus.
2. To provide opportunities to build and experience a faith community.
3. To orient students to the responsibility and experience of service because of their membership in the Christian community.
4. To provide students with opportunity for growth in prayer.
5. To provide instruction in religious truths and values in such a way that they become an integrated part of the school program.
6. To develop a faculty and staff who by their presence and teaching express on integrated approach to learning and living in their lives.
7. To provide an academic program and environment conducive to the optimal development of each student.

As your child's prime educator, may we ask you to cooperate with the following:

1. Build religious celebrations and family prayer into your life style. Attend weekend Mass and encourage stewardship through the use of the Sacraments and church envelopes.

2. It is the parents' responsibility to provide the basic needs for their children such as food, shelter, safety, and love. Until the child has these, he/she will not be ready to learn.

3. Provide the proper materials for study, both at home and in school.

4. Be sure your child's school attire, as established by the school is complete and kept in good condition.

5. Encourage regular attendance. This instills within the child the importance of his presence in school.

6. Always cooperate with the teacher and the school, as they are expected to do with you. Welcome their suggestions or advice. Never assume that the teacher is inadequate, if your child is not learning, or criticize the teacher in front of your child. Investigate all the facts before passing judgment. If you have a complaint, take it up with the school, going through the proper channels, starting with the teacher, then the principal, the parish school board, and finally the Diocesan School Board.

7. Hold the teacher and the school's rules and regulations in high regard. Your child will act accordingly.

8. Do not expect the teacher to solve <u>your</u> discipline problems. Discipline begins in the home and is only continued in the school.

9. Set your standards high, but be honest with yourself as to your child's potential and expect from him/her only what he/she can give.

10. When your child's report card is at home, praise him/her first in the subjects in which he/she has done satisfactorily or made an improvement. Then encourage him/her to try to do better in areas where improvement is necessary. He/she will then be more receptive to suggestions and will, in his/her own mind, be determined to do better. Never compare your child's grades with those of his friends, brothers, sisters, or your friend's children. He/she is an individual and should be treated as one.

Introduction

MISSION STATEMENT

Saint Rocco School is a Faith Community built upon the beliefs of the Catholic Church. We believe that respect for God, others, and self forms a family-like environment. We are committed to quality Catholic education to all elementary students. This mission is based on the Gospel values.

<u>HISTORY</u>

Since 1914 Italian immigrants, from the near west side of Cleveland, gathered to pray to Saint Rocco. Saint Rocco, who lived in the 1400's, was the son of the governor of Montpellier, France. Orphaned at age twenty, he helped people suffering from the bubonic plague when he went to Italy. When Rocco became infected with the plague, he went to the woods to die. Here he was miraculously fed by a dog, whose master soon found Rocco and looked after him. In 1922 the parish of Saint Rocco was established. In 1924 the Order of Our Lady of Mercy, Mercedarians, came to serve the parish with Father Sante Gattuso, O.deM. who became pastor. In 1927 the Sisters of the Most Holy Trinity, Trinitarians, came to staff the school which was opened September 6, 1927. Beginning with grades kindergarten to grade eight, it grew until the first class graduated June 14, 1934.

<u>PHILOSOPHY</u>

The Faculty of St. Rocco School, believes that "Catholic schools afford the fullest and best opportunity to realize the threefold purpose of Christian education among children and young people. This motivated, we strive to make people's faith become living, conscious, and active through the light of instruction." Thus instruction is offered to all God's children no matter their race, color, creed, or sex.

Understanding that not all children have been endowed with the same talents and abilities an atmosphere of openness and understanding will be provided and maintained for those students who have special education needs.

An integral part of the school program is instruction in religious truths and values. These values permeate the whole atmosphere of the school. Building on this foundation, a curriculum is offered which strives to prepare the students to develop intellectually, morally, emotionally and socially. Instruction in human skills and knowledge will hopefully enable students to reflect the gospel values and to discern the significance of God's plan for His creation.

The primary responsibility for the education of children belongs to parents. This idea is basic to the American way of life and the Christian concepts of the family as the fundamental unity of society. Although this responsibility is shared with schools as a matter of practical necessity, the parents' responsibility remains paramount.

The children tend to emulate their parents. They follow what is done rather than what is said. Therefore, the greatest factor in building a child's intellectual, cultural and moral attitudes is the EXAMPLE the parent provides in the home.

In addition to good example, some other responsibilities as parents are:

1. Provide proper facilities and encourage conscientious completion of assignments.
2. Insist that your children obey the regulations and principles of good behavior. Note their conduct and effort marks. Unsatisfactory marks or failing grades in a subject indicate a need for a conference with the teacher.

3. AVOID CRITICISM OF TEACHERS AND SCHOOL POLICY IN FRONT OF YOUR CHILD/REN. Discuss problems directly with the teacher or the principal.
4. Encourage the development of your child's individual talents and interests.
5. Build religious celebrations and family prayer into your life style.
6. Cooperate with the policies and requests throughout this handbook.

If there is a problem, please follow this policy:

1. Go to the source. Speak with the person responsible. If anyone discusses a problem with you, please have them go to the source.
2. If there is a school problem, please use this procedure:
   a. Speak with the teacher.
   b. Speak with the Principal.
   c. Speak with the Principal and the teacher.
   d. Speak with the Pastor.

All parents/guardians are expected to support the P.T.U. (Parent Teacher Unit) through membership, attending meetings, and assisting at functions. This unit will receive the names and phone numbers of all students, unless a letter is sent to the principal regarding this matter.

Periodically pictures are taken for the school, newspaper, or other news media. Unless a special letter is sent to the principal, parents' permission will be assumed during these times.

I-28

Saint Stanislaus School Materials

St. Stanislaus Elementary School
6615 Forman Avenue
Cleveland, Ohio 44105
(216) 883-3307

Fr. William Gulas, O.F.M. – Pastor

Mrs. Alice Torrence – Principal

Dear Parents/Students,

Welcome to St. Stanislaus Elementary School as we begin our school year. This handbook is of extreme importance and contains very valuable information. It is our hope that each of you, parent and student, will read each article carefully, seriously, and reflectively, and that you will keep it available so that you can refer to it often during the year.

St. Stanislaus offers each student the opportunity, encouragement, and guidance necessary to help his/her needs as an individual, as a member of a social group, and as a citizen. Each student must provide the necessary work, character, willingness to serve, and cooperation required to accomplish these ends.

Parents and teachers are working towards the same goal – the development of our students into fine, fully functioning ladies and gentlemen with excellent academic skills. This goal requires the cooperation and efforts of teachers and parents. School and home are on the same side. We must work together.

Teachers need the support of parents. Please remember to send your child to school ready to learn, well-rested, well-fed, and dressed appropriately for the weather. Send your

child emotionally ready to learn by always speaking respectfully about teacher's actions. Never undermine the teacher's or school's authority by criticizing school policies in front of your child.

The staff feels very keenly the responsibility of gently molding your children into good Christians with the proper respect for the dignity and rights of others, as well as themselves. Teachers endeavor to provide a strong example of respect to students. Children learn by the example teachers and other adults provide.

The rules and guiding principles that follow are designed to ensure the safety of all children and ensure that each child will be able to reach his/her potential in an atmosphere of respect and dignity.

Children have a right to learn, and teachers have a right to teach. Misbehavior on the part of students cannot be allowed to interfere with this process. We want to clearly spell out our expectations so that everyone clearly understands what is meant by appropriate or inappropriate behavior.

We are happy to be of assistance. We wish the best for each family and God's special blessings throughout this school year. We ask that you will join your prayers with ours.

Sincerely,

Alice Torrence
Principal

Fr. William Gulas, O.F.M.
Pastor

PHILOSOPHY

St. Stanislaus School strives to create a Community of Faith which is living and active. We aim to provide instruction in the Catholic faith, and opportunities to practice that faith in an atmosphere rooted in Christian values, principles, ideals, and traditions with an emphasis on the dignity of the person.

Through instruction, example, and guidance, the spiritual, academic, psychological, social, cultural, and physical development of each child is fostered in order to provide a quality education for all.

We believe that the school is in partnership with parents in pursuit of our ultimate goal which is the formation of the whole person in order to prepare him/her to meet the challenges of today's world.

MISSION STATEMENT

St. Stanislaus School is an integral part of the St. Stanislaus community whose shared mission with parents is to facilitate Christian values within the context of the core curriculum. We commit ourselves to the formation of a faith-filled Catholic community, preparing students for spiritual development, and future roles as responsible, knowledgeable, productive Christian individuals.

GOALS AND OBJECTIVES OF ST. STANISLAUS SCHOOL

Goal — St. Stanislaus School will increase their Catholic identity by developing opportunities for faith development of faculty and students.

Objectives
A. To provide the faculty with opportunities for religious education and spiritual growth.

B. To develop faith enriching opportunities for students of St. Stanislaus School.

C. To develop a focus on issues of peace, justice, and the Gospel values.

Goal — St. Stanislaus School will develop and/or improve programs that benefit students' educational needs.

Objectives

A. To raise the overall reading level of our students.

B. To increase schoolwide emphasis of instructional strategies particularly curriculum integration and alternative assessment of students.

C. To take a deeper look at the value of Saxon Math Program already in use at our school.

Goal — St. Stanislaus School will upgrade their technology plan to meet the needs of the students by providing a foundation for life-long learning and success in education.

Objectives

A. To improve the computer skills of the teachers at St. Stanislaus School.

B. To aggressively up-date our technology.

C. Integrate technology throughout the curriculum.

I-33

Luther Memorial School Materials

LUTHER MEMORIAL SCHOOL

OUR MISSION

LUTHER MEMORIAL SCHOOL PROVIDES A QUALITY, CHRIST-CENTERED EDUCATION IN A STRUCTURED ENVIRONMENT THAT NURTURES AND CHALLENGES STUDENTS TO ACHIEVE THEIR GOD-GIVEN POTENTIAL IN PARTNERSHIP WITH HOME AND CHURCH.

4215 Robert Avenue
Cleveland, Ohio 44109
(216) 631-3640

Dear Luther Memorial School Parent,

Greetings in the name of Jesus, our Savior!

It is my hope that this handbook will be helpful in answering any questions that you may have concerning Luther Memorial School. Even though attempts were made to include the most important topics, you may still have some questions. Please do not hesitate to call the school office, 631-3640, to ask any questions and express any concerns.

By working together as a team, we can give your child the best possible Christian education. Our overall school theme is "Sharing Christ in the City." Cooperation between our school, our homes, and our churches will guarantee the successful implementation of this theme.

May God bless us all as together we help our children in their spiritual, academic, social, emotional and physical growth.

In His Service,

Bill Ronschke
Principal

I-34

Saint John Nottingham Lutheran School Materials

ST. JOHN NOTTINGHAM LUTHERAN
CHURCH & SCHOOL

September 21, 1999

Carolyn Jurkowitz
Catholic Conference of Ohio
Fax # - (614)224-7150

Dear Ms. Jurkowitz:

Here is the information that you requested

Mission Statement –

It is our belief that the one cardinal objective
of education to which all others point
is to develop devotion to God as our Creator,
Redeemer, and Sanctifier, whose love for us
moves us to show in our every act, thought,
word and desire, our love for Him.
"THE FEAR OF THE LORD IS THE BEGINNING OF KNOWLEDGE."
Proverbs 1:7

To bring about such development, it is our constant aim to provide in each and every pupil his or her—FAITH—GOOD WORK—PERSONAL LIFE ADJUSTMENT, which includes training for maximum physical, intellectual, and emotional capabilities of each child, with all due recognition for individual difference through various developmental stages of growth.

This basic philosophy determines the curriculum, content of the course of study, and the environment making up the total teaching-learning situation at St. John.

This statement is part of our Parent Handbook. I'm not sure of the date that it was approved. It was developed by the principal and approved by the St. John School Commission.

We currently have 34 students receiving Scholarships.

Grade 1 – 3 Grade 2 – 7 Grade 3 – 13 Grade 4 – 2
Grade 5 – 7 Grade 6 – 2

Sincerely,

Susan M. Ophardt, Principal

"THE FAMILY OF GOD ...

BEARING FRUIT"

PARENT HANDBOOK

1999-2000

ST. JOHN NOTTINGHAM LUTHERAN CHURCH AND SCHOOL

17403 Nottingham Road
Cleveland, Ohio 44119
(216) 531-1156
Dr. W.P. Marcis, Pastor

1027 East 176th St.
Cleveland, Ohio 44119
(216) 531-8204
Miss Susan Ophardt, Principal

PURPOSE OF THE HANDBOOK

This handbook contains help and information on policies regarding our school, regulations for the pupils and the school calendar, etc. May it prove helpful to parents, pupils and to all others interested in the *Christian* (Christ-centered) education of their children. Let us ever recognize our children as gifts of God and do all we can for their temporal and eternal welfare.

EDUCATION: A LIFELONG PROCESS

God makes clear that Christian education is a lifelong process, and so we must not expect Christian maturity in childhood. We must be willing to wait for the fruit. *Children will simply not hear and now practice* all that they have learned. Not even mature Christian adults do this. *Therefore, evaluating behavior in childhood does not reflect the full effect of a person's training*. This knowledge will keep us from jumping to immature and wrong conclusions and will do much to overcome the tendency to try to judge the value of a Christian school by demonstrable differences between children who attend it and other Christian children who don't. If we accept God's Word and promises at all, we must accept them all the way. Accepting them all the way means believing that, ordinarily, our results in Christian education parallel the amount of effort put forth in teaching God's Word. Unless we want to deny that "The Word of God is quick and powerful" (Hebrews 4:12), we have no other choice. *A thorough Christian education with sound doctrinal teaching and with proper application of doctrine, will provide a foundation for continuing growth and maturation in spiritual matters far beyond the years of school attendance.*

We will, of course, not always be as successful in our school training as we should be. This could be partly due to our mistakes, could be caused by the unwillingness of children to accept our teaching, could be partly due to home situations, and most certainly, to the devil's snares. *But that changes neither the principle nor our faith.* With the faith that God will bless the faithful teaching of His Word, we will be able to take our successes and failures in stride, knowing that the school serves the spiritual needs of both the child and the church.

Luther said, "For it is the duty of father and mother –nay, for this very purpose they were made father and mother – to teach children and lead them to God, not according to their own notion and their own religious persuasion, but according to the command of God."

But, long before this, *God* commanded, "Train up a child in the way he should go, and when he is old he will not depart from it."

"He was before all else began and it is His power that holds everything together."

OUR PHILOSOPHY OF EDUCATION

It is our belief that the one cardinal objective
of education to which all others point
is to develop devotion to God as our Creator,
Redeemer, and Sanctifier, whose love for us
moves us to show in our every act, thought,
word and desire, our love for Him.

"THE FEAR OF THE LORD IS THE BEGINNING OF KNOWLEDGE."

Proverbs 1:7

To bring about such development, it is our constant aim to provide in each and every pupil his or her –FAITH –GOOD WORK –PERSONAL LIFE ADJUSTMENT, which includes training for maximum physical, intellectual, and emotional capabilities of each child, with all due recognition for individual difference through various developmental stages of growth.

This basic philosophy determines the curriculum, content of the course of study, and the environment making up the total teaching-learning situation at St. John.

WHY A CHRISTIAN DAY SCHOOL?

In order to carry on the command of Jesus, "teaching them to observe all things whatsoever I have commanded you…". St. John Lutheran Church in 1892 established a Christian Day School.

St. John School is maintained by the members of St. John Lutheran Church and assisted by sister congregations in the area. These members believe the school to be essential in carrying out God's command regarding the Christian training of children. They also want to assure themselves and their children of the blessings God has promised to those who give their children a Christian education.

GOD COMMANDS:

"Ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." Ephesians 6:4

"These words, which I command thee this day, shall be in thine heart, and thou shalt teach them diligently unto thy children." Deut. 6:6-7

GOD PROMISES:

"All thy children shall be taught of the Lord, and great shall be the peace of the children." Isaiah 54:13

"Train up a child in the way he should go, and when he is old he will not depart from it." Proverbs 22:6

WHAT IS EDUCATION IN A CHRISTIAN SCHOOL?

In education, we are concerned with the development of knowledge, ability, skill, attitude and character by means of teaching, study and experience. Christian education has precisely the same general aims, but it is based on the Bible and has three specific goals:

1. To lead the individual to faith in Christ and to keep him in that faith.
2. To help the individual to develop into an even better and more perfect Christian in all of life's relationships, both secular and religious.
3. To keep before the individual the goal of every child of God – Eternal Life.

The Lutheran Day School is the best agency for such Christian education because it provides for the total growth and development of the child. The Bible describes such a complete education in Luke 2:52: "And Jesus increased in wisdom and stature in favor with God and man."

Four types of growth are included in the educational program thus described:

SPIRITUAL DEVELOPMENT
INTELLECTUAL DEVELOPMENT
PHYSICAL DEVELOPMENT
SOCIAL DEVELOPMENT

OBJECTIVES OF CHRISTIAN EDUCATION

Christian education attempts to guide the child's development in these four areas of growth on a level commensurate with his God-given abilities:

In the development of his SPIRITUAL potentialities. Christian education guides the child to:

1. Acquire a thorough knowledge of God and His Word.
2. Recognize his sin and the need for salvation.
3. Accept Jesus as his Savior through the working of the Holy Spirit.
4. Rely upon God for both temporal and spiritual blessings.
5. Desire to live according to God's law.
6. Utilize the means of grace, namely, the Word and Sacraments.
7. Lead a sanctified life.
8. Desire to lead others to the Savior.
9. Serve the church through the proper stewardship of time, talents, and treasures.

In the development of his INTELLECTUAL potentialities, Christian education guides the child to:

1. Acquire a thorough knowledge of skills in the common branches of learning.
2. Develop an inquiring mind.
3. Develop independent thinking.
4. Acquire a wide range of significant interests.
5. Cultivate desirable and useful work habits and study skills.
6. Evaluate all human knowledge in the light of what God says in the Bible.

In developing his PHYSICAL potentialities, Christian education guides the child to:

1. Regard his body as a "temple of the Holy Spirit."
2. Use his body for the purposes for which God has given it.
3. Acquire and maintain desirable physical and mental habits.

In development of his SOCIAL potentialities, Christian education guides the child to:

1. Lead a Godly life.
2. Be kindly affectioned to his family and associates.
3. Respect, under God, authority of home, school, church and state.
4. Recognize the right, privileges, and obligations of others, as well as his own.
5. Serve as a useful and active citizen in his community.

ADMINISTRATIVE ORGANIZATION

St. John Lutheran School is one of the educational agencies of St. John Lutheran Congregation.

The congregation established and continues to support this form of Christian education through the directives of the Voters' Assembly.

The Voters' Assembly executes its will through the School Commission composed of one elected director who appoints 2 additional members: one member appointed by the Board of Directors of St. John: the Pastor of St. John: and the Chairman of the St. John Congregation. The Principal and Vicar are advisory members.

Immediate supervision of the school rests with the PRINCIPAL. He/She must act as the executive director, who, with the help of the faculty and the Administrative Council, suggest changes and policies, and carry out the wishes of the School Commission and the Congregation.

STATE OF OHIO STANDARDS – ACCREDITATION

St. John Lutheran School is a non-public, State of Ohio – approved elementary school. Every effort is made to meet and exceed the standards of the Ohio Department of Education.

TEACHERS

The teachers of St. John Lutheran School are concerned Christian individuals with unique God-given talents and abilities. All teachers are certified by the Ohio State Department of Education. Every effort is made to hire teachers that are members of the Lutheran Church.

HIRING PRACTICES

St. John Lutheran School follows a non-discriminatory policy in regard to the hiring of its staff.

St. John pays equal wages for equal or equivalent positions. The opportunity for employment at St. John is not based on the sex of an applicant.

ADMISSION POLICY

St. John is a school for the training of children of its members, members of sister congregations, and as an agency of outreach for the Church. Sister congregations may have

an arrangement with St. John to help pay the cost of their member children.

Other children, whose parents are interested in Christian Education, may be enrolled. Children whose parents are members of another church denomination or who have no church affiliation may be enrolled after the parents have thoroughly discussed the matter with the principal. Such parents must pay the set tuition for the cost of their children's education as determined by the Voters' Assembly of St. John.

St. John Lutheran School is proud that it has, over the years, admitted students of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the school. It does not discriminate on the basis of race, color, national and ethnic origin in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

I. *ENTRANCE AGE*:
   - A. Kindergarten pupils must be 5 on or before September 30th.
   - B. First grade pupils must be 6 on or before September 30th.

II. *ENTRANCE REQUIREMENTS*:
   - A. All students not transferring from another school shall provide proof, birth certificate or other, of proper age as required by the State of Ohio.
   - B. All new students shall be accepted as probationary for the first semester. Their progress will be reviewed periodically during this time. If the progress is unsatisfactory, the

School Commission may decide that the student not continue at St. John. Final acceptance will be determined upon parent and teacher conferences, and adequate transcript or records from the previous school, observation of academic work and behavior by the teacher, and testing if necessary. Children transferring to our school must have a valid transfer. Tests for proper placement *may be required.* Application for enrollment should be made to the Principal through the school office.

C. *HEALTH REQUIREMENTS*

1. All new students must have a physical (complete medical examination) K-8. All returning students in grades 1, 4 & 7 are required to have a complete medical examination.

I-35

SAINT MARK LUTHERAN SCHOOL
MATERIALS

Current Mission Statement:
It is the mission of St. Mark Lutheran School to provide the quality of Christian education that keeps the Light of Christ first and foremost.

Who developed the Mission Statement:
The School board in summer 1999 (revision).

Who officially approved the Mission Statement?
The School Board.

How many students in your school currently receive the scholarship?
46 students

How many scholarship students are at each grade level in your school?
GR. K – 5; 1 – 10; 2 – 12; 3 – 11; 4 – 4; 5 - 3.

St. Mark Lutheran School

1999-2000

Parent-Student Handbook

Some Things Never Change:

Jesus' Love and Promises

Welcome to St. Mark Lutheran School

What we expect of parents…

Become thoroughly informed of the purpose of St. Mark Lutheran School

- Be supportive of and respectful towards the school, the principal, the teachers, and the staff (who all contribute to your child's education)
- Ensure that your child(ren) adhere to the school rules, regulations, and responsibilities

The primary focus of St. Mark Lutheran School is on our Lord and Savior, Jesus Christ. In all of our goals, Jesus Christ must be preeminent. Because of our commitment to that focus and to our beliefs and philosophy, it is highly inconsistent for any parents to send a child to this school if they:

- Are not a Christian and/or are not interested in learning about Jesus Christ
- Are not living a Christian life or willing to learn how to lead such a life

- Are not a supporting part of a Christian congregation through worship and sharing of time and talents

What we expect of students…

- You are a child of God and as a child of God, you are expected to conduct yourself in a way that will make your life a Christian witness to all.
- You are responsible for your own behavior and attitude
- You are responsible for your own class assignments, tests, and homework
- You are expected to respect, honor, obey, and show Christian love toward teachers, the principal, pastors, and school staff/volunteers to whom God has granted authority in the school
- You are expected to be considerate of others, respect the rights of others, and show respect for their property
- You are expected to know and follow the school rules, regulations, and responsibilities in the handbook and any changes made during the school year as enacted by the teachers, principal, or school board
- Attending church and Sunday school as often as you can is an important part of a relationship with God. St. Mark Lutheran School requires and records church and Sunday school attendance. We encourage you to attend with your parent(s) as a family

What you can expect from us…

- We will be supportive of and respectful towards parents and students
- We will provide an open line of communication
- We will do our best to provide an atmosphere conducive to quality education

"See what love the Father has given us, that we should be called children of God."

I John 3:1

ADMISSIONS

In 1895, when St. Mark Lutheran Church and School were founded, the Christian day school served as an educational arm for the members of the congregation. Today, while still serving members and teaching exclusively the beliefs of the Lutheran Church Missouri Synod, St. Mark Lutheran School serves families and students from many backgrounds. Some include those from other Lutheran congregations, other Christian denominations, and those with no formal church background. We welcome members of the greater Cleveland community to become involved in our school and the Christian education it offers.

Enrollment Procedures

To enroll a student at St. Mark Lutheran School the following procedures are to be followed:

- Stop in at the school office to pick up an enrollment packet
- Return the completed enrollment form(s) to the school office, along with the enrollment fee

- Schedule an appointment to meet with the school principal and the teacher that your student will have, if accepted, at St. Mark
- When you meet with the principal and the teacher, please bring with you copies of a current report card, copies of any achievement testing, and a letter of recommendation concerning the student's behavior and attitude (this letter should be from a recent teacher or administrator)
- If accepted, the parent(s) will need to sign a release of records forms, so that the records of the student can be transferred from his/her prior school

In all cases, the principal, in conjunction with the cooperating teacher, will make the decision on enrollment and, if necessary, the school board will finalize the decision.

New Student Status

All new students are accepted on a conditional basis for the first quarter. Removal of conditional enrollment is dependent upon satisfactory receipt of transcript of records from the previous school, attendance by parents at the parent teacher

Parent Handbook

1999-2000

West Park Lutheran School
13712 Bellaire Road, Cleveland, Ohio 44135
216-941-2770

WEST PARK LUTHERAN SCHOOL

PARENT HANDBOOK
1999-2000

CONTENTS

INTRODUCING OUR SCHOOL
- FORWARD 3
- WHY A LUTHERAN SCHOOL 3
- PHILOSOPHY, PURPOSE 4
- SPONSORING CONGREGATIONS 5
- ACCREDITATION 6
- WEST PARK LUTHERAN SCHOOL BOARD 6
- WEST PARK LUTHERAN SCHOOL STAFF 6
- WORSHIP 7
- CHAPEL 7
- CURRICULUM, COURSE OF STUDY 8

ENROLLMENT AND FINANCIAL POLICIES
- ENROLLMENT POLICY 9
- EARLY ENTRANCE 10
- REGISTRATION FEE 11
- TUITION POLICY 11
- TUITION RATES 12
- FINANCIAL ASSISTANCE PROGRAM 12

SCHOOL ATTENDANCE POLICIES
- SCHOOL HOURS 13
- EMERGENCY SCHOOL CLOSING 13
- CALENDAR 14
- ATTENDANCE 15
- LEAVING SCHOOL OTHER THAN REGULAR TIME 15
- ARRIVING AT SCHOOL 16
- AFTER SCHOOL PICK-UP 16

- GOING TO AND FROM SCHOOL 16

OPERATIONAL POLICIES
- CODE OF CONDUCT 17
- EXTENDED CARE PROGRAM 20
- COMPUTER AND INTERNET USE POLICY 21
- TELEPHONE 22
- BICYCLES 22
- CAR POOLS 23
- SCHOOL VAN 23
- TRANSPORTATION REIMBURSEMENT 23
- CLEVELAND SCHOOL TRANSPORTATION 23
- UNIFORM DRESS POLICY 24
- SEX EDUCATION 26
- SCHOOL SUPPLIES 26
- RECESS 26
- LUNCH 26
- SCHOOL MILK 26
- NOTIFICATION IN CASE OF SUSPECTED CHILD ABUSE 27
- SEXUAL HARASSMENT/SEXUAL VIOLENCE POLICY 28
- POLICY ON YOUTH GANGS 29

ACADEMIC AND CURRICULAR POLICIES
- REPORT CARDS AND CONSULTATION 31
- MID-QUARTER REPORTS 31
- HONOR ROLL AND MERIT ROLL 31
- EIGHTH GRAD GRADUATION 31
- RETENTION 31
- EDUCATIONAL TESTING PROGRAM/ PROFICIENCY TESTS 32
- STUDENT ACCIDENT INSURANCE 32
- HEALTH SERVICES 33
- MEDICATIONS 33
- AIDS POLICY 33

PSYCHOLOGICAL SERVICES 34
SPEECH THERAPY 34
TUTORING 34

COCURRICULAR AND EXTRACURRICULAR POLICIES
OUTDOOR EDUCATION 34
JUNIOR HIGH CLASS TRIP 34
SCHOOL PARTIES 35
INVITATIONS 35
DANCE GUIDELINES 35
FIELD TRIPS 36
SCHOOL PICNIC 36
TREATS 36
SPORTS 36
CHEERLEADERS 36
ELIGIBILITY FOR ATHLETICS 37
REGULATIONS FOR LUTHERAN ATHLETIC EVENTS 37
BAND PROGRAM 38
BAND GUIDELINES 38

PARENT INVOLVEMENT AND INFORMATION
PAGE NINETEEN 39
YEARBOOK 39
SCHOOL PICTURES 39
PARENT ORIENTATION 39
PARENT-TEACHER LEAGUE 39
VISITORS 39
SOLICITORS 40
PARENT VOLUNTEERS 40
FAMILY CUSTODIAL SITUATIONS-RELATIONSHIP WITH THE SCHOOL 41
PROCEDURE FOR HANDLING COMPLAINTS 43

INDEX 44

ONE LORD – ONE FAMILY

FORWARD

The purpose of this booklet is to acquaint you with West Park Lutheran School. The objectives, policies, and practices of our school should be understood and deeply appreciated after reading the following pages.

The specific information will be of special importance to our parents and pupils. If kept in a convenient location, this booklet will serve as a ready source of information throughout the school year.

WHY A LUTHERAN SCHOOL

When Jesus said, *"Permit the little children to come unto me, and forbid them not."* This was not merely a suggestion, but rather a command which Christian parents would do well to heed.

Our Lutheran school has been founded on the firm foundation of God's Word. Children attending our school receive regular studies in the Christian religion as commanded by God. *"These words I command you this day shall be in your heart: and you shall teach them diligently to your children."* Deuteronomy 6:6-7

Since there are so many influences in the world that are dangerous to one's faith, a child needs to hear and learn the Word of God constantly and to apply it in all situations of his daily life. *"Train you a child in the way he should go: and when he is old, he will not depart from it."* Proverbs 22:6

This can be done only when the entire curriculum and the life of the school are grounded in the Word of God and dedicated

to the purpose of showing the love of the Savior to a world which, without Him, would be lost forever. *"All your children shall be taught of the Lord, and great shall be the peace of your children."* Isaiah 54:13

Consider well the promise of God. *"When he is old he will not depart from it." "Great shall be the peace of your children."*

PHILOSOPHY

We view the whole child as the foremost of God's creation, although alienated by sin. Because of God's love and forgiveness we focus upon redemption for all and strive to lead all to a repentance and growth in the knowledge of God as expressed in his Word.

In search of truth, the Christian acknowledges the supreme authority of God and Scripture as being relevant to our present times and situations. Anything that is taught will be of value if it serves the welfare of society and the glory of God.

Our primary purpose and obligation is to develop in our students such attitudes, habits, and skills as are necessary to train the heart, the mind, and the hands. The social, emotional, and aesthetic capacities need to be satisfied so that the child can live as a free responsible being in Christ, seeking in all things the perfect praise and glory of God.

When certain psychological conditions are recognized such as individual differences, readiness, motivation, purpose, interests, meaning and repetition, the child can learn. He will have the basic knowledge to change and choose his course of action wisely through the use of his senses (experience) and

by reason, intuition, and reliance upon the authority of divine revelation (the Bible).

PURPOSE OF WEST PARK LUTHERAN SCHOOL

West Park Lutheran School's main objectives are:

1) the leading of its children to know Christ as their Lord and Savior; and
2) to foster academic excellence.

Specifically, our aims are the following:

I. To provide thorough instruction in God's Word in order that:
   - A. Pupils may learn to trust in Jesus Christ as their living Savior and the only way to heaven.
   - B. Pupils may know what the Lord expects of them as children of God.
   - C. Pupils may willingly do that which is right and God-pleasing and avoid that which is evil.

II. To cooperate with the Christian home and the children that they might be a credit to their parents, an asset to the church and worthy citizens of the community.

III. To provide thorough instructions in all the required elementary and junior high school subjects so that knowledge, when taught in harmony with the Holy Scriptures, may help boys and girls to live successfully and in accord with the Word and will of God.

SPONSORING CONGREGATIONS

BETHANY ENGLISH LUTHERAN CHURCH (ELCA)
15460 Triskett Road
941-7880
Services: 8:30 and 11:00 A.M. (Nursery)
Summer Worship: 5:00 P.M. Saturday and 10:00 A.M. Sunday
Sunday School: 9:45 A.M.
Bible Class: 10:00 A.M.
Rev. Maurice Gold, Interim Pastor

HOLY CROSS LUTHERAN CHURCH (LCMS)
4260 Rocky River Drive
252-2348
Services 8:00, 10:15, and 11:00 A.M.
Christian Education Hour: 9:15 A.M.
Bible Class: 9:15 A.M.
Rev. Myron Prok, Pastor

MOUNT CALVARY LUTHERAN CHURCH (LCMS)
12826 Lorain Avenue
671-2099
Service: 10:30 A.M.
Summer Worship: 9:00 A.M.
Sunday School: 9:00 A.M.
Bible Class: 9:00 A.M.
Rev. Walter Kovac, Pastor

PURITAS LUTHERAN CHURCH (ELCA)
13812 Bellaire Road
251-6722
Service: 10:00 A.M.
Summer Worship: 9:00 A.M.
Sunday School: 9:15 A.M.
Prayer Group: Wednesday 9:30 A.M.
Rev. John Klein, Interim Pastor

ACCREDITATION

West Park Lutheran School is accredited by the state of Ohio for grades Kindergarten through eight. It was granted its initial state charter by the State Board of Education on July 13, 1982. The teachers employed by the school are certified for their grades under the present state laws.

WEST PARK LUTHERAN SCHOOL BOARD

Georgann Carte, Sec'y	Bethany
Bonnie Doctor	Mt. Calvary
Walter Faykus	Mt. Calvary
Timothy Hadde, Treas.	Puritas
Edward Himmelein, Chair	Holy Cross
Rev. Walter Kovac	Mt. Calvary
Michael Leininger	Holy Cross
Rae McElyea, Fin. Sec'y	Puritas
Deborah Mickey	Puritas
David Pavlick, V. Chair.	Bethany
Belinda Pesti	Mt. Calvary
Rev. Myron Prok	Holy Cross
Lynn Sparks	Bethany
Ron Tabor	Holy Cross

Glenn Kloha, Principal, ex-officio member

WEST PARK LUTHERAN SCHOOL STAFF

Glenn Kloha	Principal
Joyce Oerkfitz	Kindergarten
Doreen Hurst	Grade One
Cheryl Steinke	Grade Two
Colleen VanLoh	Grade Three
Elaine O'Dea	Grade Four
Susan Chamot	Grade Five
Harold Weseloh	Grade Six
James Hurst	Grade Seven
Michael McDermott	Grade Eight
Anita Andrews	Transportation
Diane Apelt	Secretary
Cindy Archer	Speech Therapist
Barbara Bacon	Psychologist
Edith Bottoms	Aux. Services
Patricia Deutsch	Classroom Aide
Susan Geye	Afternoon Clerk
Ruth Miller	Classroom Aide
Paulette Rush	Nurse
Giancarlo Scalzi	Social Worker
Eileen Starr	Basic Skills

CHRISTIAN VOCATION

Worship the Lord

WORSHIP

Our pupils are expected to attend church and Sunday School faithfully and to take part in extra school religious activities and special programs of our school. We feel that this is a necessary part of the Christian education in the classroom.

Children will be expected to attend church and Sunday School at least 75% of the Sundays during the school year.

Church and Sunday School attendance will be taken in the classroom each Monday and noted on the child's report card.

We invite our parents and children who have no church home to attend one of the four churches in the West Park Lutheran Association. Please contact one of the pastors for information on adult instruction classes. The churches and times of services are listed in the front of this handbook.

The following steps will apply to pupils who are negligent in church attendance.

1. Reminders will be sent home.
2. Contact may be made by the teacher, the principal, a pastor, and/or others to encourage participation in worship and Sunday School.
3. Continued disregard of church and Sunday School attendance may jeopardize enrollment.

CHAPEL

Children's chapel services are held weekly at each campus. Parents and friends are cordially welcome to attend. The services provide an excellent opportunity for development of the art of worship and promote real growth in Christian stewardship. The offerings received at these services will be designated for various mission projects throughout the year. Offering envelopes should be marked with the child's name and the amount enclosed. Parents will receive an account of their children's offerings at the end of the school year.

CURRICULUM

Since our philosophy and purpose are to provide a sound religious education, it is natural that children attending our school receive regular courses in religious instruction in addition to that provided in church and at home. Some of the primary subjects in the religion courses are Bible history, catechism, memorization and Bible reading. We consider these as the foundation upon which the Lutheran school curriculum as a whole is built.

The immediate objective of West Park Lutheran School with respect to the academic branches of study is the development of desirable and necessary skills, abilities, and attitudes. Parents may be assured that every effort is made toward realization of this important objective. Due to our limited class size of twenty-five pupils, the opportunity for close attention to the individual needs of each child is enhanced.

The Ohio state standards for elementary and junior high school outline the curriculum to be followed in all schools in Ohio. West Park Lutheran School carries out this curriculum and, in addition, provides for the spiritual growth of children through its course of study as outlined.

COURSE OF STUDY

Kindergarten	*Grades 1-6*	*Junior High*
Religion	Religion	Religion
Reading Readiness	Language Arts	Language Arts
Math Readiness	Health	Reading
Handwriting	Mathematics	Mathematics
Language Arts	Reading	Science
Art	Science	American History
Health	Social Studies	U.S. History
Music	Physical Education	Civics
Physical Education	Music	Ohio History
Science	Art	Physical Education
Social Studies	Band	Art
		Health
		Music
		Band

Physical Education is required of all pupils in grades K-8. No child will be excused except upon the advice of a doctor. Proper gym uniform is required for physical education class. Points will be deducted for not having proper attire for physical education which will effect the grade given for the quarter. Physical Education begins the first week of school and will held on Tuesdays and Thursdays. Physical education will be conducted by a S.H.A.P.E. certified physical education instructor.

ENROLLMENT POLICY

West Park Lutheran School is operated by the West Park Lutheran School Association, Incorporated which is an association formed by four participating Lutheran churches: Bethany English, 15460 Triskett Road; Holy Cross, 4260 Rocky River Drive; Mt. Calvary, 12826 Lorain Avenue; Puritas, 13812 Bellaire Road.

We exist primarily to offer religious training and academic excellence to children from these four congregations and others who wish to enroll. All must be approved by the school board upon the recommendation of the principal. All children will be enrolled according to the following priorities:

1. Pupils whose parents are members in good standing of Bethany English, Holy Cross, Mt. Calvary, or Puritas Lutheran churches;
2. Brothers and sisters of pupils enrolled;

3. Children who have been awarded a Cleveland Scholarship;
4. Pupils from other Lutheran churches;
5. Pupils of other denominations or with no church affiliation.

The age requirements for entrance are: Kindergarten – 5 years old on or before September 30; first grade – 6 years old on or before September 30. Pupils admitted to first grade must have completed a state chartered Kindergarten program.

All pupils new to the school must present a copy of their original birth certificate at the time of enrollment. Children transferring from other schools must present valid transfers or information from the previous school they attended. If no information on a transferring pupil is received within a reasonable amount of time, we must notify the law enforcement agency in the area where the pupil resides of this fact and the possibility that the pupil may be a missing child.

In accordance with state law, applicants must have the required immunizations. A pre-school check-up and completion of the health record forms are mandatory. Forms and further information are available at the school office. All 7th graders must have the MMR2 immunization.

Applications for enrollment should be made to the principal at the school office. There is an $80.00 non-refundable application fee per student.

Children transferring from another Lutheran school whose parents are members in good standing of another Lutheran church and who transfer membership to a congregation in the West Park Luthern School Association shall be eligible for

the member rate contingent upon approval of the receiving congregation.

West Park is not equipped to deal with seriously mentally and physically handicapped children in need of special care, nor is our school a correctional institution for disciplinary cases.

Enrollments are accepted until the first day of school or until classes are filled to a maximum of 25 pupils.

All pupils will be accepted on a probationary basis. Final acceptance will be determined on the basis of the child's academic and behavioral performance and upon the ability of the school to be of service to the pupil.

Final registration is accomplished by attendance at the Parent Orientation session. No pupil will be allowed to begin school until the first tuition payment and the registration fee have been paid.

After the first four weeks of school, a child may enroll only by approval of the Enrollment and Policy Committee, and board action on the child's enrollment must be taken at the next school board.

HE GATHERS THE LAMBS IN HIS ARMS AND CARRIES THEM CLOSE TO HIS HEART. HE GENTLY LEADS THOSE THAT HAVE YOUNG.

Isaiah 40:11

EARLY ENTRANCE REQUIREMENTS

Consideration for early entrance to kindergarten and first grade will be given to children whose birthdays fall between

October 1 and December 31 of the same year and only if there are not regular pupils on the class waiting list.

Children whose birthdays fall between the dates noted above will be accepted for nine weeks on a trial basis provided they pass a screening test administered by a school psychologist or a psychologist of the parents' choice and at the parents' expense. No early entrance testing will be conducted after the opening of the school year, and all pupils accepted for early entrance must be enrolled on or before the first day in session of the school year.

* * *

West Park Lutheran School admits students of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the school. The school does not discriminate on the basis of race, color, national, and ethnic origin in administration of educational policies, admission policies, and other school administered programs.

RAMAH JR. ACADEMY

HANDBOOK

RAMAH JUNIOR ACADEMY
A SEVENTH-DAY ADVENTIST INSTITUTION
Train up a child in the way he should go…Proverbs 22:6
4770 Lee Road
Cleveland, Ohio 44128
Phone: (216) 581-2626
Fax: (216) 581-4128

Dear Parent – Guardian:

Welcome to a new school year at Ramah Junior Academy. We are so happy you have chosen our school for your child's education. It is our goal to provide a Christian education for all of our students from grades K-10.

The faculty of Ramah Junior Academy believes in a personal God who governs an orderly universe in love and desires a relationship of trust with His creatures. He created social beings capable of entering personal relationships with Himself as well as with each other. In redemption, through the life and death of Jesus Christ, humankind may once again choose the way of trust and obedience which leads to a vastly enriched life on earth and eventually to eternal life.

This bulletin contains policies, procedures, and rules of the school. Please read this information carefully. Become familiar with each item so that you and your child may have an enjoyable, yet meaningful school year.

Sincerely,

LaJuan Marshall
Principal/Teacher

* * * * * * * * * *

LENGTH OF SCHOOL DAY

School Hours: Grades K – 6	9:30 – 3:00	(Mon. – Thurs.)
	8:30 – 2:15	(Friday)
Grades 7 – 10	8:15 – 3:15	(Mon. – Thurs.)
	8:15 – 2:15	(Friday)

ARRIVAL

The doors of the school will be opened at 7:50 am. All students that are eating breakfast will line up immediately. Breakfast is served from 7:50 am – 8:15 am. NO EXCEPTIONS.

CALVARY CENTER ACADEMY

Your Complete Christian School

And these words . . .
Shall be upon your hearts;
And you shall teach them
Diligently to your children . . .
Deuteronomy 6:6-7

Parent-Student Handbook
1999-2000

CALVARY CENTER ACADEMY

Parent-Student Handbok

CONTENTS

INTRODUCTION 1

MISSION STATEMENT 3

PHILOSOPHY 4

SCHOOL POLICIES 5-15
--*Admissions*
--*Attendance*
--*Code of Conduct*
--*Discipline*
--*Dress Code*
--*Medication*

ACADEMIC PROGRAM 16-18
--*Courses of Study*
--*Curriculum Content*
--*Grading System & Reporting to Parents*

GENERAL PROCEDURES 19-20
--*Classroom Visitations*
--*Parent Conferences*
--*Food Service*
--*Transportation*

STUDENT GROUPS & EXTRA CURRICULAR ACTIVITIES 21-23
--*Chapel*
--*Choir*
--*Speech Meet*

--Spelling Bee
--Honors Club
--Student Council/Government

PLEDGES 24

POLICY REGARDING TUITION PAYMENT 25

INTRODUCTION

WHAT THE HANDBOOK SEEKS TO DO

This handbook is intended to give parents and students comprehensive guidelines and an understanding of the goals and activities of the Academy. It explains the philosophy, the policies and procedures, and gives information about the curricula.

NON-DISCRIMINATION POLICY

Calvary Center Academy admits students of any race, color, nationality and ethnic origin to all programs and learning experiences that it provides. The same policy is practiced in employment.

ACCREDITATION & AFFILIATION

The Academy is chartered by the Ohio Department of Education and is a member of the Association of Christian Schools International (ACSI). Calvary Center Academy was established in 1987.

LEVELS OF COURSE WORK

The Academy offers COURSE WORK in Grades K-5.

Mission Statement

The mission of Calvary Center Academy is to promote academic excellence in secular and religious studies, and to facilitate both intellectual understanding and practical application of Apostolic Christian values in the daily lives of our students.

<<<<<>>>>>

"And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up."

Deut. 6:7

PHILOSOPHY

The Governing Board of Education of Calvary Center Academy is composed of members from the Cleveland Apostolic Ministerial Fellowship elected by the Fellowship. The Board takes the following position regarding all academic programs:

1. *The pursuit of truth is a basic commitment of the Academy and it will seek to discover, apply and communicate truth.*

2. *The entire personality develops and grows through Commitment to the Lord Jesus Christ and search for truth.*

3. *Biblical truth should be at the center and integrated into all curricular and extracurricular experiences of the student.*

4. *Faith and reason are viewed as complementary. The Academy will pursue the integration of faith and learning in all subjects.*

To fulfill these objectives, Calvary Center Academy seeks to provide a learning environment in the Apostolic-Judiac Christian tradition which brings fulfillment of the whole person through the Lord Jesus Christ.

The Calvary Center Academy Governing Board is responsible for and governs the final decisions made by school administration. The board receives periodic reports of the Academy's operations.

I – 39

Westside Baptist Christian School
Materials

Westside Baptist Christian School
Parent – Student Handbook

Revised April 30, 1998

9407 Madison Avenue
Cleveland, Ohio 44102
216-961-7375 – Phone & Fax
housed in
MADISON AVENUE BAPTIST CHURCH

Welcome to Westside Baptist Christian School

It is the desire of all school personnel to work cooperatively with parents and students to provide an atmosphere that will promote positive learning and Godly social behavior. For this cause, certain procedures and regulations have been established for the proper operation of the school. Please read the booklet carefully and use it as a handy reference throughout the year. W.B.C.S. seeks to glorify God in all of its activities. Thank you for your trust in placing your child with us. We pledge to do our utmost to show God's love and faithfulness to your child.

To God be the Glory,

David L. Mossman
Principal

INDEX

I. General School Information

A. Statement of Purpose 7
B. Statement of Faith 7
C. Accreditation and Affiliation 8
D. Board of Education 8
E. Enrollment Policy 9
-- Statement of Nondiscrimination
-- Registration & Enrollment
-- Cleveland Scholarship & Tutoring Program
F. Enrollment Procedures 10
G. School Motto 10
H. School Colors 10
I. School Publication 10
J. School Nurse 11
K. School Psychologist 12
L. School Hours 12
M. School Insurance 12
N. School Office 12

II. School Policies & Procedures

A. Arrival 13
B. Departure 13
C. Visitors 15
D. Unsupervised Activities 15
E. Absentees 15
F. Tardy Policy 16
G. Telephone 17
H. Transportation 17
I. Lost and Found 17
J. School Supplies 18
K. Bathroom 18
L. Medicines 18

III. School Events

A. PTF Events 20
1. Programs
2. PTF Assemblies
3. Classroom Parties
4. Volunteer Services
B. Birthday Celebrations 22
C. Holidays – (what not to promote) 22
D. Parent/Teacher Conferences 22
E. Chapel 22
F. Fire and Tornado Drills 23
G. School Closings 23
H. Lunch 23
I. Library 24
J. Kindergarten Graduation 24
K. Eighth Grade Graduation 25
L. Spelling Bee 25
M. Speech Meet 25
N. Field Trips 25
O. End of year field trip 25
P. Award Assembly 25

IV. Academics

A. Curriculum 26
B. Bible Version 26
C. Standardized Testing 26
D. Grade Placement 26
E. Progress Reports 26
F. Report Cards and Grading System 27
G. Grading Scale 28
H. Promotion/Retention Policy 28
I. Summer School 29
J. Probation 30
K. Honor Rolls 30
L. Late Work Policy 31
M. Homework 32

N. Physical Education.....33
O. Band.....34
P. Music and Art.....34
Q. Computers.....34

V. School Rules
A. Classroom Discipline Procedures.....35
B. Principal Discipline Procedures.....35
C. Corporal Punishment.....36
D. Dress Code.....37
E. Policy on Electronic Toys.....37
F. Policy on Dangerous and/or Offensive Material.....37
G. Social Behavior.....37
H. Building, Grounds, and Safety Regulations.....38
I. Lunchroom Rules.....38
J. Bus Procedures.....40
K. Library Rules.....41

VI. Financial
A. Tuition Policy.....42
B. Explanation of Fees.....43

Appendixes
1. Yearly School Calendar.....44
2. Dress Code.....45
3. Tuition.....48

I. General School Information

Statement of Purpose

It shall be the purpose of Westside Baptist Christian School to provide a quality Christian education in an atmosphere where Godly moral values, as taught in the Word of God are practiced.

W.B.C.S. believes that Christ is the basis of all learning. All subjects will be taught from the Biblical perspective that all truth is God's truth. The educational process is seen as a channel used by the Holy Spirit to bring the student to a personal faith in Jesus Christ and to train the student in godly living.

The student will be taught Biblical principles so he may understand God's plan for his life spiritually, mentally, emotionally, physically, and socially. We wish each student to realize his fullest God-given potential for God's glory.

It shall be the school's purpose to work in harmony with the home as W.B.C.S. believes that a student's success is dependent upon the home sharing and upholding the same principales as the school. The reinforcement of these principles by Bible preaching churches will provide a solid foundation for life.

Statement of Faith

We believe in the plenary, verbal inspiration of the Bible as the only infallible, authoritative Word of God which is the Supreme and final authority in faith and life.

We believe that there is one God, eternally existent in three persons: Father, Son and Holy Spirit.

We believe in the deity of the Lord Jesus Christ, in His virgin birth, in His sinless life, in His miracles, in His vicarious and atoning death through His bodily resurrection. In His ascension to the right hand of the Father, and His personal return in power and glory.

We believe that man was created in the image of God, and that because of sin he is both physically and spiritually dead and thus is separated from God.

We believe in the resurrection of the crucified body of our Lord, in His ascension into heaven, and His presence at the right hand of God as our High Priest and advocate.

We believe in the resurrection of both saved and the lost...they that are saved unto the resurrection of life and they that are lost unto the resurrection of damnation.

We believe in the "blessed hope" which is personal, imminent pre-tribulational and pre-millennial coming of the Lord Jesus Christ for His church and the eternal security of the believer.

Accreditation and Affiliation

Westside Baptist Christian School is chartered by the Ohio State Department of Education. All our teachers are certified by the State Department of Education. We are affiliated with the Association of Christian Schools International (ACSI).

Board of Education

The policies regarding the administration of Westside Baptist Christian School are formulated by the Board of Education. The Board of Education is composed of representatives who are elected annually by sponsoring churches.

I – 40

Second New Hope Christian Academy Materials

STUDENT HANDBOOK

SECOND NEW HOPE CHRISTIAN ACADEMY
2917 EAST 116TH STREET
CLEVELAND, OHIO 44120

STUDENT POLICIES

CODE OF CONDUCT

A code of conduct serves as a guide for behavior and should enable establishment of a positive climate for learning. It provides a detailed plan for how students are expected to behave and suggests options for teachers/students to consider when established policies and rules are broken. It should, in essence, enhance student self-discipline and serve to prevent discipline problems.

A unique characteristic of Second New Hope Christian academy is that its discipline goals and procedures are rooted in the Scriptural understanding of discipleship. Growth in discipleship is the result of the activity of the Holy Spirit working through God's word.

The teacher's goal for good behavior should always be viewed with the understanding of a student's growth as a disciple; and because each person is different, that growth may take different forms at different times.

MY CREED

I am a bright child.
I want to make something of my life.
I was born to win if I do not spend too much
Time trying to fail.

Society will continue to predict, but only
I can determine what I will, can, or cannot do.
I will use each day to the fullest.
I promise that each day shall be gained or not
lost, used, not thrown away.

I have the right to fail, but not the right to
take my teacher and other people with me.
I am the captain of only one life…my own.
Therefore, if I decide to become a failure,
it is my right.

No one will ever hand success to me on a platter.
I must earn it.
And no one will care as much about me as
I must care about myself.

I will succeed.
I believe in what I can become.
I will never say "can't," But rather,
"I will try."
With God all things are possible.

Author Unknown

WORSHIP LIFE

Church Attendance

Since the religious instruction and program of the school are integral part of congregational life, it is the assumed natural outcome that all students worship services regularly and faithfully. Parents strongly urged to attend services with their children.

Children who are not members of Second New Hope will, of course, heed the same admonition for attendance at their respective churches. Families who do not have a church home are cordially invited to attend worship services at Second New Hope and enroll the children in Sunday School.

Chapel/Daily Devotions

A children's chapel service is held every Monday and parents are welcome to attend. Chapel services should not be thought of as taking the place of Sunday Worship Services, but only as supplemental to those.

Each classroom begins and end the school day with devotions led either by the teacher, individual students or small groups.

Student Behavior

Many of the most important lessons in life are learned at home. These lessons must be remembered and practiced at school. The exercise of self-control and self-discipline reflect good home training and are a source of pride for parents. In addition, this offers encouragement to teachers to do their best for pupils, both in and out of the classroom.

Discipline is a natural and normal part of discipleship. Dealing with individual discipline needs is therefore, a legitimate use of a teacher's time and talents.

Rules may be established by each classroom teacher. These will be, generally, specific to that classroom situation.

STUDENT PLEDGE

The student pledge describes ten rules that form the basic behavior standards at Second New Hope Christian Academy.

AS A STUDENT OF SECOND NEW HOPE CHRISTIAN ACADEMY, I WILL:

- Show love and respect for the Lord.
- Show respect for myself.
- Respect teachers and other adults.
- Respect other students and their belongings.
- Be in attendance at school regularly, so that I might learn the skills I need.
- Learn to listen and follow directions.
- Listen attentively to instruction from my teachers and other adults in charge of school activities.
- Complete all assigned work to the best of my ability.
- Recognize that school is my work and doing my best work is expected, if I am to succeed.
- Keep quiet in the building (church, halls, lavatories, and classrooms).

C.C.I.S.

CLEVELAND COMMUNITY ISLAMIC SCHOOL

MORAL AND ACADEMIC EXCELLENCE IS OUR GOAL

7301 SUPERIOR AVENUE

CLEVELAND, OHIO 44103

(216) 431-2088

HANDBOOK
1999/2000

INDEX

History 1
Mission Statement 2
1999/2000 School Year Schedule 3
Admission 4-6
Expectations 7
Student's Responsibility 8
Attendance 9
Daily Schedule 10
Reporting Pupil Progress 11
Pupil Cumulative Records 12
Promotion and Retention 13
Discipline 14
Student Conduct Code 15-16
C.C.I.S. School Rules 17-18
Educational Program 19
Curriculum 20-21
C.C.I.S. Uniforms 22-23
School Supply List 24-25

C.C.I.S. 7301 Superior Ave.
Cleveland Community Islamic School Cleveland, Ohio44103
Moral and Academic Excellence is our goal (216)-431-2088

Cleveland Community Islamic School is a full-time Islamic School with a regular school curriculum. With the dedication of a few staff and parents, the school started its operation in the 97/98 school year with a handful of students. The school operates seven hours a day, five days a week, including lunch time and prayer (Salat). School hours are 8:00 am to 3:00 pm.

Staff-- The school has over ten teaching staff who are graduates and postgraduate professionals in different fields of study. Our staff consists of different Nationalities (Americans as well as those from overseas).

Charter-- The school is under the process of being chartered by the Ohio State Board of Education. The Charter process is expected to be completed this school year (98/99 school year).

Location-- The school is centrally located on the product or service and the physical facility which is on 73rd on Superior Avenue.

Visitation-- Please come and visit us, we offer a better education and moral excellence.

C.C.I.S. 7301 Superior Ave.
Cleveland Community Islamic School Cleveland, Ohio44103
Moral and Academic Excellence Tel: (216 431-2088
is our goal Fax: (216) 431-2088

MISSION STATEMENT

BISMILLAH (IN THE NAME OF ALLAH)
Our mission at The Cleveland Community Islamic School (C.C.I.S.) is the mission of discharging our sacred duty to humanity. The sacred duty prescribed to us by Allah (The Almighty God). The sacred and incumbent duty of providing meaningful and useful knowledge to all. In line with our Islamic beliefs, knowledge and its applications is not a privilege, a pastime or a hobby, rather it is incumbent and a must upon every male and female. Furthermore, it is the absolute fundamental right of every child to be well-grounded with the best knowledge and training there is.

SUBHANA ALLAH (GLORY BE TO ALLAH)
In keeping with these, it is the goal of C.C.I.S to provide knowledge and training in moral and academic excellence to each student in the school. This knowledge and training by the grace of Allah, will be planned in a conducive Islamic environment to fully equip each student with the wisdom and the understanding that will enable him or her to skillfully, efficiently and successfully face the challenges of this life and to have a very strong hope of success for the eternal life.

INSHA ALLAH (GOD WILLING)
It's also the hope of C.C.I.S. that this knowledge and training by the power the authority and the will to Allah, will give the student the upper hand to be: (1) a believer (a logical and a rational thinker, and morally and ethically conscious person); (2) an executor of good deeds (such as a peacemaker, a tolerator, an organizer, a leader, a follower, a trainer, a

respector, a contributor, an appreciator, a grateful and thankful person, a caretaker, a responsible and an honest person, a compassionate and loving person, a visionary, a pioneer, an inventor, a producer, a designer, a builder, ….an establisher of a civilization and a middle nation that is just and fair to all); (3) a leader and an adviser in the truthfulness; and (4) above all, a very patience, decent, righteous, God-fearing person.

KINDERGARTEN GUIDE

DIOCESE OF CLEVELAND, OFFICE OF CATHOLIC EDUCATION 1999

TABLE OF CONTENTS

1. Acknowledgments ii
2. The Ministry of Teaching iii
3. Philosophy and Goals of Catholic Education iv
4. Introduction.....vi
5. Kindergarten Curriculum Overview vii
6. How to Use This Guide ix
7. The Kindergarten Classroom.....1
   - Suggested Classroom Furnishings.....2
   - Basic Teacher Supplies.....3
   - Classroom Schedule.....4
   - Learning Centers.....6
   - "The First Day!" 15
   - Classroom Management 18
   - Transitional Activities 21
   - Suggestions for Appraising Student Progress.....23
     - Sample Progress Report
     - Sample Kindergarten Certificate
8. Curriculum Application/Integration 27
   - Religion.....29
   - Language Arts.....65
   - Mathematics Readiness 79
   - Social Studies.....101

Health and Safety 113
Science 125
Art 141
Music 159
Phyical Education 171

9. Appendix A – Technology ..... A-I

10. Appendix B – Field Trips ..... B-I

11. Appendix C – Cooking Experiences ..... C-I

The Ministry of Teaching

We are joined together in a common ministry.

We are called to communicate the Gospel to young children.
We need each other.
The children need each of us.
We need the children.

We will move among them with joy,
Joy in living,
Joy in being the people of God,
Joy in living and learning with young children.

We will move among them with love,
Love of God,
Love for each other,
Love for young children.

We will move among them with sensitivity,
Sensitivity to their needs,
Sensitivity to our own needs,
Sensitivity to God at work in the world.

We are joined together in a common ministry.

We are called to live among children in many ways
That speak to the good news of God's love.

Source Unknown

DIOCESE OF CLEVELAND
PHILOSOPHY OF CATHOLIC EDUCATION

SOURCES

WE BELIEVE that a philosophy of Catholic education begins with faith that God, in creating, gifted us with life, became one of us in His Son Jesus, and in the Person of His Spirit awaits our response to His unconditional overture of love. Jesus remains with the community He formed, witnessing and sharing the Good News in every age and with all people, ever yearning for a return of love either by a sincere response to conscience or by membership in His Church. It is from this perspective that the educational ministry of the Catholic community flows.

CATHOLIC EDUCATION

WE BELIEVE that education which is Catholic begins, with life, in the heart of the family. Parents, the primary educators, seed and nourish values deeply human, deeply spiritual. Affirmed, treasured, and supported by the loving witness of Christian faith communities, the child continues a lifelong response to God's love in growing and excelling through responsible involvement in the academic, cultural, and civic concerns of daily life.

CATHOLIC SCHOOLS

WE BELIEVE that the Catholic school is sensitive to the mandate of Jesus: "Love one another as I have loved you" is the goal toward which all Catholic education tends. The school community, in sharing this vision within an atmosphere designed to

celebrate and practice love of God and neighbor, is the most effective means available to the Church for the education of youth. This vision motivates students to grow academically, culturally, and socially. Among the values prized in the Catholic school are self-worth, self-discipline in the search for a moral way of life, and appreciation for our American heritage. With deep concern for their brothers and sisters, young people in the Catholic day schools and the parish schools of religion form their personal response in truth, justice and love to God their Maker.

GOALS FOR CATHOLIC SCHOOLS IN THE DIOCESE OF CLEVELAND

1. To communicate the Gospel message of Jesus.
2. To provide opportunities to build and experience a faith community.
3. To orient students to the responsibility and experience of service because of their membership in the Christian community.
4. To provide students with the opportunity for growth in prayer.
5. To provide instruction in religious truths and values in such a way that they become an integrated part of the school program.

6. To develop a faculty and staff who by their presence and teaching express an integrated approach to learning and living in their lives.

7. To provide an academic program and environment conducive to the optimal development of each student.

INTRODUCTION

One of the most vital issues in the educational world is the instruction of young children. The current emphasis upon early childhood education represents a logical response to the urgent needs within our society today.

Educational research indicates that the early years are the most crucial for learning and that the environment of these years permanently affects the child's total development and personality. Therefore, any effective educational program must begin with the very young child.

Philosophy and Goals of the Kindergarten Program

We, as Christian educators, believe that the major purpose of the Catholic school is to educate the whole person in the relationship of a total family community. Within the school community, teachers must be prepared to create an atmosphere enlivened by the Gospel spirit of freedom and charity, based on the wholeness of human knowledge and culture through the teachings of Christ.

A balanced Catholic kindergarten program must be a synthesis of all that is best in curriculum design. It is within this setting that the child begins to develop as a unique person through "schooling." Provided with a variety of

opportunities, the child interacts with his social and natural environment in order to build a foundation for later learning. The whole process of educating the kindergarten child must be conceived not as a series of individual pieces, but as a whole, having its impact upon a total human being. Kindergarten helps the transition from home to school.

While cognitive, affective, and psychomotor growth are all part of the life of the five-year-old, care must be taken not to over-emphasize mastery of subject matter, not to forget the personal-social-emotional growth of the individual. Each child should experience success and gain a positive self-image. A happy child who is eager to come to school is the most important achievement of the kindergarten year. The student should:

1. Develop a positive self-image and an appreciation of the personal worth and dignity of every individual.

2. Gain and use knowledge to make sound judgments based on Christian principles and to think independently through a hierarchy of values.

3. Be a witness for Christ through growth in home life and in the total parish community, participate in the sacramental life of the Church with concern for and service to all.

4. Acquire appropriate behavior, attitudes, values, and knowledge about physical, social, intellectual, and a spiritual well-being.

5. Learn to accept change intelligently and creatively by the use of communication arts and skills effectively in daily living.

6. Value the arts as a necessary and fundamental part of life; be appreciative of the countless ways in which beauty is experienced, and be aware of music as one emotional expression of normal, health, happy living.

7. Become aware of mathematics as a means of communication, thinking accurately in abstract situations, and gaining insight and knowledge through logical thinking.

8. Develop a sound physical body through a series of activities based on refinement of skills and maintenance of fitness.

9. Grow in the ability to make choices, participate actively in learning, and accept consequences.

KINDERGARTEN CURRICULUM OVERVIEW

RELIGION READINESS is a vital part of the Catholic School Kindergarten Program. From concrete life experience, the child learns the meaning of love and being loved in a family setting. Children realize that they are special not only in their own family, but in God's family through Baptism. In a loving atmosphere of security and trust, the child is introduced to the loving goodness of God as shown in the gifts of creation and through His greatest gift, Jesus. By becoming acquainted with the life of Jesus, the child learns by being guided by the Spirit of Love to witness to God's love in the world.

COMMUNICATION SKILLS are fostered when children have the spontaneity and encouragement to express their ideas verbally through written or picture form; listening to, sharing, and enjoying stories, poetry, and dramatic play.

Language is a means of sharing wonder through social patterns based on specific skills: listening, speaking, reading, and thinking.

READING READINESS begins at birth and continues throughout a lifetime. It comes through many informal and planned activities of the family and school environment through field trips, show and tell, and audio-visual materials. Some activities are: learning left to right, top to bottom progression, eye-hand coordination, recalling stories and happenings in sequence, following directions, perceiving rhyming words, recognizing the alphabet in mixed order along with sounds, and learning to appreciate books through hearing stories read aloud and taking part in picture reading.

Reading is treated separately from the other communication skills; however, they are taught together in a kindergarten readiness program: phonics, reading, writing, listening, speaking, and literature appreciation.

Children are offered opportunities for reading according to their own readiness level. Print and decoding skills are offered to children in a multi-level format.

HANDWRITING is not considered a formal learning area in kindergarten. However, work and play with blocks, clay modeling, finger painting, coloring, and use of scissors build eye-hand coordination which is essential for this later-acquired skill. As children individually evidence a desire to print, they are shown the correct letter forms and instructed to write on the baseline. Children are encouraged to use their natural hand preference for all hand work.

MATHEMATICS READINESS is acquired through informal group activities and planned experiences which occur in games and discovery in working with manipulative

materials. They include rote counting, recognizing and understanding the meaning of the numerals from 1 to 20, learning about comparisons, the calendar, the clock, money, measurement, cluster counting, sets, one-to-one correspondence, equivalence, geometric shapes, simple oral problems, and addition readiness.

HANDBOOK FOR ELEMENTARY SCHOOLS

OFFICE OF CATHOLIC EDUCATION
DIOCESE OF CLEVELAND
1997

1. FORWARD
2. Chapter I:
   SCHOOL PERSONNEL
3. Appendix I:
   SCHOOL PERSONNEL
4. Chapter II:
   EDUCATIONAL PROGRAMS
5. Appendix II:
   EDUCATIONAL PROGRAMS
6. Chapter III:
   PUPIL PERSONNEL
7. Appendix III:
   PUPIL PERSONNEL
8. Chapter IV:
   SELECTED LEGAL TOPICS
9. GUIDELINES FOR CATHOLIC
   ELEMENTARY SCHOOLS
10. GENERAL INDEX

FOREWARD

Catholic elementary schools in the Diocese of Cleveland are independent units under the authority of the local parish or religious community. In parish schools the final authority for all decisions resides with the pastor. In schools owned and operated by a religious community, the final authority resides with the major superior or designated representative. Catholic schools not affiliated with a parish or religious community have a designated ecclesiastical liaison. All Catholic schools are subject to the Bishop of the Diocese in matters of faith and morals and in all other matters prescribed by the Code of Canon Law.

The services provided by the Secretariat for Education are intended to help the schools maintain quality educational programs and to implement the educational mandates applicable by law. The Office also acts as a liaison between the schools and the Ohio Department of Education. Schools pay an annual fee to the office for the delivery of these services:

1. Catechetical Services
2. Curriculum Services, including
   a. Development of Curriculum
   b. Coordination of inservice for teachers and administrators to implement the curriculum and to update them on current educational issues
   c. Coordination of standardized testing programs (basic competency and basic skills)
3. General administrative advice and consultation
4. Teacher and administrative certification/ licensure coordination

5. Consultation regarding potential legal concerns
6. Government Programs Administration
7. Buildings and Grounds Consultation
8. Development and Public Relations Consultation

Other services are provided by the diocese when possible, especially when it is to the advantage of the schools to act as a group rather than as individual units. For example, schools may also purchase services from other diocesan agencies such as, hospitalization, pension, unemployment, workers compensation, and data processing.

The contents of this handbook are offered as suggested guidelines to principals and pastors in order to help maintain our schools as centers of quality Catholic education. These are recommended guidelines and are not binding on parish or private schools unless officially adopted.

Each parish/private school should be certain that student/parent and faculty handbooks are adopted, and that these handbooks are up-to-date. Copies are to be provided to parents, students, and faculty when they are adopted and/or amended.

Companion volumes include but are not limited to:

1. Parish As Employer
2. State and Federal Programs Manual

* Throughout this handbook the word "parent" includes any court-appointed legal guardian who has primary responsibility for the child.

DIOCESAN VISION STATEMENT

We are the people of God in the Catholic Diocese of Cleveland, continuing the journey of faith begun in 1847 by pioneers who explored the wilderness and farmers who tilled the earth and immigrants, wave upon wave, who built the cities and worked in the factories.

We are women and men of faith and courage and love; a people come from many lands and places – some long ago, some recently; a people who have suffered – and who still suffer – from violence, from poverty, from discrimination; a gifted people, a diverse people, a people united through the power of the Holy Spirit.

Faith-filled, we have built churches to pray in and schools to hand on the faith to our children and hospitals and orphanages and settlement houses to care for those in need.

Enriched by our many cultures and voices and called through faith and Baptism, we proclaim God's living Word; we witness to God's presence in all of life; we celebrate God's love in worship and prayer.

Responding to the needs and challenges we now face:

with faith *received from those who have gone before us nurtured in prayer and worship together; We pass this faith on to our children and to those who have not yet heard the Good News.*

with love *binding us together and reaching out with compassion; We serve our brothers and sisters in need.*

with hope *relying on the power of the risen Christ and the grace of God at work within us; We extend the reign of God in this time and place.*

DIOCESAN ADMINISTRATION MISSION STATEMENT

Promulgated September 11, 1998

As members of the diocesan staff,
we support the bishop in ministering to the people of God
by working together to provide vision, leadership and service
to continue the mission of Jesus to transform the world.

As a community, we are committed to live by these values:
Faith – Our ministry is rooted in the Gospel of Jesus and the Teaching and Tradition of the Catholic Church. We joyfully proclaim God's presence in our midst through service centered in prayer.

Dignity – We reverence each person as created and loved by God. Serving in a spirit of love and compassion, we embrace and celebrate the diversity of gifts among us.

Stewardship – We are responsible to fulfill our roles with integrity through the wise and careful use of diocesan resources and or individual gifts in a manner that reflects excellence and gives glory to God.

Justice – We extend the Reign of God by co-creating a world where every person is loved. With others, we form relationships and structures which promote life, foster freedom, invite reconciliation, and build communities of hope.

MISSION STATEMENT OF THE SECRETARIAT FOR EDUCATION

The Secretariat for Education witnesses to the Gospel
Through the teaching mission of the Catholic Church.
We commit our expertise, experience, and energies
to lead and assist
those who carry out the educational ministries
of the Diocese of Cleveland.

Our **Core Values** include:

Dignity of Person. We believe in the dignity of each person, created in God's image and likeness, loved and called by God to life everlasting. Therefore, we treat each person with respect and dignity.

Stewardship. We believe tht we are responsible to fulfill our specific role in ways that properly utilize the environment and the resources entrusted to us.

Service. We believe that each person is called to achieve full potential of mind, body and spirit. To enable the fulfillment of this potential, we pledge to render service to all with sensitivity, compassion, and commitment.

MISSION STATEMENT OF THE OFFICE OF CATHOLIC EDUCATION

We are a Faith Community in Formation.
We are committed to the educational mission of the Catholic
Church in the elementary and secondary schools.
Therefore, our mission is to lead, assist, and support
Catholic schools in providing quality education
infused with gospel values.

CODE OF CANON LAW RELATIVE TO Catholic EDUCATION IN GENERAL

Following are the canons from the English translation of the 1983 *Code of Canon Law* pertinent to Catholic Education in general (793-975) and Catholic schools in particular (796-806).

Catholic Education

Can. 793 1 Parents, and those who take their place, have both the obligation and the right to educate their children. Catholic parents have also the duty and the right to choose those means and institutes which, in their local circumstances, can best promote the Catholic education of their children.

2 Parents have moreover the right to avail themselves of that assistance from civil society which they need to provide a Catholic education for their children.

Can. 794 1 The church has in a special way the duty and the right of educating, for it has a divine mission of helping all to arrive at the fullness of Christian life.

2 Pastors of souls have the duty of making all possible arrangements so that all the faithful may avail themselves of a Catholic education.

Can. 795 Education must pay regard to the formation of the whole person, so that all may attain their eternal destiny and at the same time promote the common good of society. Children and young persons are therefore to be cared for in such a way that their physical, moral and intellectual talents may develop in a harmonious manner, so that they may attain

a greater sense of responsibility and a right use of freedom, and be formed to take an active part in social life.

Schools

Can. 796 1 Among the means of advancing education, Christ's faithful are to consider schools as of great importance, since they are the principal means of helping parents to fulfill their role in education.

2 There must be the closest cooperation between parents and the teachers to whom they entrust their children to be educated. In fulfilling their task, teachers are to collaborate closely with the parents and willingly listen to them; association and meetings of parents are to be set up and held in high esteem.

Can. 797 Parents must have a real freedom in their choice of schools. For this reason Christ's faithful must be watchful that the civil society acknowledges this freedom of parents and, in accordance with the requirements of distributive justice, even provide them with assistance.

Can. 798 Parents are to send their children to those schools which will provide for their Catholic education. If they cannot do this, they are bound to insure the proper Catholic education of their children outside the school.

Can. 799 Christ's faithful are to strive to secure that in the civil society the laws which regulate the formation of the young, also provide a religious and moral education in the schools that is in accord with the conscience of the parents.

Can. 800 1 The Church has the right to establish and to direct schools for any field of study or any kind and grade.

2 Christ's faithful are to promote Catholic schools, doing everything possible to help in establishing and maintaining them.

Can. 801 1 Religious institutes which have education as their mission are to keep faithful to this mission and earnestly strive to devote themselves to Catholic education, providing this also through their own schools which, with the consent of the diocesan Bishop, they have established.

Can. 802 1 If there are no schools in which an education is provided that is imbued with a Christian spirit, the diocesan Bishop has the responsibility of ensuring that such schools are established.

2 Where it is suitable, the diocesan Bishop is to provide for the establishment of professional and technical schools, and of other schools catering to special needs.

Can. 803 1 A Catholic school is understood to be one which is under the competent ecclesiastical authority or of a public ecclesiastical juridical person, or one which in a written document is acknowledged as Catholic by the ecclesiastical authority.

2 Formation and education in a Catholic school must be based on the principles of Catholic doctrine, and the teachers must be outstanding in true doctrine and uprightness of life.

3 No school, even if it is in fact Catholic, may bear the title 'Catholic school' except by the consent of the competent ecclesiastical authority.

Can. 804 1 The formation and education in the Catholic religion provided in any school, and through various means of social communication, is subject to the authority of the church. It is for the Episcopal Conference to issue general norms concerning this field of activity and for the diocesan Bishop to regulate and watch over it.

2 The diocesan Bishop is to be careful that those who are appointed as teachers of religion in schools, even non-Catholic ones, are outstanding in true doctrine, in the witness of their Christian life, and in their teaching ability.

Can. 805 In his own diocese, the diocesan Bishop has the right to appoint or to approve teachers of religion and, if religious or moral considerations require it, the right to remove them or to demand that they be removed.

Can. 806 1 The diocesan Bishop has the right to watch over and inspect the Catholic schools situated in his territory, even those established or directed by members of religious institutes. He has also the right to issue directives concerning the general regulation of Catholic schools; these directives apply also to the schools conducted by members of a religious institute, although they retain their autonomy in the internal management of their schools.

2 Those who are in charge of Catholic schools are to ensure, under the supervision of the diocesan Bishop, that the formation given in them is, in its academic standards, at least as outstanding as that in other schools in the area.

PHILOSOPHY OF CATHOLIC EDUCATION

Office of Catholic Education
Diocese of Cleveland, Ohio

SOURCES

WE BELIEVE that a philosophy of Catholic education begins with faith. God, in creating us, gifted us with life, became one of us in Jesus, and in the Person of the Spirit awaits our response to this unconditional love. Jesus remains within the human community witnessing and sharing the Good News in every age and with all people. We return God's love by a sincere response to conscience and by membership in the Church. It is from this perspective that the education ministry of the Catholic community flows.

CATHOLIC EDUCATION

WE BELIEVE that education, which is Catholic begins with life in the heart of the family. Parents, the primary educators, seed and nourish values deeply human, deeply spiritual. Affirmed, treasured, and supported by the loving witness of Christian faith communities, the child continues a lifelong response to God's love through involvement in the academic, cultural, social, and civic concerns of daily life.

CATHOLIC SCHOOLS

WE BELIEVE the Catholic school exists to teach the mandate of Jesus: "Love one another as I have loved you." This is the goal of all Catholic education. The school community, in sharing a global vision within

an atmosphere designed to celebrate and practice love of God and neighbor, is the most effective means available to the Church for the education of youth. This vision motivates students to grow academically, physically, culturally, and socially. Among the values prized in the Catholic school are self-worth, self-discipline in the search for a moral way of life, and appreciation for our American heritage. With deep concern for their sisters and brothers, young people in Catholic day schools form their personal response in truth, peace, justice, and love.

Diocese of Cleveland
Office of Catholic Education

DISTRICT PLAN
FOR CATHOLIC SCHOOLS
August 1998

GOAL I

Our **CATHOLIC IDENTITY** will permeate every aspect of the school climate and program and will guide staff selection and professional development.

A. Administration and faculty will engage in study and reflection on the core documents and core values of the Catholic faith.

B. Appropriate certification as catechists and catechetical leaders will be maintained by teachers

and administrators according to the guidelines of the diocesan Religious Education Office.

C. Schools will show tangible evidence of being Catholic through their expression of community, message, service, and worship.

D. Eucharist will be revered as the center of our lives, and thus liturgy will receive appropriate attention in its preparation and celebration.

E. School communities will strive to form a faith community with its foundation in the parish and the diocese.

F. The school administration will ensure that a Catholic philosophy of education permeates instruction by providing faith formation opportunities for faculty; engaging with staff in regular review of the curriculum; and performing regularly scheduled class visitation.

G. The religious heritage strand in each subject area curriculum will receive appropriate emphasis to ensure that Catholic values and social justice principles are essential elements in student learning.

H. The school administration will review hiring practices and orientation programs to ensure that religion is taught by practicing Catholics.

I. Parents and families will receive support from the school as integral members of the school's community of faith for the enrichment of their faith lives.

GOAL II

All schools will engage in **PLANNING** to ensure the continued presence of Catholic education in every area of the diocese.

A. Elementary schools will engage in Catholic Schools Futuring, a six year cyclical strategic planning process.

B. All schools will be accredited by the Ohio Catholic School Accrediting Association by the year 2002, and will renew accreditation on a six year cycle.

C. In addition to North Central Association Accreditation, high schools address the Catholicity of their schools through a Catholic Identity goal derived from their mission statement and verified by the Ohio Catholic School Accrediting Association.

D. Schools located in areas of growth, increasing population, high poverty, decreasing population, and/or financial concerns will collaborate with neighboring parishes and schools to enable all families who desire a Catholic education to obtain it and to maintain viable Catholic schools in all areas of the diocese.

E. All schools will provide parents with opportunities for involvement in planning and implementation of programs not only as volunteers, but as investors for the future.

GOAL III

IMPROVEMENT OF STUDENT LEARNING will guide decisions about professional development, curriculum, instruction, assessment, program, staffing and facilities.

A. Individual Professional Development Plans (IPDP) will be based on student needs, related to the school's continuous improvement plan as well as this Office of Catholic Education District Plan.

B. Curriculum and instruction will be adapted to the specific needs of the local student population to ensure acceptable competence and proficiency levels.

C. The school program will address the holistic needs of students through curricular and extra-curricular activities as well as educational options where feasible.

D. Decisions about staffing and facilities will take into account both proper stewardship of limited resources and the best way to respond to student needs based on results of systematic planning.

Goal IV

TECHNOLOGY will be an integral part of the tools for learning in every school in the diocese.

A. Schools will establish a technology committee and develop a technology plan including securing resources for the integration of technology throughout the curriculum.

B. Schools will investigate, experiment with, and integrate forms of technology that promote increased and effective student learning.

C. Schools will align their technology efforts with the mission statement and competency outcomes of the Technology Department of the Office of Catholic Education to assure appropriate skills development for students in the 21st century.

D. Schools will provide ongoing staff development in appropriate use of technology and related issues.

Language Arts '93

Catholic Diocese of Cleveland

DEVELOPMENT AND APPLICATION OF CHRISTIAN VALUES

The development and application of Christian values is a vital and integral component of our Diocesan Graded Course of Study in Language Arts—and all subject areas.

While, for the most part, formal and specific actions are not detailed within the instrument, it is the responsibility of the individual teacher to recognize and include these values as they relate to what is being taught within the entire teaching process. The Christian values which have been identified as those that should be developed and applied in our teaching of Language Arts are the following:

The learner will:

I. Relate the Christian value DIGNITY OF THE INDIVIDUAL to reading selections

   A. Relate instances where respect for individuals is stated or implied in reading selections
   B. Explain why one should respect and accept every individual regardless of race, color, ethnicity, religion, sex, work, intellectual ability, or physical appearance
   C. Demonstrate respect for, acceptance of and courtesy toward everyone in speech and action
   D. Recognize stereotypes of gender bias in reading selection

II. Relate the Christian value RIGHT TO LIFE to reading selections

A. Recognize instances where the individual's Right to Life is directly stated or implied in a reading selection
B. Explain why every person has a right to life
C. Commit oneself through word and action to this belief and to the protection of human life

III. Relate the Christian value SACREDNESS OF THE FAMILY to reading selections

A. Recognize instances which illustrate the sacredness of the family and its importance to society
B. Identify causes of good family relationships

IV. Relate the Christian value NEED FOR LAWS AND REGULATIONS to reading selections

A. Recognize instances that illustrate the purposes and need for laws and regulations
B. Respect and observe the laws and regulations of the school, city, state and country

V. Relate the Christian value JUSTICE AND PEACE to reading selections

A. Demonstrate understanding of the Catholic interpretation of "peace," "justice," "injustice"
B. Recognize in reading selections causes of lack of peace and justice
C. Recognize in reading selections those promoting peace and justice

D. Translate into personal action the example of the peacemakers and those working for justice
E. Relate environmental problems to the value of peace and justice

VI. Relate the Christian value RESPECT FOR AMERICAN HERITAGE to reading selections

A. Appreciate persons contributing to our American heritage
B. Recognize instances in reading selections that illustrate the components of the American heritage: justice, equality, responsibility, diversity, privacy, freedom of speech, freedom of religion, right to vote
C. Demonstrate appreciation of one's American heritage by fulfilling one's responsibilities as an American

VII. Relate the Christian value RESPECT FOR PEOPLE OF DIFFERENT CULTURES to reading selections

A. Appreciate the cultures and traditions of different peoples as they are illustrated in stories, poems, drama
B. Demonstrate acceptance of and respect for the cultures, traditions and customs of all peoples

VIII. Relate the Christian value of INTERDEPENDENCE OF ALL HUMAN BEINGS to reading selections

A. Recognize the natural and spiritual interdependence of all human beings
B. Appreciate all that others add to life and living
C. Suggest ways in which individuals can interact harmoniously

IX. Relate the Christian value of GLOBAL INTERDEPENDENCE to reading selections
   A. Recognize instances in reading selections that indicate global interdependence
   B. Apply the value of global interdependence to reading and discussion on space science, technology, conversation, business

X. Develop a responsible INQUIRING MIND TO SOCIAL, POLITICAL, AND ECONOMIC ISSUES related to Christian values
   A. Be aware of the impact on human society of world events recounted in reading and the media
   B. Recognize in reading instances of injustice, oppression, and indifference to human suffering
   C. Recognize cultural bias and prejudice

XI. Relate the Christian value DIGNITY OF WORK to reading selections
   A. Perceive the dignity of different types of work and occupations as these are illustrated in reading selections
   B. Recognize the rights and obligations of both employer and employee
   C. Demonstrate in practice ways the conviction that work is dignified

XII. Relate the Christian value CONSERVATION OF NATURAL RESOURCES to reading selections
   A. Explain why individuals and nations have an obligation to use natural resources wisely
   B. Suggest ways individuals, communities and nations can conserve and share natural resources

TABLE OF CONTENTS

Introduction
- Introduction to Graded Course of Study i
- Table of Contents ii
- Philosophy of Catholic Education iii
- Goals for Catholic Schools in the Diocese of Cleveland iv

Preface to Each Grade Level
- Development and Application of Christian Values ... P-1
- Philosophy and Goals of the Curriculum P-3
- Format of Graded Course of Study P-5
- Development Continuum P-7
- Curriculum Matrix P-8
- Scope and Sequence in Phonics P-10
- Scope and Sequence in Grammar and Mechanics ... P-11
- Evaluation Policy and Procedures P-15

Performance Objectives
- Kindergarten K-1
- Grade One 1-1
- Grade Two 2-1
- Grade Three 3-1
- Grade Four 4-1
- Grade Five 5-1
- Grade Six 6-1
- Grade Seven 7-1
- Grade Eight 8-1

Appendix to Each Grade Level
Intervention Services Model.....A-1
Intervention in Reading A-3
Intervention in Writing A-5
Procedures in the Development of the
Elements of Manuscript Handwriting.....A-7 in K,1,2
Procedures in the Development of the
Process of Cursive Handwriting ..... A-7 in 2,3,4,5,6
Portfolio Assessment in Language Arts A-9
Glossary A-11

DIOCESE OF CLEVELAND

PHILOSOPHY OF CATHOLIC EDUCATION

Sources

WE BELIEVE that a philosophy of Catholic education begins with faith that God, in creating, gifted us with life, became one of us in His Son Jesus, and in the Person of His Spirit awaits our response to His unconditional overture of love. Jesus remains with the community He formed, witnessing and sharing the Good News in every age and with all people, ever yearning for a return of love either by a sincere response to conscience or by membership in His Church. It is from this perspective the educational ministry of the Catholic community flows.

Catholic Education

WE BELIEVE that education which is Catholic begins, with life, in the heart of the family. Parents, the primary educators, seed and nourish values deeply human, deeply spiritual. Affirmed, treasured, and supported by the loving witness of Christian faith communities, the child continues a lifelong response to God's love by growing and excelling through responsible involvement in the academic, cultural, and civic concerns of daily life.

Catholic Schools

WE BELIEVE that Catholic school is sensitive to the mandate of Jesus: "Love one another as I have loved you" as the goal toward which all Catholic education tends. The school community, in sharing this vision within an atmosphere designed to celebrate and practice

love of God and neighbor, is the most effective means available to the Church for the education of youth. This vision motivates students to grow academically, culturally, and socially. Among the values prized in the Catholic school are self-worth, self-discipline in the search for a moral way of life, and appreciation of our American heritage. With deep concern for their brothers and sisters, young people in the Catholic day schools and the parish school of religion form their personal response to truth, justice and love to God their Maker.

GOALS FOR CATHOLIC SCHOOLS

IN THE DIOCESE OF CLEVELAND

1. To communicate the gospel message of Jesus.

2. To provide opportunities to build and experience a faith community.

3. To orient students to the responsibility and experience of service because of their membership in the Christian community.

4. To provide students with the opportunity for growth in prayer.

5. To provide instruction in religious truths and values in such a way that they become an integrated part of the school program.

6. To develop a faculty and staff who by their presence and teaching express an integrated approach to learning and living in their lives.

7. To provide an academic program and environment conducive to the optimal development of each student.

* * * * * * * * * * *

To successfully impiement this Graded Course of Study in Language Arts, the principal and faculty should examine the philosophy as well as the goals and objectives in order to accept them as they are or to adapt them to meet the specific needs of their students. A similar study should be made of the subject objectives in order to ensure a proper sequence of objectives from grade to grade.

When this is completed, and if some adaptation is thought to be necessary, an Introduction to the school's version of the Diocesan Graded Course of Study in Language Arts should be formulated, stating the purpose of the graded course of study and how it is to be used by the teachers and principal.

PHILOSOPHY
of the
GRADED COURSE OF STUDY IN LANGUAGE ARTS

The communication of the Gospel message by word and witness is central in Catholic education. A Graded Course of Study in Language Arts makes a unique and important contribution to the attaining of these goals in Catholic education. This philosophy envisions our schools motivating students to grow academically, culturally and socially in an

atmosphere "designed to celebrate and practice love of God and neighbor."

Developing skills in language and communication is basic to this vision as our schools prepare literate students for life in a changing society. The Catholic school focuses, therefore, on imparting to the student a general knowledge of English language and literature as well as fluency in reading, writing, speaking, listening, and thinking.

Special emphasis is given to the development of comprehension and critical thinking skills because we believe that our students are to be prepared to make sound judgments based on Christian values.

Recognizing that a growing number of students in our Diocesan elementary schools are non-English speaking, bilingual or speak a non-standard English dialect, we are committed to develop within ourselves and in our classrooms an understanding and appreciation of the culture and language our students bring with them. While accepting the cultural pluralism in our society, we help our students move sequentially from competency in reading, in basic oral and written communication to the acquisition of standard English syntax and pronunciation.

Flowing from the PHILOSOPHY OF EDUCATION for the elementary and high schools of the diocese of Cleveland, the goals and objectives incorporate an instructional approach that is built on student experience, developed within the context of the language used by the students, in a logical sequence of teaching objectives related to the ability of the growing young person so that students will demonstrate growth in various aspects of oral and written language at each grade level.

GOALS
of the
GRADED COURSE OF STUDY IN LANGUAGE ARTS

THE GRADED COURSE OF STUDY IN LANGUAGE ARTS endeavors to attain the goals of Catholic education by forming Christians who:

--work cooperatively in a spirit of mutual service
--cultivate their intellectual growth and determine their aesthetic standards
--appreciate and enjoy a constantly widening scope of literature and the language in which it is communicated
--become aware of important historical and literary elements of our cultural heritage
--relate the ideas, feeling and experiences derived from literature and communicate them effectively to others
--use knowledge gained from reading to make sound judgments based on Christian principles
--realize that the effective and responsible use of the English language is crucial to becoming a Catholic influence in contemporary social justice and moral issues
--are encouraged to broaden their reading interests
--make choices in leisure reading and viewing activities grounded in literary discretion and moral judgments
--possess the tools of language necessary for critical evaluation of media, propaganda, news and advertisements
--integrate and apply language arts activities to all aspects of the curriculum

FORMAT OF GRADED COURSE OF STUDY IN LANGUAGE ARTS

The 1993 model English Language Arts Graded Course of Study follows a matrix consisting of four language processes along one axis and four dimensions of language along the other. Together this format constitutes the strands upon which the model is structured. Program objectives as well as subject objectives are included for all grade levels from kindergarten through grade eight. The instructional activities implemented by teachers will provide any developmentally appropriate differentiation.

The matrix consists of *four Language Process components* along one axis. These are:

Structure
Meaning Construction
Application
Multidisciplinary

The *four Dimensions of Language* to accompany each language process consist of the following components:

Reading
Writing
Listening/Visual Literacy
Oral Communication

The components of the Language Process and Dimensions of Language are highlighted as they appear in the instrument.

A listing of Performance Objectives precedes each grade level. Performance Objectives are highlighted in bold print as they appear within the grade level area.

The curriculum strands are grouped into grade clusters: kindergarten-two, three-five, and six-eight. Literacy development within, as well as between these clusters, is reflected by increases in the sophistication and complexity of student performance.

Each grade level segment contains:

Development and Application of Christian Values
Philosophy and Goals of the Curriculum
Format of Graded Course of Studies
Curriculum Matrix
Developmental Continuum
Development of Skills in Decoding and Word Recognition
Evaluation Policy and Procedures

The Committee has deemed it important to define the cueing systems in determining word meanings. To aid the teacher in this respect, the Diocesan Scope and Sequence in the Development of Skills in Decoding and Word Recognition precedes each grade level in the instrument.

At every grade level in the elementary school the teacher will plan for a systematic teaching of grammar and mechanics of the English language to achieve:

1) a student awareness of correctness in listening, speaking and writing.
2) application in student writing.

Supreme Court, U.S.
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Nos. 00-1751, 00-1777, 00-1779

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

BRIEF OF STATE PETITIONERS

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58 pp

QUESTION PRESENTED

Ohio's experimental school choice program provides tax-funded scholarships to low-income children who live in the Cleveland City School District. Parents of children in kindergarten through eighth grade may use the scholarships to pay tuition for those children at the private schools of their choosing, including religious schools. In light of Ohio's program, the question presented is as follows:

Whether the Establishment Clause prohibits Ohio's program from authorizing parents to use the scholarships at any private school, whether religious or not.

PARTIES TO THE PROCEEDING

The State Petitioners are Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the State of Ohio, the State of Ohio, and Saundra Berry, in her official capacity as the Director of the Cleveland Scholarship and Tutoring Program.

Respondents are Doris Simmons-Harris, Marla Franklin, Rev. Steven Behr, Sue Gatton, Mary Murphy, Rev. Michael DeBose, Cheryl DeBose, Glenn Altschuld, and Deidra Peterson.

Intervening defendants in the proceedings below are Senel Taylor, in his own behalf and as natural guardian of his daughter, Saletta Taylor, Johnnietta McGrady, on her own behalf and as natural guardian of her children, Trinnietta McGrady and Atlas McGrady, Christine Suma, on her own behalf and as natural guardian of her children, Dominic Suma, Gloria Suma, Emeric Suma, and Emily Suma, Arkela Winston, on her own behalf and as natural guardian of her children, Tanashia Winston and Devonte Winston, Amy Hudock, on her own behalf and as natural guardian of her child, Amber Lee Angelo, Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland, and Delories Jones.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. The Education Crisis In Cleveland. 2

II. Creation Of The Pilot Scholarship Program. 3

A. The Scholarship Program. 3

B. The Tutoring Program. 7

III. The Framework Of Educational Options. 8

IV. Early Research Findings 10

V. The Litigation 11

SUMMARY OF ARGUMENT 15

ARGUMENT 18

I. Ohio's Program Passes Constitutional Muster Because It Is Religiously Neutral And Affords True Private Choice To Cleveland Parents. 20

A. Ohio's Program Satisfies This Court's Longstanding Test Applied In Individual Benefits Cases. 22

1. Private Choice. 22

2. Religiously Neutral Criteria. 28

B. Ohio's Program Satisfies This Court's *Agostini* Test Used In Direct-Aid Cases. 33

1. Governmental Indoctrination 34

2. Reference to Religion 36

II. The Sixth Circuit's Asserted Justifications For Invalidating The Program Do Not Withstand Scrutiny 37

A. Cleveland Parents Do Not Lack "Real Choice" Merely Because A Large Majority of Scholarship Schools Are Religious. 37

B. Ohio's Program Does Not Lack Religious Neutrality Because Of The Amount Of Its Scholarships. 39

C. The Sixth Circuit Misread This Court's Decision In *Nyquist*. 41

D. Ohio's Program Fits Comfortably Within *Nyquist*'s Reservation Of Judgment On Generally Available Scholarship Programs. 44

E. *Nyquist* Should Not Be Applied To Invalidate The Ohio Program 47

CONCLUSION 48

TABLE OF AUTHORITIES

Cases

Agostini v. Felton,
521 U.S. 203 (1997)..... passim

Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen,
392 U.S. 236 (1968)..... 29, 32, 36

Board of Edu. of Kiryas Joel Vill. Sch. Dist. v. Grumet,
512 U.S. 687 (1994)..... 30, 41, 46

Board of Educ. of Westside Cmty. Sch. v. Mergens,
496 U.S. 226 (1990)..... 41

Bowen v. Kendrick,
487 U.S. 589 (1988)..... 20

Committee for Pub. Educ. and Religious Liberty v. Nyquist,
413 U.S. 756 (1973)..... passim

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,
483 U.S. 327 (1987)..... 34

Everson v. Board of Educ. of Ewing,
330 U.S. 1 (1947)..... 22, 29, 31

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121 S.Ct. 2093 (2001)..... 25, 26

Jackson v. Benson,
578 N.W.2d 602 (Wisc.),
cert. denied, 525 U.S. 997 (1998)..... 47

Lee v. Weisman,
505 U.S. 577 (1992)..... 25

Lemon v. Kurtzman,
403 U.S. 602 (1971)..... 20

Lynch v. Donnelly,
465 U.S. 668 (1984)..... 21

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418 U.S. 717 (1974)..... 41

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530 U.S. 793 (2000)..... passim

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463 U.S. 388 (1983)..... passim

Reed v. Rhodes,
No. 1:73CV1300, 1995 U.S. Dist. Lexis 3814
(N.D. Ohio March 3, 1995) 2

Rosenberger v. Rector and Visitors of Univ. of Va.,
515 U.S. 819 (1995)..... 20, 21, 45

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973)..... 41

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000)..... 25

School Dist. of Grand Rapids v. Ball,
473 U.S. 373 (1985)..... 35

Simmons-Harris v. Goff,
711 N.E.2d 203 (Ohio 1999) 11, 30

Simmons-Harris v. Zelman,
234 F.3d 945 (6th Cir. 2000) ..... passim

Simmons-Harris v. Zelman,
54 F. Supp. 2d 725 (N.D. Ohio 1999) 1, 12

Simmons-Harris v. Zelman,
72 F. Supp. 2d 834 (N.D. Ohio 1999) 1, 12, 33

Tilton v. Richardson,
403 U.S. 672 (1971)..... 25, 32

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474 U.S. 481 (1986)..... passim

Zelman v. Simmons-Harris,
528 U.S. 983 (1999)..... 12

Zobrest v. Catalina Foothills Sch. Dist.,
509 U.S. 1 (1993)..... passim

Constitution, statutes and rules

U.S. Const. Amend. I..... 1

28 U.S.C. §1254(1)..... 1

Health Insurance for the Aged Act,
42 U.S.C. §1395 *et seq.* 41

Personal Responsibility and Work Opportunity
Reconciliation Act,
42 U.S.C. §604(h)..... 41

Veterans' Readjustment Benefits Act,
38 U.S.C. §3451 *et seq.* 41

R.C. 3313.974..... 3

R.C. 3313.975..... passim

R.C. 3313.976..... passim

R.C. 3313.977..... 3, 5

R.C. 3313.978..... passim

R.C. 3313.979..... 3, 6, 8

R.C. 3317.03..... 6, 14

R.C. 3317.022..... 6, 14

R.C. 3333.27..... 41

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Martha Minow, *Reforming School Reform*,
68 Fordham L. Rev. 257 (1999) 39

Ohio Am. Sub. H.B. 282, Section 4.34 (1999)..... 10

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 234 F.3d 945 (6th Cir. 2000) (State Petitioners' Appendix ("State Pet. App.") at 1a-58a). The final order of the District Court is reported at 72 F. Supp. 2d 834 (N.D. Ohio 1999) (State Pet. App. at 61a-126a). The order of the District Court granting a preliminary injunction is reported at 54 F. Supp. 2d 725 (N.D. Ohio 1999) (State Pet. App. at 133a-65a).

JURISDICTION

The Court of Appeals entered judgment on December 11, 2000. (State Pet. App. at 1a-58a.) The Court of Appeals denied a petition for rehearing on February 28, 2001. (State Pet. App. at 166a.) The jurisdiction of this Court is proper under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The relevant provisions of state law, Ohio Revised Code Chapters 3313 and 3314, are reprinted in the Joint Appendix ("J.A.") at 21a-53a.

STATEMENT OF THE CASE

I. The Education Crisis In Cleveland.

In the summer of 1995, Ohio's General Assembly passed and then-Governor George Voinovich signed into law the Pilot Project Scholarship Program to address a deepening educational crisis within the Cleveland City School District. By almost any measure—test scores, graduation rates, student discipline, judicial intervention, and financial stability—objective assessments of the Cleveland schools' performance led to the same conclusion: a child's prospect for receiving a decent education from Cleveland's public schools was dismal.

This bipartisan measure was adopted in the wake of an unprecedented step by the United States District Court for the Northern District of Ohio. Earlier in 1995, that court in overseeing the longstanding Cleveland desegregation case ordered the State Superintendent to assume operational and managerial control of the district. *Reed v. Rhodes*, No. 1:73CV1300, 1995 U.S. Dist. Lexis 3814 (N.D. Ohio March 3, 1995). (Petitioners have lodged copies of this unreported decision with the Clerk.) In taking this extraordinary action, the federal district court cited the absence of fiscal, managerial, and operational controls, and the presence of a "financial crisis of magnitude." *Id.* at *6.

In March 1996, the State Auditor echoed the district court's concerns in a comprehensive audit of the Cleveland school district. Cleveland City School District Performance Audit (March 15, 1996), http://www.auditor.state.oh.us. The district, the State Auditor observed, was mired in a "financial crisis that is perhaps unprecedented in the history of American education." *Id.* at pp. 1-1, 2-1. The crisis had reached such proportions that it prevented the district from

providing even a minimally adequate education for its students. *Id.* At the time of the State Auditor's 1996 report, only nine percent of the district's high school students had passed all four sections of Ohio's ninth grade proficiency test. *See id.* at p. 2-3.

In these circumstances, many parents would have withdrawn their children from the public schools. In Cleveland, however, most families with school-age children were economically disadvantaged. *See* 1996 Audit at p. 1-4 ("72.5%" of the district's student body "are economically and academically disadvantaged . . ."). They had no practical choice but to accept what the Cleveland public schools offered them.

II. Creation Of The Pilot Scholarship Program.

Responding to this extraordinary situation, the General Assembly offered one immediate solution. On June 28, 1995, the legislature passed an experimental low-income scholarship law. *See* Ohio Revised Code ("R.C.") 3313.974-979. The Pilot Project Scholarship Program ("Program") provides two types of general relief for poverty-level families in the Cleveland school district: (i) it grants scholarship awards that may be used at the qualifying school of the parents' choice; and (ii) it provides to public school students money grants that may be used to pay for private tutoring. R.C. 3313.975.

A. The Scholarship Program.

The Program establishes a pilot project for *any* school district in the State that has been the subject of a federal court order "requiring supervision and operational management of the district by the state superintendent." R.C. 3313.975(A).

Cleveland is currently the only Ohio school district falling within that category.

The Program provides scholarships to children residing in the Cleveland school district in grades kindergarten through eighth grade. R.C. 3313.975(C)(1). In determining which children are awarded scholarships, the Program requires the State Superintendent to establish eligibility criteria that "give preference to students from low income families," which the Program defines as families whose income is below 200 percent of the poverty line. R.C. 3313.978(A). In implementing this provision, the State Superintendent gives an absolute preference to children from low-income families: "Scholarships may be awarded to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement." Cleveland Scholarship and Tutoring Program, Administration Procedures Manual at p. 1-11 (emphasis in original) (R. 96 at 759, Court of Appeals' Appendix ("C.A. App.") at 1358). When the number of qualified low-income applicants exceeds the scholarships available, the State Superintendent conducts a lottery to award scholarships among those applicants.

The scholarship amount likewise depends on family income. For low-income families, the State caps a participating school's tuition at $2,500 and pays 90 percent of whatever tuition the school actually charges. R.C. 3313.976(A)(8); 3313.978(A). For other families, the State pays 75 percent of a school's tuition, up to a maximum of $1,875 (75 percent of $2,500). *Id.*

The Program permits the participation of all private schools, whether religious or nonreligious, so long as they are located within the boundaries of the Cleveland school district and meet Ohio's statewide educational standards.

R.C. 3313.976(A)(1), (3). Eligibility to participate in no manner turns on whether a private school has a religious affiliation or includes religious teaching in its curriculum. Because the parents of scholarship recipients select among participating schools, the State exercises no control over the extent to which scholarships are used to attend religious rather than nonreligious private schools.

The State Superintendent provides information about the Program to *all* students in the Cleveland school district, and sets a deadline for submission of applications. R.C. 3313.978(A). After a student is selected to participate in the Program, his or her parent applies to a participating private school. R.C. 3313.978(A)(2)(a). The school then notifies the parent as to whether the child has been admitted. R.C. 3313.978(A)(2)(b). To ensure that scholarship recipients may choose which school to attend, the Program requires participating schools to admit students in accordance with rules and procedures established by the State Superintendent. If the number of applicants exceeds the available spaces in a particular school, the school must give priority to students enrolled during the preceding year, siblings of students enrolled during the preceding year, and students from low-income families. R.C. 3313.977(A)(1)(a)-(c). The participating school must fill any remaining spaces by lot. R.C. 3313.977(A)(1)(d).

The Scholarship Program also requires participating schools to be non-discriminatory in both their admissions policies and educational practices. Specifically, no participating school may "discriminate on the basis of race, religion, or ethnic background." R.C. 3313.976(A)(4). In addition, participating schools must "not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." R.C. 3313.976(A)(6).

Each scholarship is "payable to the parents of the student entitled to the scholarship," to be used at whichever participating school they have selected. R.C. 3313.979. The State mails these scholarship checks to the selected school, and the parents endorse them over to the school to meet their tuition obligations. *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000) (State Pet. App. at 4a).

The Program also permits public school districts adjacent to the pilot project district to participate in the Program and "receive scholarship payments on behalf of parents." R.C. 3313.976(C). As yet, no public school adjacent to Cleveland has chosen to participate in the Program. If adjacent public schools do participate, however, they will receive a tuition grant (up to $2,250) for each Program student accepted, *in addition to* the ordinary per-pupil state funding for that student. R.C. 3317.03(I)(1), 3317.022(A)(1).

The record shows that the Program, as implemented, is offering educational alternatives to the neediest Cleveland families. Affidavit of Kim Metcalf ("Metcalf Aff.") at ¶13 (J.A. at 71a). Scholarship recipients are predominately low-income minority children from families headed by a single mother. Affidavit of Joseph Viteritti ("Viteritti Aff.") at ¶12 (R. 95 at 715-16, C.A. App. at 1311-12). Indeed, 70 percent of the households of scholarship students are headed by a single mother, and the mean income of those families is $18,750. Metcalf Aff. at ¶7 (J.A. at 69a). These socioeconomic characteristics suggest that these children are more likely to suffer academic setbacks than the average student. *Id.*

Approximately 3,800 students enrolled in the Program during the 1999-2000 school year, Affidavit of

Saundra Berry ("Berry Aff.") at ¶5 (R. 96 at 1081, C.A. App. at 1678); more than 2,100 students were on the waiting list for entry. *Id.* at ¶12 (R. 96 at 1083, C.A. App. at 1680). Over 60 percent of the participating children came from families with income at or below the poverty line. *Id.* at ¶10 (R. 96 at 1082, C.A. App. at 1679).

For the 1999-2000 school year (on which the District Court record was based), parents chose from among 56 participating schools, 46 of which (82 percent) were religiously affiliated. *Simmons-Harris*, 234 F.3d at 949 (State Pet. App. at 5a). In that same year, 96 percent of all scholarship students attended one of these 46 religiously affiliated schools, which included Catholic, non-denominational Christian, Baptist, Lutheran, Seventh-Day Adventist, and Islamic schools. *Id.*; Declaration of Alice O'Brien at Exhibit E (J.A. at 281a-86a). The proportion of religious schools and students in the Program has varied significantly from year to year. At one point, 22 percent of Program students attended nonreligious schools. *Simmons-Harris*, 234 F.3d at 949 (State Pet. App. at 5a). The later decline in this percentage is explained in large measure by the 1997 enactment of legislation authorizing the creation of Cleveland's "community schools." As discussed below, *see infra* at 9, these schools offer another secular alternative in the State's comprehensive scheme to provide educational choice.

B. The Tutoring Program.

In addition to scholarships, the Program provides tutorial assistance grants for kindergarten through eighth grade students who choose to remain in the Cleveland public schools. R.C. 3313.978(B). Under these provisions, parents may arrange for registered tutors to provide assistance to their children and then submit bills for those services to the

Superintendent for payment. R.C. 3313.976(D), 3313.979(C). The Superintendent must offer as many tutorial assistance grants as she does scholarships. R.C. 3313.975(A). Students apply for the grants by the first day of the school year, and qualify for either 75 percent or 90 percent of the grant amount (up to $360), depending on family income. R.C. 3313.978(B), (C)(3). *See* Affidavit of Lytle Davis ("Davis Aff.") at ¶4 (J.A. at 166a).

During the 1998-99 school year, 1,391 students received tutoring assistance, which was offered at 41 sites throughout the Cleveland district. Davis Aff. at ¶¶6-7 (J.A. at 166a). Over 80 percent of tutoring-program families have incomes at or below the poverty level. *Id.* at ¶8 (J.A. at 166a).

III. The Framework Of Educational Options.

The Ohio Program operates among various educational options available to the parents of Cleveland's approximately 57,000 school children in the elementary grades, kindergarten through eight. In 1999, Cleveland had 82 public schools offering elementary education in those grades. http://www.cmsdnet.net/schools. Among those public schools, parents were able to choose from among 23 "magnet schools" providing a specialized approach or curriculum, focusing on, for example, arts, foreign language, computers, or science. Viteritti Aff. at ¶6 (R. 95 at 708, C.A. App. at 1304). Students must apply to attend magnet schools; however, a lottery determines assignments when the number of eligible applicants exceeds the number of available slots. *Id.* In 1999, Cleveland's 23 magnet elementary schools together enrolled 13,000 students. Affidavit of Jim Daubenmire at Exhibit 1 (J.A. at 151-52a); Viteritti Aff. at ¶6 (R. 95 at 708, C.A. App. at 1304). For each child enrolled in a magnet school during the 1997-98

school year, the district received $7,746, Viteritti Aff. at ¶7 (R. 95 at 709, C.A. App. at 1305), including state funding of $4,167. Affidavit of Catherine Hoxby ("Hoxby Aff.") at ¶4d (J.A. at 56a).

Among their educational options, parents also may select a "community school." A community school (called a "charter school" in other States) is an independently operated public school. Chartered separately, such schools are operated by their own independent governing boards, not by local school districts. Community schools enjoy academic independence to hire their own teachers and to determine their own curriculum. Affidavit of Steven M. Puckett ("Puckett Aff.") at ¶¶6-9 (J.A. at 159a-60a). As public schools, however, community schools can have no religious affiliation and are required to accept applicants based on a lottery. *Id.* at ¶¶3, 9 (J.A. at 158a, 160a). In 1999, Cleveland parents could choose among eight community elementary schools, which together enrolled approximately 1,600 students. Puckett Aff. at ¶12 (J.A. at 161a). For each child enrolled in a community school that year, the school received state funding of $4,518. *Id.* at ¶14 (J.A. at 163a).

The evidence before the District Court on the incentives facing low-income families thus identified two critical *dis*incentives to choosing participation in the tuition scholarship program: first, the State provides less per-pupil funding to scholarship schools; and, second, parents must pay a portion of scholarship schools' tuition. Hoxby Aff. at ¶¶4b-4d (J.A. at 57a). Community schools, in particular, serve as the direct competitors of private schools participating in the Scholarship Program. All else being equal, a community school enjoys a financial advantage because the State provides such schools at least twice the funding ($4,518 to community schools; no more than $2,250 as a tuition scholarship) as compared to scholarship schools.

Hoxby Aff. at ¶¶4a, 4c (J.A. at 57a). Parents, moreover, have a strong incentive to choose community schools inasmuch as they pay no tuition for their children. Puckett Aff. at ¶3 (J.A. at 158a). Notwithstanding this incentive structure, thousands of parents have chosen each year to participate in the Scholarship Program.

IV. Early Research Findings.

The Ohio General Assembly, in enacting the Program, required the State to contract with an independent research entity to assess and evaluate the Scholarship Program's operation and results. Ohio Am. Sub. H.B. 282, Section 4.34 (1999) (J.A. at 26a-27a). Accordingly, the Ohio Department of Education retained researchers at Indiana University to evaluate the Program, which took effect in the 1996-97 school year. The Indiana researchers found improved test scores in language and science for scholarship students, as compared with public school students. Metcalf Aff. at ¶17 (J.A. at 71a-72a). Paul E. Peterson of Harvard University conducted a similar study, concluding that scholarship students "did at least as well—and in some subject domains better than—the students in the public schools." Affidavit of Paul E. Peterson ("Peterson Aff.") at 34 (J.A. at 107a).

Both Metcalf and Peterson found that parents of scholarship students are significantly more satisfied with their children's schools than parents of public school students. In particular, they are more satisfied with teachers, academic standards, order and discipline, social activities, and other pupils at the school. Metcalf Aff. at ¶16 (J.A. at 71a); *see also* Peterson Aff. at 42-44 (J.A. at 115a-16a) (confirming evidence of parental satisfaction).

The studies also indicate that the factors leading parents to apply for the Program are overwhelmingly secular in nature. In the third year of the Program, 96.4 percent of the parents interviewed for the Indiana University study cited their belief that Program schools offered a better education as a ."very important" or "somewhat important" reason for applying for a scholarship. Metcalf Aff. at ¶9 (J.A. at 69a-70a). Safety was a reason cited by 95 percent of the respondents. *Id.* Results from the Peterson study are to the same effect, with 85 percent of the parents citing academic quality and 79 percent citing safety as being "very important" considerations in choosing a Program school. Peterson Aff. at 28 (J.A. at 101a). In selecting a particular school, responding parents indicated that the religious affiliation of that school was the least important of five factors. Metcalf Aff. at ¶11 (J.A. at 71a); *see also* Peterson Aff. at 28 (J.A. at 101a).

V. The Litigation.

In January 1996, respondents mounted a multi-faceted challenge to the Scholarship Program in Ohio state court. The state trial court upheld the constitutionality of the Program, but the state court of appeals reversed. On appeal, the Ohio Supreme Court concluded that the Program did not violate the Establishment Clause, but held that the original enactment of the Program violated the "single subject" requirement imposed by the Ohio Constitution. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). By a substantial bipartisan majority, the Ohio General Assembly reenacted the Program, and Governor Bob Taft signed it into law on June 29, 1999.

In July 1999, respondents launched a new challenge to the revised program, this time in federal district court. In

contrast to their earlier multi-pronged attack, respondents in this latter challenge relied solely on the Establishment Clause. Two groups of participating students and schools intervened in the Program's defense. On August 24, 1999, the District Court granted a preliminary injunction against the scholarship portion of the Program. *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 741-42 (N.D. Ohio 1999) (State Pet. App. at 164a-65a). Three days later, on the State's motion, the District Court stayed its preliminary injunction only insofar as it applied to scholarship students who had participated in the Program during the previous academic year. (State Pet. App. at 130a-32a). The State then sought relief from the Sixth Circuit to extend the stay of the preliminary injunction to encompass children new to the Program in 1999; however, the Court of Appeals did not rule on the motion. On November 5, 1999, this Court, by a five to four vote, granted the State's application for a full stay of the preliminary injunction. *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999) (State Pet. App. at 127a).

The District Court issued its final opinion and order on December 20, 1999, granting summary judgment in favor of respondents and enjoining the distribution of scholarships under the Program. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 865 (N.D. Ohio 1999) (State Pet. App. at 126a). The District Court stayed its own injunction pending review by the Sixth Circuit. *Id.*

On December 11, 2000, a divided panel of the Sixth Circuit affirmed the District Court's permanent injunction. The panel majority held that the Program violates the Establishment Clause on the grounds that it has the primary effect of advancing religion and constitutes an endorsement of religion and "sectarian" education. *Simmons-Harris*, 234 F.3d at 961 (State Pet. App. at 1a-58a). The Sixth Circuit determined, first, that it could not consider other educational

options available to Cleveland parents, such as community schools. Since the Program is set forth in a separate chapter of the Ohio Revised Code and respondents had challenged only the Scholarship Program, the Court concluded that the other options available were "at best irrelevant." *Id.* at 958 (State Pet. App. at 23a-24a).

The panel majority further concluded that this Court's decision in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), controlled. The Court of Appeals reasoned that in both *Nyquist* and the Cleveland Program, the majority of schools participating in the programs were religious. *Simmons-Harris*, 234 F.3d at 958 (State Pet. App. at 26a). Even though the Ohio Program is open to both religious and non-religious schools, the court below determined that, in fact, the Program was not neutral. Referring to "facts" not in the record, the panel majority found that the relatively low scholarship amount discourages non-religious schools from participating. *Id.* at 959 (State Pet. App. at 25a-26a). Since the majority of students receiving scholarships attend religious schools, the court found that parents had no "meaningful public school choice." *Id.* at 960 (State Pet. App. at 28a). Putting aside the feature of the Program that money flows to religious schools solely as a result of parental decisions, the Court of Appeals concluded that the Ohio Program directly funnels monetary subsidies to religious institutions. *Id.*

Similarly, the Sixth Circuit gave no weight to the fact that adjacent public school districts may choose to participate in the Program. The court's conclusion that these schools have a "financial disincentive" for participating was based on an erroneous assumption that such schools would receive a *total* of $2,250 for each Cleveland public school student they admitted. *Id.* at 959 (Pet. App. at 26a). In fact, any adjacent public school districts would receive $2,250 *in addition to*

their usual state funding, because scholarship students would be included in each suburban school district's total number of students (the "average daily membership," or "ADM") for purposes of calculating the amount of state funds the district receives. *See* R.C. 3317.03(I)(1), 3317.022(A)(1).

Judge Ryan dissented. In his view, the New York statute at issue in *Nyquist* was "totally different" from the Ohio statute in all essential respects. *Id.* at 963 (State Pet. App. at 34a) (Ryan, J., dissenting in part). The purpose of the New York statute, Judge Ryan noted, was to benefit financially pressed private *schools*, whereas the purpose of the Ohio Program was to assist poverty-level *students*. *Id.* at 964 (State Pet. App. at 37a-38a). Unlike the New York schools in *Nyquist*, the schools participating in Ohio's program do not receive direct financial grants and may not discriminate on the basis of religion. *Id.* at 965 (State Pet. App. at 38a). Quite apart from these factual distinctions, Judge Ryan concluded that this Court's post-*Nyquist* decisions had undermined *Nyquist*'s continuing vitality—at least as applied to a genuine private choice program such as Ohio's. *Id.* at 973 (State Pet. App. at 56a-57a).

On December 22, 2000, the State filed a petition for rehearing and suggestion for rehearing en banc. The Court of Appeals denied the petition on February 28, 2001. (State Pet. App. at 166a-67a.) On March 8, 2001, the court issued a stay of mandate pending the filing of any petitions for *certiorari*, which the State Petitioners timely filed on May 23, 2001. On September 25, 2001, this Court granted *certiorari* as to three separate petitions and consolidated the cases for argument.

SUMMARY OF ARGUMENT

The Ohio Scholarship and Tutoring Program readily passes constitutional muster under this Court's Establishment Clause jurisprudence. Tailored to meet the profound needs of Cleveland parents, the Program—which was twice passed by Ohio's General Assembly—is a neutral regime based on genuine parental choice among an array of educational options. Specifically, the Program distributes aid to Cleveland parents, who in turn redirect that aid to participating private schools through individual parental decisionmaking. As a true private choice program, the Ohio Program in no wise presents the heightened Establishment Clause dangers—in particular the danger of perceived governmental endorsement of religion—that this Court has discerned in direct-aid programs.

To the contrary, Ohio's program was crafted with careful attention to Establishment Clause requirements. In contrast to direct-aid programs, this Court's test for adjudicating challenges to government aid programs under which individual students are intended beneficiaries focuses on two pivotal considerations: first, the presence or absence of true private choice and, second, the neutrality of the program. Where a State offers individualized benefits through a neutral regime of private choice, this Court has uniformly upheld such programs against Establishment Clause assaults. That result should obtain here too, as the Ohio Supreme Court concluded in an earlier phase of the litigation and as Judge Ryan demonstrated in his vigorous dissent.

The record in this case establishes beyond cavil that Cleveland parents do indeed exercise true, independent choice. Most importantly, the Ohio Program creates no financial incentives to choose religious schooling. Instead,

Ohio provides for the same scholarship amounts regardless of whether a parent chooses education in religious or secular settings. Moreover, state funding of Program scholarships is, on a per-pupil basis, far less than state per-pupil expenditures for students attending Cleveland's public schools. Cleveland parents are therefore subject to no governmental inducements favoring religious education.

The Ohio Program also satisfies this Court's longstanding neutrality guidelines. Only one factor determines a family's initial Program eligibility: whether that family resides in a school district that is or has been under federal court order requiring state supervision or operational management. The Program's second criterion, personal income, is used specifically to steer aid toward children from Cleveland's neediest families and is also religiously neutral. This carefully calibrated neutrality is a far cry from situations where lawmakers engage in covert religious gerrymandering of program eligibility.

These elements of neutrality and private choice also satisfy the more recent test set forth in *Agostini v. Felton*, 521 U.S. 203 (1997), in the context of direct aid to religious schools. Respondents have never challenged the secular purpose of this program, nor have they alleged excessive entanglement between government and religious institutions. The sole questions under an *Agostini* analysis are therefore whether the Ohio law results in governmental indoctrination and whether it defines recipients by reference to religion.

The Ohio Program unequivocally satisfies both requirements. Because distribution of the Program's inherently secular scholarships rests entirely upon the true, uncoerced choices of Program parents, any indoctrination that occurs in religious schools is attributable to parental choice, not governmental action. In addition, the Program

defines beneficiaries without reference to religion. In particular, parental eligibility is in no way determined by religion, and no social coercion or financial incentives influence parents toward selection of religious, as opposed to secular, schooling. These same features also guarantee that the Program does not constitute governmental endorsement of religion.

In opposition to this double line of unambiguous authority, the Sixth Circuit advanced several reasons for invalidating the Program, including (i) its large proportion of religiously affiliated scholarship schools; (ii) a novel theory that *under*-funding religious activities can constitute unconstitutional *favoring* of religion; and (iii) this Court's decision in *Nyquist*. The first two rationales did not loom large in the panel majority's opinion and in any event are foreclosed by this Court's decisions. In particular, this Court's pronouncements in *Mueller v. Allen*, 463 U.S. 388 (1983), and other cases stand squarely against the non-*Nyquist* branches of the panel majority's analysis.

The Sixth Circuit majority relied in the end on *Nyquist* itself. But the majority failed to mention, much less consider, the critical distinction that *Nyquist*'s elaborately interrelated program provided assistance to at-risk private schools, whereas Ohio's program provides assistance solely to at-risk students. Nor did the Sixth Circuit heed *Nyquist*'s express reservation of judgment on cases, like this, posing constitutional challenges to generally available scholarship programs. This case, accordingly, does not necessarily require the Court to consider whether, given its unique facts, *Nyquist* remains good law. We are nonetheless constrained to observe that *Nyquist* continues to sow seeds of constitutional confusion, as illustrated by the panel majority's disruptive *Nyquist*-driven evisceration of Ohio's generally applicable scholarship program for Cleveland's

needy families. This is tragically misguided. *Nyquist* should not be permitted, at this late date in the development of Establishment Clause doctrine, to stand in the way of the Ohio Program.

ARGUMENT

In the mid-1990s, the Cleveland public schools were engulfed in a profound educational crisis, which led the federal district court in Cleveland to order oversight of the school district by Ohio's State Superintendent of Public Instruction. The Ohio Pilot Project Scholarship and Tutoring Program represents the considered response of the Ohio General Assembly—on two separate occasions and with the approval of two different governors—to that extraordinary mandate and the underlying problems plaguing Cleveland's schools. This comprehensive response has as its centerpiece the opening of additional educational alternatives for Cleveland parents, primarily low-income families with children not otherwise enrolled in private school.

In looking to expand parental options, the General Assembly fashioned a program that neutrally invites the participation of all qualifying private schools within the Cleveland school district. No distinctions were drawn between religiously affiliated schools and schools lacking such affiliations. Instead, Ohio's lawmakers were inclusive in their approach, taking the city's private educational institutions as they found them and excluding no qualifying institution that might provide opportunity for Cleveland schoolchildren. The Program, in short, is one that maximizes the range of parental choice through equal access to *all* private schools.

The response from the Cleveland community has been overwhelmingly positive. The Program has attracted thousands of inner city parents, predominantly poor, who are deeply concerned about the educational quality and safety of the institutions to which their children are entrusted each school day. This support for the Program within the inner city, broad as well as deep, is reflected in the waiting lists of parents seeking to obtain scholarships for their children. The early educational returns are also promising. Researchers are in the process of confirming what Cleveland parents already know—that private schools are indeed helping to ameliorate the profoundly disturbing conditions that had afflicted Cleveland's schools.

Although the Sixth Circuit held that Ohio's program must fall to the sword of the Establishment Clause, that view is misguided. At every turn, the Ohio General Assembly—and Governors Voinovich and Taft—consciously crafted a program respectfully attentive to this Court's Establishment Clause jurisprudence. In fact, Ohio's representatives and governors relied on expectations that this Court would stay its steady jurisprudential course in shaping what they consider an effective and constitutional program.

The Sixth Circuit implicitly recognized as much, for in invalidating Ohio's neutral regime of private choice the panel majority, over a spirited dissent by Judge Ryan, reached far back in time to a decision from the early years of the Burger Court. Specifically, the court invalidated the considered judgment of Ohio's political branches based on a single decision from a generation ago in *Nyquist*—a precedent that, upon analysis, by no means forecloses the full range of educational opportunities for Cleveland's schoolchildren. This case is not *Nyquist*-redux. To the contrary, Ohio's program stands comfortably in the mainstream of this Court's body of precedent upholding

benefits programs in the face of Establishment Clause challenges. It is to that precedent, and the principles underlying it, that we now turn.

I. Ohio's Program Passes Constitutional Muster Because It Is Religiously Neutral And Affords True Private Choice To Cleveland Parents.

In recent years, the Court has clarified the constitutional standards that test whether government aid programs violate the Establishment Clause. While the Court once employed the three-pronged test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), it has now set forth—in addition to *Lemon*'s traditional "purpose" prong—a more precise three-pronged "effects" analysis that considers whether the aid results in governmental indoctrination; defines recipients by religion; and creates excessive entanglement. *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (plurality opinion); *id.* at 845 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 234.

This Court's recent clarifications of the *Lemon* test have come in cases distinct from (and in some respects more difficult than) the one presented here. The programs at issue in the Court's most recent decisions, principally *Mitchell* and *Agostini*, distributed aid directly to religiously affiliated schools. *See Mitchell*, 530 U.S. at 829 (plurality opinion) (citations omitted); *Agostini*, 521 U.S. at 209-10. While far from being *per se* invalid, such direct aid poses unique Establishment Clause concerns. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995); *id.* at 846-47 (O'Connor, J., concurring); *Bowen v. Kendrick*, 487 U.S. 589, 608-09 (1988).

As Justice O'Connor, joined by Justice Breyer, recently observed: "In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools." *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring). In programs of direct aid, if a religious school employs that aid to inculcate religious doctrine or teaching, it might be argued that the government has communicated a subtle message of endorsement. *Id.* Such messages of official endorsement, as various Justices have indicated, are potentially problematic under the Establishment Clause. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). By contrast, when government aid supports a school's religious mission only as a result of independent decisions by numerous individuals to guide *their* aid to that school, "no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment); *accord Rosenberger*, 515 U.S. at 849 (O'Connor, J., concurring).

Ohio's program is not one of the variety that offers direct aid to private schools. Rather, the Program, as fashioned by Ohio legislators and governors, distributes aid to *parents*, who in turn redirect that aid to participating schools through entirely uncoerced individual decisions: (i) choosing to participate in the Scholarship Program in the first instance; and then (ii) selecting which school will receive the

tuition payment. The Program accordingly does not pose the particular dangers of governmental endorsement of religion that this Court has discerned in direct-aid programs.

A. Ohio's Program Satisfies This Court's Longstanding Test Applied In Individual Benefits Cases.

To consider the validity of a true private choice program like Ohio's, we return to the roots of this Court's modern Establishment Clause jurisprudence. Since the initial incorporation of the Establishment Clause through the Fourteenth Amendment, in each and every instance in which individual students were the intended, direct beneficiaries of a government aid program (*Everson*, *Mueller*, *Witters*, and *Zobrest*), this Court has focused attention on two overriding considerations: first, the presence or absence of true private choice and, second, whether the program "neutrally provides state assistance to a broad spectrum of citizens." *Mueller*, 463 U.S. at 398-99. Where, as here, a neutral regime of true private choice is found, the Court has uniformly upheld challenged aid programs under the Establishment Clause.

1. Private Choice. The first prong of this Court's longstanding Establishment Clause test for individual aid programs asks whether the State permits true private choice. For example, *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), upheld reimbursements to parents who paid for their children's bus transportation to public or private schools, including parochial schools. While recognizing that some children might not attend parochial school without the reimbursements, the Court nevertheless found that the "legislation, as applied, does no more than provide a general program to help parents get their children, *regardless of their religion*, safely and expeditiously to and from accredited schools." *Id.* at 18 (emphasis added).

Mueller v. Allen similarly upheld a program of tax deductions for educational expenditures, even though the overwhelming majority of those deductions (96 percent) went to parents whose children attended religious schools. *Mueller*, 463 U.S. at 401. The Court approved the program because, among other reasons, the law "channel[ed] whatever assistance it may provide to parochial schools *through individual parents*." *Id.* at 399 (emphasis added). Because the public money became available to religiously affiliated schools "only as a result of numerous private choices of individual parents of school-age children," it differed from earlier decisions of the Court involving "the direct transmission of assistance from the State to the schools themselves." *Id.*

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court reaffirmed the importance of individual choice. In permitting a blind student to spend public educational grant money at a religious seminary, the *Witters* Court held that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487. Under *Witters*, when individuals—rather than government—determine whether and how much money flows to religious institutions, it is no more constitutionally troubling than when a government employee donates his or her paycheck (all derived from public funds) to a church. *Id.* at 486-87. Similarly, *Zobrest* upheld a challenged program of government-paid sign-language interpreters that "dispens[ed] aid not to schools," as the Court stressed, "but to individual" hearing-impaired children. *Zobrest*, 509 U.S. at 13. Again, the program's hallmark trait of private choice proved critical: "By according parents

freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.* at 10.

The Ohio Program forthrightly meets these requirements. By its terms, the Program dispenses aid to schools only as a result of the individual choices by Cleveland parents. Before the district court, the State submitted abundant evidence confirming that the percentage of religious schools participating in the Scholarship Program does not restrict private choice, but reflects it. Specifically, the State furnished affidavits of parents who testified, without contradiction, about the unconstrained choices they had made and why they made them. *See, e.g.*, Affidavit of Leigh-Anne Ford (J.A. 168a-70a); Affidavit of Dayna Hunter (R. 96 at 1050, C.A. App. at 1648). What is more, the State provided expert reports demonstrating that, in evaluating which school to select, Program parents consider various factors, the least important of which is the school's religious affiliation. *See* Peterson Aff. at 28-29 (J.A. at 100a-01a) (religion ranked fourth among reasons, behind academic quality, safety, and location); Metcalf Aff. at ¶¶10-11 (J.A. at 70a-71a) (religion was less important than school reputation, availability of space, school location, and recommendations of other people).[1]

[1] These reports systematically analyzed the overwhelming satisfaction of parents who chose to participate in the Scholarship Program. Parents of scholarship students are significantly more satisfied with their children's schools than are parents of either public school students, or students who applied for, but did not receive scholarships. In addition, Scholarship Program parents are more satisfied with the academic quality of the schools, the teachers, safety, school discipline, and the level of parental involvement. Metcalf Aff. at ¶16 (J.A. at 71a); Peterson Aff. at 43 (J.A. at 116a).

So too, not a shred of record evidence suggests that *any* Cleveland parent has ever wanted a non-religious Scholarship Program school but failed to find it. As Judge Ryan emphasized in dissent, "there is no evidence that any of the several nonreligious, private schools participating in the program have ever rejected a single voucher applicant for any reason," nor is there any evidence "that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive." *Simmons-Harris*, 234 F.3d at 971 (Ryan, J., dissenting in part) (State Pet. App. at 51a-52a).

This impressive body of uncontradicted evidence is constitutionally dispositive under this Court's teachings because it is *adult parents* who are making these independent choices. This is not a case where the Court must concern itself with distinctions among elementary, secondary, and college students, or deal with the sensitive issue of safeguarding individual conscience from social pressures for religious conformity. *Cf. Mitchell*, 530 U.S. at 904-06, (Souter, J., dissenting); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Lee v. Weisman*, 505 U.S. 577, 592-93 (1992); *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971). To the contrary, as the Court "consider[s] whether the community would feel coercive pressure" to engage in religious activities, "the relevant community would be the parents, not the elementary school children." *Good News Club v. Milford Cent. Sch.*, 121 S.Ct. 2093, 2104 (2001); *compare Lee*, 505 U.S. at 592-93. Because Cleveland children "cannot attend without their parents' permission," those children "cannot be coerced into engaging

in . . . religious activities." *Good News Club*, 121 S.Ct. at 2104. The Ohio Program thus provides for *private* and *parental* decisionmaking, ensuring that decisions as to whether to participate in the Program are uninfected by social coercion. Indeed, parents' decisions with regard to Scholarship Program participation are legally indistinguishable from their use of federal scholarships at religiously affiliated colleges under the G.I. Bill and similar adult educational programs.

Nor does the record suggest that Cleveland parents might be influenced by state-created financial incentives favoring religious as opposed to secular education. This requirement for a lack of coercive financial incentives, evident in *Witters* and *Zobrest* and confirmed by *Agostini* and *Mitchell*, is fundamental to the protection of genuine private choice. "For to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly 'independent.'" *Mitchell*, 530 U.S. at 813 (plurality opinion) (quoting *Witters*, 474 U.S. at 487, and citing *Agostini*, 521 U.S. at 232 (holding that Title I did not create any impermissible incentive, because its services were "available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school")); *see also Zobrest*, 509 U.S. at . 10 (discussing, in successive sentences, neutrality, private choice, and financial incentives, respectively).

The Sixth Circuit nonetheless found these elements of facial neutrality insufficient. *Simmons-Harris*, 234 F.3d at 959 (State Pet. App. at 25a). The court concluded that, since a large majority of participating schools are religious and a large majority of participating students are enrolled at religious schools, "the program clearly has the impermissible effect of promoting sectarian schools." *Id.* at 959 (State Pet. App. at 25a-27a). This is profoundly misguided. The

relevant question, according to *Mueller*, *Witters*, and *Zobrest*, is not what schools participate in the program from year to year; rather, it is whether all parents with eligible children and all private and public schools—secular or religiously affiliated—may exercise *uncoerced private choice* in determining whether to participate. If, as here, the State establishes a regime of uncoerced individual choice, and provides all neighboring public and private schools—both secular and sectarian—a right of equal participation, it need do no more.

Moreover, looking beyond the immediate Scholarship Program to the larger context of public support for education in general, the State provided uncontradicted evidence not only of a lack of financial incentives to choose religious schooling, but of affirmative incentives to select *non-religious* schooling. While students may attend public school free of charge, parents of Scholarship Program students—including those from low-income families—must pay at least ten percent of the cost of a child's education. Moreover, the State provides significantly less funding to Scholarship Program schools than to the other educational options available to the largely low-income Scholarship Program parents. For example, the State spends almost twice as much for each student attending a community school—which must by law eschew religious affiliation—as compared to a Program school. Hoxby Aff. at ¶¶4a, 4c (J.A. at 56a). Similarly, magnet schools, which are public and therefore necessarily secular, receive government aid equal to an average of about three times the amount of Program scholarships. Hoxby Aff. at ¶¶4a, 4d (J.A. at 56a). The combined effect of the required Program co-payment and the larger pattern of state educational spending in Cleveland is that "the State has not created a spending incentive for Cleveland parents to choose a religious private school rather than a non-religious community school." Hoxby Aff. at ¶¶4f,

4g (J.A. at 58a); *see also* Viteritti Aff. at ¶7 (R. 95 at 708, C.A. App. at 1304).[2]

With the Scholarship Program itself lacking any financial incentives to select religious education and broader state policies affirmatively favoring non-religious education, the Court of Appeals should have concluded that the Scholarship Program does not "creat[e] a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. As this Court instructed in both *Mueller* and *Witters*, there ordinarily can be no "primary effect of aiding religion" where, as here, an individualized educational assistance program imposes no social coercion and "creates no financial incentive for parents to undertake the sectarian education." *Witters*, 474 U.S. at 488. Under this Court's precedents, the Ohio Program is a regime of true private choice.

2. Religiously Neutral Criteria. In addition to the critical element of genuine private choice, this Court's longstanding test probes whether an aid program "neutrally provides state assistance to a broad spectrum of citizens." *Mueller*, 463 U.S. at 398-99. In its earliest modern-day interpretation of the Establishment Clause, this Court held in *Everson* that the Constitution does not preclude a State from extending the benefit of its laws to all citizens without regard

[2] Indeed, the Scholarship Program co-payments and higher per-pupil payments to community and magnet schools (as compared to Program scholarships) are undoubtedly important reasons why non-religious schools often seek to participate in the Community School Program, not the Scholarship Program, *see* Hoxby Aff. at ¶5b (J.A. at 59a), and why parents who take their children out of neighborhood public schools, but decline religious educational options, overwhelmingly choose community and magnet schools. *Id.* at ¶¶ 4i, 4j (J.A. at 59a).

to religious affiliation. To the contrary, the "First Amendment *requires* the state to be a *neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson*, 330 U.S. at 17 (emphasis added).

Likewise, in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 243 (1968), the Court placed critical reliance on the neutral availability of the public benefit there at issue: "The law merely makes available to *all* children the benefits of a general program to lend school books free of charge." In similar vein, *Witters* upheld a private choice program even in the most profoundly religious educational context—training for clerical ordination—by virtue of the fact that the program's benefits were "'made available generally without regard to the sectarian-non-sectarian, or public-nonpublic nature of the institution benefited.'" *Witters*, *474* U.S. at 487 (quoting *Nyquist*, 473 U.S. at 782-83 n.38); *see also Zobrest*, 509 U.S. at 10.

The Ohio Scholarship Program readily satisfies this bedrock criterion of neutrality. Only one factor determines a family's initial Program eligibility: whether that family resides in a school district that is or has been "under federal court order requiring supervision and operational management of the district by the state superintendent." R.C. 3313.975(A). This requirement of judicial intervention clearly rebuts any claim that the facially neutral selection of the Cleveland geographic area somehow masks a covert religious classification. While Cleveland is currently the only Ohio school district to be under such a federal court order, that unfortunate distinction is in no way connected to the religious character of the majority of its private schools. Rather, under the statute as neutrally drawn, additional Ohio school districts, including those with different religious

demographics, could be added to the Scholarship Program in the future. *See Simmons-Harris v. Goff*, 711 N.E.2d at 213-14.

This point is fundamental because Cleveland's long-standing preponderance of religiously affiliated private schools serving urban students did not arise as the result of any government action, much less the Scholarship Program. This is not a case where legislators have configured a program, "with purpose and precision, along a religious line," in order to effect the type of "explicit religious gerrymandering" that violates the Establishment Clause. *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 729 (1994) (Kennedy, J., concurring). It would therefore be incongruous—and problematic under the Establishment Clause—to invalidate a Cleveland scholarship program while permitting an identical program in another community, with equally troubled schools, where secular private schools command a larger share of the educational market. Because "[t]he Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools," the "proper" principle for Establishment Clause jurisprudence is "government impartiality, not animosity, toward religion." *Id.* at 717-18 (O'Connor, J., concurring).

Beyond the requirement of a federal court order, the other Program eligibility criterion is likewise religiously neutral: personal income. Specifically, the Program channels benefits toward children from low-income families through a regime of preference both in the application process, R.C. 3313.978(A), and in the form of larger scholarship awards once children are admitted into the program. R.C. 3313.976(A)(8); 3313.978(A). The evidence confirms that the Program is, in fact, serving these intended beneficiaries, as 60 percent of the participating students in the 1999-2000

school year were from families with incomes at or below the poverty line. Berry Aff. ¶10 (R. 96 at 1082, C.A. App. at 1679). Such preferential distribution of benefits to citizens having the greatest need poses no Establishment Clause concerns. *Mitchell*, 530 U.S. at 830 (plurality opinion) ("[W]e would not presume that such a deviation [in favor of poor families] created any incentive one way or the other with regard to religion.").

Finally, the Program confirms its studied neutrality by expressly requiring that no participating school "discriminate on the basis of race, religion, or ethnic background." R.C. 3313.976(A)(4). This non-discrimination requirement ensures that no child is denied equal access to the education offered by a particular participating school based on his or her religious beliefs. Both the Scholarship Program itself and the opportunity to take advantage of it through admission to participating schools are thus open on equal terms to a class of children defined as being at greater educational risk *solely* by federal court order and family income. The Program's eligibility rules can in no way be taken to define either express or implied religious classifications.

To be sure, in order to further guard against state coercion of religious participation, this Court has often demanded that public benefits themselves meet a final requirement: that of "neutrality" in the sense of not being inherently religious. The seminal *Everson* decision thus upheld the provision of bus transportation to all school children, including those attending religiously affiliated schools, only after placing such transportation in the category of "general government services." *Everson*, 330 U.S. at 17. *Everson* analogizes student transportation to such other long-settled practices as governmental provision of crossing guards, police and fire protection, and the like. *Id.* at 17-18.

Everson's requirement that the benefits themselves not be inherently religious was further elaborated in *Allen*, upholding the provision of secular textbooks: "Bus rides have no inherent religious significance . . . . [Similarly,] we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content." *Allen*, 392 U.S. at 244. Justice Douglas put an even finer point on the issue in his *Allen* dissent: "Whatever may be said of *Everson*, there is nothing ideological about a bus. There is nothing ideological about a school lunch, or a public nurse, *or a scholarship*." *Allen*, 392 U.S. at 257 (Douglas, J., dissenting) (emphasis supplied); *see also Mitchell*, 530 U.S. at 890 (Souter, J., dissenting) (citing *Agostini*, 521 U.S. at 232 (discussing need to assess whether aid was "neutral and nonideological"); *Zobrest*, 509 U.S. at 10 (describing translator as "neutral service"); *Tilton*, 403 U.S. at 688 (characterizing buildings as "religiously neutral")).

Here, the Scholarship Program offers benefits that are in themselves not inherently religious. As monetary aid, these benefits, like buses and buildings, are free of content and, therefore, the nature of this benefit itself presents no inherent risk of covert promotion of religion. *See Mitchell*, 530 U.S. at 824 (plurality opinion) (financial aid lacks content and therefore minimizes risk that religious indoctrination will be attributed to the government); *id.* at 841 (O'Connor, J., concurring) (monetary payments acceptable in neutral program based on private choice); *Mueller*, 463 U.S. at 400 (tax deduction not religious in nature). Indeed, as we have seen, *Witters* upholds precisely this sort of tuition grant in the profoundly religious context of training for the ordained ministry. *Witters*, 474 U.S. at 489. Because Scholarship Program grants are usable at *any* institution meeting secular educational criteria, *see* R.C.

3313.976(A)(3), such benefits are in themselves no more ideological than bus rides, secular textbooks, or school lunches. Where, as here, they are exercised through private choice and distributed according to neutral criteria, they satisfy the demands of the Establishment Clause.

B. Ohio's Program Satisfies This Court's *Agostini* Test Used In Direct-Aid Cases.

The same elements of the Ohio Program that satisfy the criteria articulated in the Court's longstanding line of authority in cases of individualized benefits likewise satisfy *Agostini*'s more recent test set forth in the context of *direct aid*. When considering the validity of direct-aid programs, this Court continues to ask "whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Agostini*, 521 U.S. at 222-23. Here, respondents long ago conceded that Ohio acted to achieve secular purposes—improving educational opportunities for low-income Cleveland students. *Simmons-Harris*, 72 F. Supp. 2d at 845, n.6 (State Pet. App. at 82a); *accord Simmons-Harris*, 234 F.3d at 967 (State Pet. App. at 44a) (Ryan, J., dissenting in part) ("The *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority public school children from the devastating consequences of requiring them to remain in the failed Cleveland schools, if they wish to escape.") (emphasis in original). These concededly secular purposes are only reconfirmed by the extraordinary judicial mandate that prompted Ohio's elected representatives and governors to fashion the Program.

What has changed in recent years is this Court's articulation of "the criteria used to assess whether aid to religion has an impermissible *effect*." *Agostini*, 521 U.S. at 223 (emphasis added). The Court recently has set forth three

primary criteria to test whether government aid programs impermissibly advance religion: (i) whether the aid results in governmental indoctrination, (ii) whether the aid program defines its recipients by reference to religion, and (iii) whether the aid creates an excessive entanglement between government and religion. *Mitchell*, 530 U.S. at 808 (plurality opinion); *id.* at 845 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 234. Since respondents have not suggested that the Ohio Program creates an excessive entanglement, only two *Agostini* criteria—indoctrination and reference to religion—are germane to this case. Assessed against those criteria, the Ohio Scholarship Program plainly passes muster.

1. Governmental Indoctrination. The question whether governmental aid to religious schools results in governmental indoctrination is "ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809 (plurality opinion); *accord Agostini*, 521 U.S. at 230 (question is whether "any use of [governmental] aid to indoctrinate religion could be attributed to the State"); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence.").

To answer this question, and to distinguish between indoctrination attributable to the State and that attributable to private citizens, the Court has "consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 U.S. at 809 (plurality opinion); *id.* at 838 (O'Connor, J., concurring) ("we have emphasized a program's neutrality repeatedly in our decisions approving

various forms of school aid"); *id.* at 878 (Souter, J., dissenting) (acknowledging that the Court has addressed the presence or absence of neutrality "in some sense" "from the moment of *Everson* itself").

In addition to neutrality, the Court has also "repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.* at 810 (plurality opinion) (quoting *Agostini*, 521 U.S. at 226). The Court has found important whether the "private choices of individual parents," as opposed to the "unmediated" will of government, *School District of Grand Rapids v. Ball*, 473 U.S. 373, 395 n.13 (1985) (internal quotation marks omitted) (overruled in part on other grounds), determine what schools ultimately benefit from the aid, and how much. *Mitchell*, 530 U.S. at 810 (plurality opinion). "For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Id.*

As we have already seen, the Ohio Scholarship Program plainly satisfies these requirements. Distribution of the Program's scholarships is based on religiously neutral criteria and depends entirely upon the private, uncoerced choices of Program parents. For that reason, any indoctrination that occurs in religiously affiliated schools participating in the Program is attributable only to individual parental choice, not governmental action. Such a "carefully constrained program" can in no way "be viewed as an endorsement of religion," *Agostini*, 521 U.S. at 235 (citation omitted), for "[t]he mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for

[a] religious education" does not "confer any message of state endorsement." *Witters*, 474 U.S. at 488-89.

2. Reference to Religion. The second *Agostini* criterion looks to a closely related set of facts, and asks a familiar but slightly different question—whether the criteria for allocating the aid in question "create a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. *Agostini* itself sets out the rule for resolving this issue: "This incentive is not present" where aid "is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* In addition, "simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does *not* mean that the program, by reducing the cost of securing a religious education, creates, under *Agostini*'s second criterion, an 'incentive' for parents to choose such an education for their children." *Mitchell*, 530 U.S. at 814 (plurality opinion) (citing *Allen*, 392 U.S. at 244) (emphasis added). After all, "*any* aid will have some such effect." *Id.* (emphasis in original).

Viewing the Program against these principles, whether in isolation or within the comprehensive range of educational options available in Cleveland, ineluctably demonstrates that the State has not defined its recipients in religious terms, either explicitly or through impermissible financial incentives. Significantly, within the Scholarship Program itself, eligible recipients are in no way defined in religious terms, but instead are defined only as parents of students residing in a school district that has been under a federal court order and (potentially) as having low-income status. R.C. 3313.975(A). Nor, as demonstrated above, *supra* at 25-27, is there any social coercion or financial incentive for parents to select a religious, as opposed to

secular schooling. Once again, "this carefully constrained program also cannot reasonably be viewed as an endorsement of religion." *Agostini*, 521 U.S. at 235 (citing *Witters*, 474 U.S. at 488-89). *Agostini*'s more recently framed direct-aid test, like *Mueller*'s longstanding individualized-benefits test, demonstrates that the Program readily passes muster.

II. The Sixth Circuit's Asserted Justifications For Invalidating The Program Do Not Withstand Scrutiny.

In the face of unambiguous authority to the contrary, the Sixth Circuit struck down the Program based primarily on (i) the large proportion of religiously affiliated scholarship schools; (ii) the novel theory that *under*-funding religious activities can somehow constitute unconstitutional *favoring* of religion; and (iii) this Court's decision in *Nyquist*. As demonstrated below, none of these arguments finds support in this Court's decisions.

A. Cleveland Parents Do Not Lack "Real Choice" Merely Because A Large Majority Of Scholarship Schools Are Religious.

Respondents challenged the Program below on grounds that the number of non-religious Program schools is inadequate to provide "real choice." The Sixth Circuit agreed, deeming it highly significant that "the great majority of schools benefited by these tuition dollars are sectarian." *Simmons-Harris*, 234 F.3d at 958 (State Pet. App. at 25a). This Court's body of precedent offers no support for this odd analysis.

As a matter of law, the Establishment Clause precludes giving *any* significance, much less dispositive weight, to tabulations of the aggregated results of thousands

of truly independent parental decisions. As *Mueller* explained, "Where, as here, aid to parochial school is available only as a result of decisions of individual parents[,] no imprimatur of State approval can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller*, 463 U.S. at 399 (internal quotation omitted).

Mueller thus held that even where an overwhelming majority (96 percent) of individual tax benefits go to parents of children in religious schools, this fact, without more, does nothing to call into question whether parents have exercised "real choice." *Id.* at 401. Putting any lingering doubt to rest, Justice Powell observed in *Witters* that *Mueller* had settled the constitutionality of otherwise valid educational assistance programs in such circumstances. "*Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate [the Establishment Clause] because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at 490-91 (footnote omitted) (Powell, J., concurring) (citing *Mueller*, 463 U.S. at 398-99). Similarly, Justice O'Connor's separate opinion in *Witters* expressly embraced this view. *Id.* at 493 (O'Connor, J., concurring).

Mueller therefore controls in holding that the dual feature of *ex ante* neutrality and private choice is what legally matters, not the tally of *ex post* results aggregated over thousands of independent parental decisions:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

Mueller, 463 U.S. at 401.

As if more were needed, *Agostini* involved a challenged program under which more than 90 percent of participating private schools were religious. *Agostini*, 521 U.S. at 210. Even so, *Agostini* succinctly states: "Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who receive the otherwise neutral aid." *Id.* at 229. Aid programs are therefore not subject to invalidation based on numbers of recipients who choose to employ aid in parochial settings.

B. Ohio's Program Does Not Lack Religious Neutrality Because Of The Amount Of Its Scholarships.

The Sixth Circuit concluded that the mere dollar amount of a scholarship can transform what had been a secular benefit into a "sectarian" one. Here, the Sixth Circuit cited no precedent whatsoever; instead, it relied exclusively on a law review article claiming that in scholarship programs generally, a purportedly low scholarship amount can discourage participation by non-religious schools. *See Simmons-Harris*, 234 F.3d at 959 (State Pet. App. at 25a-26a) (citing Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999)).

This novel theory was neither advanced by respondents nor adopted by the district court, and for good reason. At the outset, the record is barren of any support for

the suggestion that the Program scholarship amounts are tied to the tuition of religiously affiliated schools, or that only parochial schools receive funding from sources other than tuition. In fact, the scholarship amount is actually *higher* than the tuition costs of most participating schools. *See* Affidavit of Carolyn Jurkowitz ("Jurkowitz Aff.") at ¶2 (Hanna Perkins Pet. App. at 145a) (most scholarship schools do not receive the full $2,250 per pupil, because the scholarship amount is limited to 90 percent of tuition). Moreover, non-religious schools receive significant financial support from non-tuition sources. *See* Affidavit of Thomas Barrett at ¶5 (R. 34 at Exhibit 6, C.A. App. at 272) (superintendent of non-religious school explains that the full cost of educating one of its disabled children is between $13,000 and $14,000 per year—far more than the school's tuition or the scholarship amount).

More fundamentally, the Sixth Circuit's approach would lead the federal courts into a quagmire of litigation lacking clear constitutional standards, call into question a host of state and federal programs providing secular, voucher-type benefits, and ultimately would itself violate the Establishment Clause. The simple fact is that funding of the Program, like all state funding decisions in Ohio, rests ultimately with the Ohio legislature. Scholarship Program funding is therefore determined in exactly the same manner as funding for other programs—through the push and pull of democratic debate over priorities, against a backdrop in which worthy projects inevitably outstrip available monies.

If this Court were to uphold the Sixth Circuit's analysis, it would mean that funding levels for a wide array of state and federal programs would ultimately be subject to intrusive and standardless federal court review. This review would encompass not only elementary school scholarships, but scholarships for higher education, reimbursement

programs for medical expenses, and "vouchers" for social services under state and federal programs. *See, e.g.*, Veterans' Readjustment Benefits Act, 38 U.S.C. §3451 *et seq.*; Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. §604(h); Health Insurance for the Aged Act, 42 U.S.C. §1395 *et seq.*; Ohio Student Choice Grant Program, R.C. 3333.27. Each such program would be subject to scrutiny not only on grounds that a facially neutral funding formula had *over*-funded religiously affiliated service providers but also, on the Sixth Circuit's novel theory, that such formulas leave those providers *under*-funded.

Needless to say, such an approach "would scarcely provide the certainty that this field stands in need of," nor would there be any "principled standards" by which such budgetary allocation decisions "might be evaluated." *Mueller*, 463 U.S. at 401. One result would be judicial intrusion into state and local educational affairs of the precise sort that this Court long ago renounced. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44-55 (1973); *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *see also Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 270, 289-291 (1990) (Stevens, J., dissenting). A second and equally troubling result would be a judicial command for government to engage in the precise sort of covert "religious gerrymandering" that the Establishment Clause had been thought to forbid. *Kiryas Joel*, 512 U.S. at 729 (Kennedy, J., concurring).

C. The Sixth Circuit Misread This Court's Decision in *Nyquist*.

Given these alternative rationales, it is not surprising that the majority below ultimately came to rely almost exclusively on *Nyquist*. *See Simmons-Harris*, 234 F.3d at

958 (Pet. App. at 24a-25a). But *Nyquist* should in no way control, by virtue of the important differences between the New York State program at issue there and the Cleveland program at issue in this case.

Nyquist involved a New York program that attempted to rescue religious schools from "increasingly grave fiscal problems." *Nyquist*, 413 U.S. at 756. To accomplish this goal, the New York legislature enacted a statewide, three-tiered structure of aid: direct *per capita* grants to non-public schools for "maintenance and repair;" tuition reimbursements to parents of non-public school children of $50 (students in the first eight grades) or $100 (high school students); and tax relief at similar levels for parents whose annual income was too high to qualify them for reimbursements, but still below $25,000. Significantly, despite this state aid, the *Nyquist* schools remained free to "impose religious restrictions on admissions" and to "require obedience by students to the doctrines and dogmas of a particular faith." *Id.* at 767.

In light of these features, the *Nyquist* Court emphasized legislative findings acknowledging the genesis of New York's program as a response to what the legislature itself termed a "fiscal crisis in *non-public* education." *Id.* at 763 (emphasis added). Far from being strictly neutral toward religion, the Court found aspects of the program "a recent innovation, occasioned by the growing financial plight of such nonpublic institutions." *Id.* at 792.

Despite these statements, the panel majority below never came to grips with the fact that *Nyquist*'s tuition reimbursements were invalidated precisely because of concerns about opening doors to use of covert means "to support or to subsidize" religion. *Id.* at 793. *Nyquist* itself was quite clear in this respect: "[I]t is precisely the function of New York's law to provide assistance to private schools,

the great majority of which are sectarian." *Id.* at 783. With such a sharpened objective, the *Nyquist* program could not have missed its intended target of locking in an educational status quo. *Nyquist*'s holding is therefore limited to circumstances where students already attending religious schools are given purposeful inducements to encourage them to stay in those schools, albeit in order to promote ostensibly secular purposes like preserving educational diversity, enabling free exercise of religion, and forestalling overcrowding of public schools. *Id.* at 764-65.

Indicative of its overreading of *Nyquist*, the Sixth Circuit majority did not even mention, much less consider, the dispositive distinction that *Nyquist*'s program was intended to "provide assistance to private *schools*," *id.* at 783 (emphasis added), while Ohio's is intended to provide assistance to public- and private-school *students*. The panel majority thus overlooked entirely several aspects of Ohio's program that pointed to this fundamental difference.

For example, as indicated earlier, Ohio provides tutorial scholarships available to students attending the Cleveland public schools. R.C. 3313.978(B). This portion of the Program makes available the same number of tutoring grants by grade as scholarships, and, significantly, provides that these two facets of the Program draw funding from the same sources. *Id.* Likewise, Ohio's carefully-fashioned plan, unlike *Nyquist*'s, requires that at least half of all scholarships must be awarded to students who did *not* attend private school prior to receipt of their initial Program scholarship. R.C. 3313.975(B). Far from locking in a private-school status quo, this feature ensures that Ohio's program has its intended effect of expanding educational opportunities for low-income students in a troubled school system. Finally, unlike *Nyquist* schools, schools participating in Ohio's program are prohibited from

discriminating on the basis of religion or requiring obedience to a particular faith. R.C. 3313.976(A)(4). This program element, absent entirely from New York's program, guards against any conceivable misperception of governmental indoctrination or endorsement of religion. Ohio's program, unlike *Nyquist*'s, is thus precisely what it purports to be—a comprehensive regime of choice for students in dire need. Nothing in *Nyquist* requires the invalidation of such programs.

D. Ohio's Program Fits Comfortably Within *Nyquist*'s Reservation Of Judgment On Generally Available Scholarship Programs.

The reliance on *Nyquist* below was particularly misplaced in light of *Nyquist*'s own reservation of judgment as to this very situation—that is, "a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782 n.38. This express reservation, assessed in light of the extensive post-*Nyquist* jurisprudence, also points to the Program's constitutionality.

At the outset, for reasons already described, the Program provides the sort of generally available scholarships on which *Nyquist* expressly withholds judgment. The Ohio Program extends as many tutorial assistance grants to public school students as it does scholarships to private school students; permits the voluntary participation in the Program by all public and private schools in or adjacent to the Cleveland City School District; applies not statewide but only to the geographic area and individual students most in need of better schools; and is open to *any* Ohio school district meeting certain neutral, inherently secular criteria of educational and management failure. The Ohio scholarships

are thus constitutionally indistinguishable from scholarships provided under the G.I. Bill—the paradigmatic example of the programs on which *Nyquist* reserves judgment. *Id.*

Because *Nyquist* by its own terms does not control, the Sixth Circuit erred in declining to take decisive guidance from this Court's post-*Nyquist* decisions. *See supra* at 22-24. It bears noting, for instance, that all nine Justices in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), emphasized the central roles of neutrality and private choice in a proper analysis under the Establishment Clause. *See id.* at 839 (majority opinion relying on "neutrality towards religion"); *id.* at 880, 886 (Souter, J., dissenting) (dissent relying on private citizens' ability to "break the circuit" through their "independent discretion to put State money to religious use"). This broad-based agreement (even amid other disagreements) spotlights not only the Sixth Circuit's mishandling of authority, but more importantly, the grave Establishment Clause issues raised by its neglect of private choice and neutrality in favor of an odd focus on percentages of religiously affiliated schools and students.

Notwithstanding *Mueller*, the Sixth Circuit decision appears to impose unprecedented requirements that, before dispensing benefits capable of use in "sectarian" settings, government must somehow ensure that not too great a share of those benefits will be directed through private choice to religiously affiliated providers. Even though it struck down the Cleveland program, the Sixth Circuit might well approve, for example, a scholarship component for an educational reform program in Columbus, because according to recent Ohio survey results, Columbus, in contrast to Cleveland, boasts roughly equal numbers (about 15 each) of Roman Catholic and non-religious elementary schools. Alternatively, the panel's opinion might be read to approve a

scholarship component for a city with Cleveland's religious demographics, but on condition that those benefits are restricted to use in non-religious settings.

Any such line-drawing produces significant tensions with post-*Nyquist* understandings of neutrality and entanglement. Specifically, any requirement that States survey religious demographics and tailor any private choice aspects of localized programs to ensure that no "too large" share of benefits ends up in "sectarian" hands would contradict the fundamental principle of "government impartiality, not animosity, toward religion." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring).

Likewise, a requirement that States legally restrict benefits to use only in non-religious settings would contradict not only the command of "impartiality, not animosity," but non-entanglement requirements as well. *See, e.g., Agostini*, 521 U.S. at 232-33 (incorporating entanglement analysis into the effects inquiry). For instance, the question whether Columbus has precisely equal numbers of Catholic and secular elementary schools may well turn on whether one categorizes the Westgate Friends Kindergarten as a purveyor of secular education, or as the inculcator of Quaker theology. For government even to attempt to answer that question tends intrusively toward constitutionally sensitive entanglements between religious and secular authorities.[3]

[3] This is especially true in light of the extensive evidence of religious pluralism in the student bodies and on the faculties of even those Cleveland schools participating in the program and having the clearest religious identities. Jurkowitz Aff. at ¶4 (Hanna Perkins Pet. App. at 146a) (Sixty-two percent of the scholarship students enrolled in the registered Catholic

The Sixth Circuit's heavy *Nyquist* reliance was misplaced not only because *Nyquist*'s facts are distinguishable; and not only because *Nyquist* stops short of prejudging generally available scholarships; but also because, by misreading post-*Nyquist* authority, the Sixth Circuit heightened, rather than dispelled, Establishment Clause concerns. For these reasons, this Court need not address whether, in view of its unique facts, *Nyquist* remains good law.

E. *Nyquist* Should Not Be Applied To Invalidate The Ohio Program.

We are constrained to note, however, that *Nyquist* continues to spawn nationwide confusion. As in Wisconsin, officials in Ohio created their scholarship program with this Court's jurisprudence firmly in mind. The Ohio Supreme Court has approved the Ohio Program, just as the Wisconsin Supreme Court similarly upheld—notwithstanding *Nyquist*—a neutral, private choice program fashioned by Governor Tommy Thompson and Wisconsin's legislature. *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998). Along these same lines, Judge Ryan passionately argued in dissent that nothing in this Court's decisions demands the sweeping, rigid *Nyquist* interpretation embraced by the Sixth Circuit majority.

We believe, for the reasons stated, that *Nyquist*'s strictures are fully satisfied by the Ohio Program, all the more so in light of *Nyquist*'s own reservation of judgment in footnote 38. But if we are mistaken, and if state supreme

schools are not of the Catholic faith); *see generally*, Brief of Petitioners Hanna Perkins School, *et al.*

court judges in both Ohio and Wisconsin are likewise in error, and if Judge Ryan is also wrong, then the problem lies with *Nyquist* itself. Because it continues to sow seeds of confusion, and since it stands in tension with the Court's more recent decisions on which state officers have relied and continue to rely, *Nyquist* should not be permitted to stand in the way of Ohio's program.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 2001

SUSAN TAVE ZELMAN, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*, and SUE GATTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS SUE GATTON, MICHAEL DEBOSE, CHERYL DEBOSE, GLEN ALTSCHULER, AND DEIDRA PEARSON

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Ohio Voucher Program under which tax monies are paid without restriction as to use to private elementary schools in Cleveland, of which a preponderant majority are sectarian and in which the district court found "that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience", violates the Establishment Clause of the First Amendment to the United States Constitution.

TABLE OF CONTENTS

COUNTER-STATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF THE CASE 1

I. *The Essentially Undisputed Facts* 1

II. *The State Litigation* 2

III. *The Instant Proceedings* 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE SUBSTANTIAL GRANTS GOING DIRECTLY TO SECTARIAN ELEMENTARY SCHOOLS UNDER THE CLEVELAND VOUCHER PROGRAM, AND AVAILABLE WITHOUT RESTRICTION FOR RELIGIOUS FUNCTIONS AND ACTIVITIES, ARE CORE VIOLATIONS OF THE ESTABLISHMENT CLAUSE 7

A. Despite the Transparent Form of Payment to Parents, the State's Checks in Undisputed Fact are Paid Over Directly and Exclusively to the Schools 8

B. On Principles Espoused by Madison and Jefferson, and Steadily Enforced by this Court, Payments to Sectarian Schools like those Involved here are Barred by the Establishment Clause 9

C. The Unfortunate State of Cleveland's Public Schools in Poor Areas, Shamefully and Unlawfully Neglected by the Ohio Legislature, Supplies No Justification for the Use of Tax Monies to Support Sectarian Schools 23

D. Decisions of this Court since Nyquist *Leave its Soundness and Authority Unimpaired* 24

E. Nyquist *Should Not Be Overruled* 31

II. WHERE, AS HERE, A PROGRAM SKEWED TOWARD RELIGION LEAVES LITTLE OR NO CHOICE BETWEEN PAROCHIAL AND NONPAROCHIAL SCHOOLS, PARENTAL "CHOICES" ARE MEANINGLESS OR IMMATERIAL 34

III. NEITHER THE FACTS NOR THE LAW SUPPORTS THE STATE'S DEFENSE OF "NEUTRALITY" FOR THE VOUCHER PROGRAM 44

CONCLUSION 49

TABLE OF AUTHORITIES

CASES

Agostini v. Felton,
521 U.S. 203 (1997) ..... passim

Allegheny County v. ACLU,
492 U.S. 573 (1989) 21 n.3, 33, 47

Board of Educ. v. Mergens,
496 U.S. 226 (1990) 26

Bowen v. Kendrick,
487 U.S. 589 (1988) 26

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 26, 40

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 45, 46

Committee for Public Educ. v. Regan,
444 U.S. 646 (1980) 33

Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) ..... passim

DeRolph v. Ohio,
78 Ohio St. 3d 193, 677 N.E.2d 733 (1997), *clarified*, 83 Ohio St. 3d 1212, 699 N.E. 518 (1998) 23

DeRolph v. Ohio,
93 Ohio St. 3d 309, 754 N.E.2d 1184, *on reconsideration*, 93 Ohio St. 3d 628 (2001) 24 n.5

Dickerson v. United States,
530 U.S. 428 (2000) 6, 33

Estate of Thornton v. Caldor, Inc.,
472 U.S. 703 (1985) 46

Everson v. Board of Educ.,
330 U.S. 1 (1947) ..... passim

Flast v. Cohen,
392 U.S. 83 (1968) 14, 15, 16

Larkin v. Grendel's Den,
459 U.S. 116 (1982) 33

Larson v. Valente,
456 U.S. 228 (1982) 15, 46

Lee v. Weisman,
505 U.S. 577 (1992) 16, 17, 33, 45

Lemon v. Kurtzman,
403 U.S. 602 (1971) 9, 43

Lynch v. Donnelly,
465 U.S. 668 (1984) 21 n.3

Mitchell v. Helms,
530 U.S. 793 (2000) ..... passim

Mueller v. Allen,
463 U.S. 388 (1983) 25, 26, 35

Planned Parenthood of Southeastern PA. v. Casey,
505 U.S. 833 (1992) 6, 32

Roemer v. Maryland Public Works Bd.,
426 U.S. 736 (1976) 7, 16, 17, 28, 46

Rosenberger v. Rector,
515 U.S. 819 (1995) ..... passim

School Dist. of Abington Township v. Schempp,
374 U.S. 203 (1963) 21

Simmons-Harris v. Goff,
86 Ohio St. 3d 1,
711 N.E.2d 203 (1999) 3, 31 n.7

Sloan v. Lemon,
413 U.S. 825 (1973) 42

Stone v. Graham,
449 U.S. 39 (1980) 33, 42

Texas Monthly v. Bullock,
489 U.S. 1 (1989) 33

Tilton v. Richardson,
403 U.S. 672 (1971) 17, 28

Walz v. Tax Comm'n,
397 U.S. 664 (1970) 43

Widmar v. Vincent,
454 U.S. 263 (1981) 26, 33

Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) ..... passim

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509 U.S. 1 (1993) 29, 35, 38

STATUTES AND REPORTS

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§§ 3313.974-3313.979 ..... 1, 2, 38

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16 EDUCATION AND URBAN SOCIETY
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2 Writings of James Madison 183
(Hunt ed. 1901) 15

COUNTER-STATEMENT OF THE CASE

I. *The Essentially Undisputed Facts*

The two sets of respondents, Doris Simmons-Harris, *et al.*, and Sue Gatton, *et al.*, brought separate actions, which have been consolidated throughout, to have enjoined as violative of the Establishment Clause the central portion of the Ohio Scholarship Program, which has been referred to generally as the Cleveland Voucher Program, embodied in Ohio Rev. Code Anno. (Anderson) (hereinafter "R.C.") §§ 3313.974-3313.979. Both courts below have sustained the claim, with Judge Ryan dissenting in the circuit, and the case is here on this Court's writ of certiorari.

The Voucher Program was enacted in 1995 following a takeover of the Cleveland City School District by the State pursuant to a U.S. district court order. The legislation also created a tutorial program for grants much smaller than the voucher amounts to students attending Cleveland public schools. The constitutionality of the latter program is not questioned by anyone, but it plays a part in respondents' arguments for sustaining the Voucher Program. After being held invalid in June 1999 on state constitutional grounds, the Voucher Program was re-enacted by the Ohio Legislature later in that month, and it is the Program as re-enacted that is now before this Court.

From the district court's full account of the undisputed facts, the following are noted as salient for this counter-statement:

- Both Cleveland private schools and public school districts adjacent to the Cleveland District are eligible to participate in the Voucher Program by registering for it with the State Superintendent. However, in the more than six years of the Program's operation, no adjacent district has registered to participate (State Pet. App. 63a).

• The Program provides for vouchers, awarded by lot, worth up to $2,500. Students whose family income does not exceed 200% of the federally-defined poverty level receive up to 90% of their school tuition. Students in families with higher incomes receive up to 75%. R.C. § 3313.978(C).

• Public schools in districts adjacent to Cleveland receive on average $7,097 in public funding per student as against the $2,250 payable for voucher students (JA 56a).[1]

• Checks for the voucher amounts are drawn to the parents and sent to the participating private schools where the parents must appear and endorse the check to the school. There are no restrictions on the uses to which the private schools may put the funds thus received (JA 63a).

• As found by the district court and reflected in the schools' handbooks or mission statements (which can be found in the Joint Appendix at pp. 293a-521a), with respect to the sectarian private schools, "it can generally be said that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience." (State Pet. App.64a.)

• At the beginning of the 1999-2000 school year 56 private schools were registered to participate in the Voucher Program. Forty-six of these, over 82%, were religiously-affiliated. There were 3,761 students enrolled in the program; of these, 3,632, over 96%, were in sectarian schools. (State Pet. App. 64a.)

II. *The State Litigation*

Both groups of respondents sued initially in Ohio state court where, as here, the cases were consolidated.

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1 This and similar references are to the Joint Appendix in this Court.

The complaints asserted (1) a variety of state constitutional objections to the Program and (2) if the state contentions failed, that the Ohio law should be held invalid as a violation of the Establishment Clause. A dismissal by the trial court was reversed by the Ohio Court of Appeals on both state constitutional grounds and the Federal Establishment Clause claim. Thereafter, the Supreme Court of Ohio also found the law void under the State's Constitution, but only on the ground that the Voucher Program, created as part of a general appropriations enactment, violated the "one-subject" rule of Article II, Section 15(D).

Having voted that the Program was not validly enacted and therefore must be set aside under the State's Constitution, the Ohio Supreme Court majority also opined that the claim under the Establishment Clause (with an exception that soon became and remains immaterial) was not meritorious. It declared that the holding in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), upon which the state as well as the later federal complaints relied, "has been undermined by subsequent case law." *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 5, 711 N.E.2d 203, 208 (1999). Having written in the State's favor on that and other grounds, the Ohio court held, as noted above, that "the School Voucher Program must be" struck down because its enactment had violated the one-subject rule. *Id.* at 17, 711 N.E. 2d at 216.

The Ohio Supreme Court added, however: "our holding is stayed through the end of the current fiscal year" in order to allow completion of the then current school year. *Id.* The Ohio Legislature then re-enacted the Program on June 29, 1999, avoiding the state constitutional flaw of its earlier action.

III. *The Instant Proceedings*

Following re-enactment of the Program, the plaintiffs (respondents) sued again, this time in the

Northern District of Ohio, to have it enjoined as a violation of the Establishment Clause. Two groups appearing now as petitioners were granted the right to intervene as defendants. Following discovery of facts that give rise to no genuine dispute and fairly extensive briefing, the district court granted summary judgment for plaintiffs but stayed its order on consent pending review by the Sixth Circuit.

The district court wrote a detailed summary of the facts and an extensive account of its legal conclusions. Unlike the Ohio Supreme Court, it held that *Nyquist* has not been overruled or "undermined" in any sense that allows lower courts to conclude that it "should not be followed" (State Pet. App. 93a). In support of this conclusion, the district judge reviewed the series of this Court's decisions since *Nyquist* that continue to be debated in this connection and found significant, *inter alia*, that (1) "students in the Voucher Program have no meaningful choice between attending sectarian or nonsectarian schools" (State Pet. App. 106a), (2) "nearly all state aid under the Voucher Program will flow to religious institutions" (*id.*), (3) this program is in fact "skewed toward religion" (*id.*), (4) other cases invoked by petitioners differ critically from this one because in this case "all monies under the Program flow directly to the coffers of religious schools" (*id.* at 109a), and (5) other forms of publicly supported education (e.g., community schools and magnet schools) are not material to the question of "choice" as it relates to the challenged Program (*id.* at 118a-119a).

The Court of Appeals for the Sixth Circuit affirmed (2-1). Reviewing *de novo* the district court's grant of summary judgment, the circuit agreed with the district court in appraising the facts and the impact of *Nyquist* and subsequent cases, concluding "that *Nyquist* governs our result" (State Pet. App. 24a). It found "illusory" the purported choice between private schools and public schools from districts adjacent to Cleveland since none of the latter are in the Program and available to parents as

choices (*id.* at 26a). Like the district court, the court of appeals found the controlling effect of *Nyquist* for this case unimpaired by decisions of this Court since 1973.

The dissenting circuit judge declared that "*Nyquist* is simply inapposite" to the appeal in this case (State Pet. App. 35a). He would have held the Ohio statute to be entirely "unlike the New York statute [in *Nyquist*] both in its purpose and in the manner of its application" (*id.* at 37a). Further, he said, "the rule of law upon which *Nyquist* was decided has changed" (*id.* at 39a). He would have found that there is "a genuine choice" for children under the Cleveland Voucher Program in that it makes available tutorial assistance in the public schools and potential seats in adjacent school districts (*id.* at 45a-46a). He criticized the majority for what he saw as taking the ground that "the religious schools in the program are too religious" (*id.* at 48a). And he added, among other things, his hope (not fulfilled) that his "colleagues [would] take this case for *en banc* review" (*id.* at 58a).

SUMMARY OF ARGUMENT

I. The substantial and wholly unrestricted grants of State funds to Cleveland religious schools, which have a primary purpose of teaching and promoting religious doctrine, violate a fundamental prohibition of the Establishment Clause. The formality of checks made out to parents, who have no choice but to endorse them over to the religious schools, leaves clear that these are direct grants to the schools.

The Establishment Clause principles forbidding such grants have been clear since James Madison and his colleagues formulated them in the First Amendment, and have been steadily enforced by this Court. *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), which is squarely within these principles, leads *a fortiori* to affirmance in this case. The Cleveland religious schools supported by the Voucher Program proclaim as vital centers

of their efforts the promotion of religious doctrine that "permeates" all of their teachings (*e.g.*, JA 337a). Government funds are employed not only to indoctrinate children of families belonging to the schools' respective religions but also to proselytize among the majority of the voucher students whose families are of religions other than the sponsors of the schools they attend (Hanna Perkins Br. 7-8, 47). Typically, the St. Patrick School describes its mission as being "to live and teach the Gospel message" (JA 408), and a Lutheran School in the Program says "the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer and Sanctifier", with its "primary focus . . . on our Lord and Savior, Jesus Christ" (JA 437a-438a).

The Court's decisions since 1973 have not altered or "undermined" the sound Establishment Clause doctrine followed in *Nyquist*. Petitioners have made no showing whatever of changed social facts or doctrinal error in *Nyquist* sufficient to approach the kind of "special justification" sufficient to justify overruling that precedent. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833, 854-855 (1992).

II. The Cleveland Voucher Program, heavily skewed toward religion, was correctly seen by the courts below as presenting "no meaningful choice between attending sectarian or nonsectarian schools." (State Pet. App. 106a and 157a-158a.) The petitioners' invocation of *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), where a rare grant to attend a school for religious studies was made to a handicapped adult student with choices among a large universe of almost totally secular institutions, is of no help to them in attempting to avoid the Establishment Clause barrier against direct grants to religious elementary schools of the kind involved in this case. The Ohio statutory provision for "tutorial assistance" grants of up to $360 for children in the public schools,

supposedly to "balance" the grants of up to $2,250 for religious school students, is at best an irrelevancy, at worst a transparent form of legislative window-dressing.

III. Serving in fact to fund preponderantly religious private schools, with some 96% of the voucher places going to students in such schools, the Voucher Program is not "neutral" in any conceivably material sense. Government must indeed remain truly neutral in matters of religion. The Ohio Program neither meets the requirement nor is defensible under the Establishment Clause; "facial neutrality" is not constitutionally sufficient when "in fact the State is lending direct support to religious activity." *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 747 (1976)(plurality opinion).

ARGUMENT

I. THE SUBSTANTIAL GRANTS GOING DIRECTLY TO SECTARIAN ELEMENTARY SCHOOLS UNDER THE CLEVELAND VOUCHER PROGRAM, AND AVAILABLE WITHOUT RESTRICTION FOR RELIGIOUS FUNCTIONS AND ACTIVITIES, ARE CORE VIOLATIONS OF THE ESTABLISHMENT CLAUSE

At the heart of the Religion Clauses, buttressing rather than qualifying in this central respect the right of Free Exercise, the core protection of the Establishment Clause defends all of us against compelled support through tax monies of functions or activities of religions of which we are nonadherents or opponents or even supporters as voluntary members. From the germinal conceptions of James Madison through the history of this Court's attentions in the twentieth and twenty-first centuries, the fundamental understanding has been that "general assessments in support of religion . . . lie at the core of the prohibition against religious funding." O'Connor, J., concurring in *Rosenberger v. Rector*, 515 U.S. 819, 851 (1995). In that vital core is the fact that this Court has

never allowed unrestricted public funding of religious elementary or high schools. Because this crucial limit imposed by the Establishment Clause deprives religious organizations of public funds available to their secular counterparts, recurrent efforts have come to this Court, and been rebuffed, to transcend or revise the barrier. The Cleveland Voucher Plan is another such effort. The salutary course of precedent, the grounds of which remain clear and firm, should lead in this case, we submit, to defeat of the attempt.

A. *Despite the Transparent Form of Payment to Parents, the State's Checks in Undisputed Fact are Paid Over Directly and Exclusively to the Schools*

The procedure for the State's disbursement and the subsequent freedom to employ the voucher monies is succinctly described by the district court as follows (State Pet. App. 63a):

> Disbursement of scholarship money to a private school is accomplished by the State sending a check to the chosen school made payable to the parents of the recipients; thereafter, the parents must endorse the check to the school. The State places no restriction on how the private school may utilize the money.

Whether or not this procedure is in itself decisive, it is a material fact among others that define the problem and point toward the answer. The tuition payments held invalid in *Nyquist* were for *reimbursement* of tuition already paid; proceeds of the checks they received could be used by the parents as they saw fit. *See* 413 U.S. at 780, 785-787. Thus, there was in both form and substance no direct payment from the State to the sectarian schools. That did not in itself validate the arrangement. The Court said "the

fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.* at 781. Here, even that form is missing. Subject only to the parents' rubber-stamped endorsement, monies flow directly from the state treasury to the coffers of religious schools.

Ohio's Legislature could not reasonably have thought, or expected this Court to hold, that a formal procedure of receipt by parents and automatic endorsement to religious schools would avoid the Establishment Clause barrier. But it brought forth a clumsy and ineffective device to avoid the conclusion that it was providing for payments directly to sectarian schools. As the Court made clear in *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), the Establishment Clause inquiry is not "a legalistic minuet" in which the observance of some prescribed form "is itself the substantive end." The substantive end is precisely to avoid the sort of direct payments of tax dollars to religious institutions, totally available for unlimited religious purposes, that the Ohio Legislature saw fit to provide in the Voucher Program.

B. *On Principles Espoused by Madison and Jefferson, and Steadily Enforced by this Court, Payments to Sectarian Schools Like Those Involved Here are Barred by the Establishment Clause*

There is no restriction of any kind on the uses to which the religious schools may put the State funds they receive under the Voucher Program. And the record is clear in undisputed fact that a dominating use to which these schools put their resources is the teaching and propagation of their respective religious beliefs. It follows, respondents submit, that the Program amounts to a fundamental Establishment Clause violation, central among the harms against which the Clause was designed and has

been understood to stand since the first days of its existence.

The record supports at length and in detail the district court's observation "that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience." (State Pet. App. 64a.) The fact is stated repeatedly in the mission statements of the several schools from which only illustrative statements suffice for this brief.

"The mission of St. Patrick School is to live and teach the Gospel message." (JA 408.) Since the majority of the religious schools are under Roman Catholic auspices, numerous statements of a similar nature are in the record (JA 293a-418a). The Cleveland Diocese says in its District Plan for Catholic Schools: "Our CATHOLIC IDENTITY will permeate every aspect of the school climate and program." (JA 504a, capital letters in original.)

Similar statements are seen from Protestant and Islamic schools (JA 419a-482a). A Lutheran school in the Program describes itself by saying (JA 437a):

> It is our belief that the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer, and Sanctifier, whose love for us moves us to show in our every act, thought, word and desire, our love for Him.

It goes on to say, underscoring words emphasized again here, that it teaches reading, mathematics, spelling, and other secular subjects "*with a Christ-centered approach.*" (State Pet. App. 68a, italics in original.) And it adds as advice to parents considering the school for their children (JA 437a-438a):

> The primary focus . . . is on our Lord and Savior, Jesus Christ. In all of our goals, Jesus Christ must be preeminent. Because of our commitment to that focus and to our beliefs and philosophy, it is highly inconsistent for any parents to send a child to this school if they
>
> - Are not a Christian and/or are not interested in learning about Jesus Christ.
> - Are not living a Christian life or willing to learn how to lead such a life.
> - Are not a supporting part of a Christian congregation through worship and sharing of time and talents.

While most of the religious schools eligible for the Voucher Program are under Christian auspices, a mission statement comparable for present purposes is published by the Cleveland Community Islamic Schools (JA 481a):

> BISMILLAH (IN THE NAME OF ALLAH) Our mission at The Cleveland Community Islamic School (C.C.I.S.) is the mission of discharging our sacred duty to humanity. The sacred duty prescribed to us by Allah (the Almighty God). The sacred and incumbent duty of providing meaningful and useful knowledge to all. In line with our Islamic beliefs, knowledge and its applications is not a privilege, a pastime or a hobby, rather it is incumbent and a must upon every male and female.

Eligible religious schools repeatedly proclaim that they integrate a religious point of view into every aspect of their teaching. JA 309a, 315a, 321a, 330a, 335a, 337a,

341a, 342a, 343a, 345a, 346a, 351a, 355a, 368a, 408a, 430a, 447a, 487a.

A number of the sectarian schools state explicitly that participation in religious observances is compulsory or routinely expected without regard to the family religion of any particular student. For example:

Saint Francis School says in its Parent-Student Handbook and echoes in its Mission Statement (JA 317a):

> We are a Catholic School which promotes Catholic values, traditions and morals. We exist for Catholics, for others seeking an alternative way of education, and as an evangelizing agent of the church . . . . Students are required to participate in religion classes, prayer, and worship held during the school day.

In the Handbook of the Saint Mary Byzantine School it is said (JA 331a):

> In keeping with our intention of developing religious and moral values in accordance with Christian Catholic teachings, every student participates in daily religion classes . . . . Each student participates in daily prayer within the classroom community . . . . All student [sic] enrolled in our school must participate in our religious instruction program.

The West Park Lutheran School Parent Handbook for 1999-2000 says (JA 451a):

> Children will be expected to attend church and Sunday School at least 75% of the Sundays during the school year.

> Church and Sunday School attendance will be taken in the classroom each Monday and noted on the child's report card.

To grant tax monies for religious teaching of the kind supported throughout Cleveland under the Voucher Program runs afoul of a central prohibition enacted by the Establishment Clause. The principle at stake has been affirmed and reaffirmed in a long course of opinions by the Court and by individual Justices. Thus, the pronouncement in *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), on which the Court was and has remained unanimous:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

The historical account traced in *Everson* for a Court unanimous on this subject recalled that a central goal of the colonists had been to escape taxation for the support of churches and ministers. *See id.* at 8-11. The Court recalled the now very familiar but still fundamental history of the struggle in Virginia and the "dramatic climax" there (*id.* at 11) leading to state laws that extended the same protections for conscience and against establishments that were soon to be embodied in the Establishment Clause of the First Amendment. *See id.* at 11-13. Later to be quoted in *Everson* (at 13), and by the district judge in this case (State Pet. App. 78a), Jefferson's Bill for Religious Liberty declared

> that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious

> persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.

Madison, allied with Jefferson in the Virginia struggle, and soon to become the "leading architect" of the Religion Clauses, *Flast v. Cohen*, 392 U.S. 83, 103 (1968), had produced in 1775 his monumentally important Memorial and Remonstrance Against Religious Assessments, which was to become and remain one of the most quoted and followed documents in American history.[2] The great history of this subject is familiar and is spread upon the volumes of this Court's reports. It is important once again to recall and apply the principles enforced without deviation from the heroic times of Madison and Jefferson to this date. This Court has found itself divided on a number of specific issues arising under the Religion Clauses. There has been no deviation, however, from the proposition that "[n]o tax in any amount . . . can be levied to support any religious activities or institutions, . . . whatever form they may adopt to teach or practice religion." *Everson, 330 U.S.* at 16. The Court has steadily reaffirmed that principle in opinions for the Court as a whole and in concurring opinions by individual Justices.

Just over two hundred years after the Memorial and Remonstrance, the Court reaffirmed the principle when it said that "of course"

> a tax levied for the direct support of a church or group of churches . . . would run contrary to Establishment Clause

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[2] The Memorial and Remonstrance is reprinted as an Appendix to the dissenting opinion of Justice Rutledge in *Everson*, 330 U.S. at 63 *et seq.*

> concerns dating from the earliest days of the Republic.

Rosenberger v. Rector, 515 U.S. 819, 840 (1995). Concurring in terms that read flatly against what is happening in Cleveland under the Voucher Program, Justice O'Connor said "[p]ublic funds may not be used to endorse the religious message." *Id.* at 846-47 (internal quotation marks omitted). More broadly, Justice O'Connor's concurrence went on to observe that though the cases may permit some forms of secular aid for secular functions, they "provide no precedent for the use of public funds to finance religious activities." *Id.* at 847. Deep among the objections to general assessments to support religion is the hostility from the earliest days to taxes "for the support of a denomination to which [a particular taxpayer] did not belong." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The question of Article III standing for a federal taxpayer to challenge expenditures under the Establishment Clause presented another occasion for this Court to recall the history and basic substantive principles. In holding that a taxpayer had such standing, the Court said:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute

> three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.

Flast v. Cohen, 392 U.S. 83, 103-04 (1968) (footnotes omitted).

In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court reaffirmed again a number of Madison's precepts. It emphasized that the Religion Clauses are not simply shields for minorities but "exist to protect religion from government interference" as a broadly general matter. *Id.* at 589-90. Roger Williams, writing a century before the First Amendment, had argued for separation of the spiritual garden of God from the wilderness of secular forces. *See, e.g.*, Mark de Wolfe Howe, *The Garden and the Wilderness* (1965). Expanding on this point, as Madison had, the Court said "the Framers deemed religious establishment antithetical to the freedom of all." *Lee v. Weisman*, 505 U.S. at 591. Of particular interest in the present case is the Court's further mention of "heightened concerns with

protecting freedom of conscience . . . in the elementary and secondary public schools." *Id.* at 592. This specific thought echoes considerations the Court has noted elsewhere in dealing with the relationship between church and state. *See also Roemer v. Board of Public Works*, 426 U.S. 736, 750-51 (1976)(plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971).

Justice Blackmun's concurrence in *Lee v. Weisman* (joined by Justices Stevens and O'Connor) reminded us that while they sometimes present problems of reconciliation, both Religion Clauses exist and work together to promote "religious liberty." 505 U.S. at 605. Justice Souter's concurrence (also joined by Justices Stevens and O'Connor) notes "the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement" (*id.* at 618) -- an observation that is of far greater force in a case like the present one where tax money is employed to help teach and propagate religious messages through the strength of government itself.

The focus of this subpoint in our brief thus far has been upon precedents reaching back over 200 years and extending down to date without mentioning yet the *Nyquist* decision, which has been at center stage throughout the litigation. This is not by any means to avoid or neglect that precedent. On the contrary, the respondents invoke *Nyquist* as not merely a directly applicable precedent -- indeed, one from which affirmance herein should follow *a fortiori* -- but as a decision that remains a vibrant example of Establishment Clause doctrine in its essential functioning as a bar against use of public funds to teach or promote religion. The thought in placing *Nyquist* as it is placed here is simply to avoid any suggestion that it represents a unique subject rather than an instance of solid and fundamental principle. This said, and noting that the violation here is clearer than it was in *Nyquist*, respondents' brief could scarcely omit the litany of thoughts written for the Court by

Justice Powell that proclaim the governing mandate of the Establishment Clause:

- That the form taken by transmittal of the public funds, though the use of "reimbursement" checks paid to parents might be a fact to consider along with others, could not avoid the substantive constitutional evil -- a factor, as noted earlier, on which the instant case is clearer.

- There it was said (413 U.S. at 780), in words equally applicable here: "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."

- There, as here, the large preponderance of the schools in the program (85% as against 82% in the present case) were religious schools.

- The argument that the grants were validated because they gave to parents of parochial school students benefits "comparable" to those of parents with children in public schools "prove[d] too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools -- a result wholly at variance with the Establishment Clause." *Id.* at 782 n.38.

- The "effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.

(While the factor of impermissible "effect" has been recast somewhat, *see Agostini v. Felton*, 521 U.S. 203, 233 (1997), there is no room to doubt that the direct grants of substantial public funds, especially for the major use of teaching and preaching religion, reaches the forbidden result of "endorsement.")

- The fact that the New York checks were for "reimbursement" which parents could spend as they chose rather than for conveyance as grants directly to the religious schools did not save the New York scheme. *Id.* at 785-87. (Again, the instant case is stronger against the State than *Nyquist* was.)

- As part of the same point, but meriting separate notice, the Court said (413 U.S. at 786) that "if the grants [were] offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause [was] violated whether or not the actual dollars given eventually [found] their way into the sectarian institutions."

- Expressing sympathy for parents who must help support public schools with their taxes while paying in addition for religious school education if they choose that for their children, the Court nevertheless rejected the contention that state support for religious schooling is required by the Free Exercise Clause. *Id.* at 788-89.

In a thought related to the concern about separate financial burdens for parents of parochial school children, Justice Rehnquist (as he then was) spoke of "the State's concern that those at the lower end of the income brackets are less able to exercise freely their consciences by sending

their children to nonpublic schools." *Id.* at 810. Also dissenting, Justice White, joined by Chief Justice Burger and Justice Rehnquist, made the same point. *Id.* at 820. Without questioning the human appeal of that thought, two observations are in order. First, *Nyquist*, decided without a record, contained no evidence of the motives or reasons of the parents choosing sectarian schools.

Second, in the present case, the subject is actually treated as a matter of fact, perhaps somewhat surprisingly as it turns out. The Hanna Perkins Intervenors have placed in the record without dispute, and made of this a point upon which they rely, that 62.5% of the students attending religious schools with vouchers are in schools sponsored by a religious faith of which they and their families are not adherents (Hanna Perkins Br. 7-8, 47; *see also* State Br. 46 n.3). Individual affiants say they chose these schools for their children for such reasons as their supplying "a better education"; "the teachers are more personable" (Hanna Perkins Pet. App. 80a); the "respect . . . shown for students and teachers" (*id.* at 82a); "rules of behavior are more strictly applied" (*id.* at 84a); and other things unrelated to religion. Whatever else may be said of this intelligence, it hardly seems, with all respect, supportive of respondents' position in the case.

As an *a priori* matter, it might have been supposed that people who desired a religious school would want one representing their own faith. Instead, in Cleveland schools that earnestly and vigorously preach their own articles of faith as compulsory portions of what they teach, children are entrusted to them with tax-paid tuition for what must surely be seen by any reasonable observer as proselytization or attempted proselytization. The missionary enterprise, with whatever exceptions in literature and elsewhere, is generally regarded as a worthy endeavor by caring people. But it is a far cry from acknowledging that to considering it acceptable or desirable for governments under the Establishment Clause

to be using their funds to assist poor Americans, as it is thought, by helping to convert them from their religious associations.

To put the thought more squarely, the percentage of children from other religions or none in the state-subsidized religious schools, contrary to the virtue made of it by the Hanna Perkins Intervenors, adds support to the decision under review. As noted by Justice Stewart, who thought from time to time that the majority strayed or achieved excessive results on this subject, it has been clear and evidently unquestioned by any Justice of the Court that "government support of proselytizing activities of religious sects" is forbidden by the Establishment Clause. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 314 (1963) (dissenting). In its practical operation, the Cleveland Voucher Program offends against this prohibition.

Viewed in all its undisputed particulars, the record vindicates the conclusion that the massive infusion of state money into Cleveland's religious schools is *endorsement* of the most palpable kind. Used freely by the religious schools in Cleveland, which have religious beliefs and doctrine as a paramount message that "permeates" their teaching (*e.g.*, JA 337a), the grants collide squarely with the "axiom in the history and precedent of the Establishment Clause [that] . . . [p]ublic funds may not be used to endorse the religious message." *Rosenberger v. Rector*, 515 U.S. 819, 846-47 (1995) (Justice O'Connor concurring and quoting from the dissent of Justice Blackmun in *Bowen v. Kendrick*, 487 U.S. 589, 642 (1988)). To speak of such financing as "endorsement" in terms of the quoted passage is no mere figure of speech. It is the very pith of what we (or our government) do when we give money to support a program

or activity. We "support" or "endorse" the cause, the two words being dictionary synonyms.[3]

It is also literally correct and fair to say broadly that Ohio's funds, spread without restriction through the religious schools of Cleveland, have the "'effect' of advancing religion." *Agostini v. Felton*, 521 U.S. 203, 223 (1997). This is not a subtle question in the context of this case. It bears emphasis that, as the district court said, "a central part of each school's program is instruction in the theology or doctrine of a particular faith and . . . religion and religious doctrine are an integral part of the entire school experience." (State Pet. App. 64a.) Prayer, religious activities, the learning of "religious truth and values," and various forms of "liturgical celebrations" are required activities without apparent regard to the religious or nonreligious backgrounds of the students.

Because Ohio's resources are being given without restriction for enterprises that comprise explicitly religious "indoctrination" (521 U.S. at 223) and the "inculcation" (521 U.S. at 204) of religious beliefs and values, the Program "has the impermissible effect of advancing religion." *Agostini v. Felton, supra*, at 223.[4] This is not a

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[3] "Moreover, the term 'endorsement' is closely linked to the term 'promotion,' *Lynch v. Donnelly*, 465 U.S., at 691 (O'CONNOR, J., concurring), and this Court long since has held that government 'may not . . . promote one religion or religious theory against another or even against the militant opposite' . . . ." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 593 (1989).

[4] Petitioners, neglecting what this Court wrote, undertake to distinguish *Nyquist* on the asserted ground that New York had the impermissible sectarian purpose of aiding financially troubled religious schools (State Br. 42-43; Senel Taylor Br. 18-19; Hanna Perkins Br. 45-46. To the same effect, *see* U.S. Br. Amicus 26-27.) However, the Court found a valid secular purpose in *Nyquist*, *see* 413 U.S. at 773-74, as did the courts below in this case. The New York program was invalidated, as Ohio's has been by the court below, because New York's statute had a "primary effect that advances religion in that it subsidizes directly

matter for presumption or metaphors. It is an exact description of what is being done in Cleveland. More than 200 years of history and a straight line of precedent speak against this as a violation of the Establishment Clause.

C. *The Unfortunate State of Cleveland's Public Schools in Poor Areas, Shamefully and Unlawfully Neglected by the Ohio Legislature, Supplies No Justification for the Use of Tax Monies to Support Sectarian Schools*

The State, along with the Intervenors, includes among its arguments for the Voucher Program extensive accounts of the unquestionably depressed state of Cleveland's public schools. It is a poignantly incongruous contention to come from the State and its representatives.

During the present litigation the State was resisting -- and ultimately, on March 24, 1997, lost in the Supreme Court of Ohio -- a suit in which a number of Ohio public school districts, superintendents, and board of education members demonstrated that poorer districts like Cleveland were so profoundly and discriminatorily deprived by the State's school financing arrangements as to violate the State's constitutional requirement, Sec. 2, Art. VI, that it provide a "thorough and efficient system of common schools throughout the State." *DeRolph v. Ohio*, 78 Ohio St. 3d 193, 203, 677 N.E. 2d 733, 740 (1997), *clarified*, 83 Ohio St. 3d 1212, 699 N.E. 2d 518 (1998). The record of that case showed "vast wealth-based disparities" between splendid public school conditions in affluent suburban districts and appallingly rotten conditions in city centers like Cleveland. *See id.* at 198, 677 N.E.2d at 737. Overall, the Ohio Supreme Court found, education "ranks miserably low in the state's priorities." *Id.* at 209, 677 N.E.2d at 745.

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religious activities of sectarian . . . elementary schools." 413 U.S. at 774.

A concurring Justice noted that as of 1990 "Ohio ranked forty-eighth out of the fifty states in the extent of disparity of revenue and expenditure per pupil." *Id.* at 230, 677 N.E.2d at 759 (Douglas, J., concurring).

In these circumstances, Ohio's advocates accomplish at most a display of unintended irony when they come here urging that the State's money be given in substantial amounts to religious private schools despite the Establishment Clause while the State's gross neglect of underfunded public schools continues to await a remedy.[5] The incongruity is not in itself a weighty point showing an Establishment Clause violation. It should, however, at least put to rest a surprisingly false note in the State's position.

D. *Decisions of this Court since Nyquist Leave its Soundness and Authority Unimpaired*

Six decisions of this Court rendered over the years 1983 to 2000 are heavily relied upon by the petitioners in the effort to show that *Nyquist* has somehow lost its force since 1973 and should therefore be given little or no weight in the Court's consideration of the Ohio Voucher Program. While these cases are noted elsewhere in the composition of this brief, it seems convenient and appropriate to collect them here in one place and to submit that none of them, and not all of them together, diminishes the steadily reaffirmed weight and soundness of *Nyquist.* Introductorily, we note that *Witters v. Washington Dept. of*

[5] On September 6, 2001, the Ohio Supreme Court entered a decision and order requiring a substantial additional expenditure by the State on public education that would have included additional funds for the Cleveland City School District. *DeRolph v. Ohio*, 93 Ohio St. 3d 309, 754 N.E.2d 1184, *on reconsideration*, 93 Ohio St. 3d 628 (2001). The State sought reconsideration as to the amount of the additional spending required. The State's motion for reconsideration was granted with "Decision and opinion to follow" by order of November 2, 2001. Case No. 99-0570, *DeRolph v. Ohio*.

Servs. for the Blind, 474 U.S. 481 (1986) -- involving a relatively trivial grant to a single disabled divinity student with a choice among hundreds of educational opportunities for using his grant -- is the only one of the six, and the only one cited by petitioners anywhere, where even the most minuscule amount of government money found its way to a religious institution. That case is so thoroughly distinguishable as to lack any persuasive force for present purposes. Stressing that vital point as a factor diminishing all of petitioners' arguments from precedent, we proceed to note briefly the limits and distinctions that defeat the petitioners' reliance.

(1) *Mueller v. Allen*, 463 U.S. 388, 396 (1983), upheld provisions for tax deductions in connection with expenses of parents sending their children to both public and private schools. The Court noted the special "deference" given to state taxing arrangements and observed that the Minnesota statute there involved was "vitally different from the scheme struck down in *Nyquist*." *Id.* at 398. It also made the point (at 399), of signal importance here, that it was, as it remains, "noteworthy that all but one of [the Court's] recent cases [*Nyquist*] invalidating state aid to parochial schools [had] involved the direct transmission of assistance from the state to the schools themselves." Given those dispositive observations and the fact that nothing whatever was granted by the government to any private school in Minnesota, the *Mueller* case should not long detain us in dealing with the present problem.

It is obviously necessary, however, to attend with care to a passage upon which petitioners place heavy emphasis, namely, the Court's treatment of the use by petitioners in that case of "a statistical analysis of the type of persons claiming the tax deduction." *Id.* at 401. In that connection the Court went on to write, in a sentence the petitioners seize with enthusiasm (*id.*):

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.

From this, the petitioners reach the heady conclusion that since the enrollment figures may change from year to year, there is no way at all to take hold of this case, no way at all that *Nyquist* could have gone precisely as it did, and thus that the whole subject on which this Court has granted its writ should somehow disappear. This pattern of misconceptions does not avoid the constitutional issue before the Court, and is not warranted by an intelligent reading and the context of *Mueller* or any other case.

The case and controversy that is here will not go away despite the undoubted reality that "statistical evidence" may vary from year to year. The variations are not matters of consequence for the case at hand. The Solicitor General reports (Br. 24) that "most private schools in the Cleveland area are religiously affiliated", and this is at least equally true for Columbus, Ohio (*see* note 10, *infra*). In this case, which concerns the current facts of Cleveland, nobody suggests any fluctuations that could affect the substance of the problem before the Court, namely, the direct granting of a preponderant portion of the funds given by the State under the Voucher Program to religious schools where a paramount function is the teaching and promotion of religious doctrine.

Moreover, unless the Court's remarks on statistics in *Mueller* are swollen and distorted beyond any sensible meaning, they cannot be read to indicate that the Court for some reason has departed on this subject from the usual practice of our jurisprudence and ignored the facts on which cases of this nature are brought. Specifically, unless we are to read out of the law the question of "effects" of a

program challenged under the Establishment Clause, there is no sound way to avoid attention to the actual facts of particular cases, and this Court's treatment of such problems reflects that. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777-78 (1995); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Board of Educ. v. Mergens*, 496 U.S. 226, 275 (1990); *Widmar v. Vincent*, 454 U.S. 263, 275 (1981).

The frequently close and subtle questions that arise under the Establishment Clause call specially for attention to concrete facts rather than broad abstractions. This necessity presses hard when the subject is one on which general principles broadly stated may yield seeming conflict rather than resolution:

> Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging -- sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case. *See Lee v. Weisman*, 505 U.S. 577, 598 (1992) ("Our jurisprudence in this area is of necessity one of line-drawing").

Rosenberger v. Rector, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring).

Thus, the district judge in this case was on plainly sound ground when he wrote (State Pet. App. 99a):

> Consideration of the number and percentage of sectarian schools participating in the Voucher Program is not forbidden by *Mueller*. Assessing the choices available to students in the

> Program by determining the number of participating religious schools versus the number of participating nonreligious schools is very different than annually taking account of the number of students who have availed themselves of a particular option. In other words, determining whether an aid recipient has neutral options available under a program is not the same as probing how the recipient has chosen to exercise those options.

(2) *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), involved state vocational assistance to a single blind adult for religious education. While similar aid could have been sought and sustained for more than one adult student, there could hardly have been many. The state assistance program was open to "a huge variety of possible careers, of which only a small handful [were] sectarian." *Id.* at 488. This rare case of aid to an adult or on behalf of at most a handful of adults was characterized by the Court as a situation in which no more "than a minuscule amount of . . . aid [was] . . . likely to flow to religious education." *Id.* at 486. The opinion distinguished *Nyquist* and pointed out that the Washington disability program was "in no way skewed towards religion." *Id.* at 488. It was a case where no significant portion of the aid expended under the Washington program as a whole [would] end up flowing to religious education" (*id.*) as contrasted with the present situation, where the bulk of Ohio's money going to Cleveland is destined for sectarian institutions. The link between the State and the school was "a highly attenuated one." *Id.* It may bear emphasis among the many distinctions that the aid in *Witters* was for higher and vocational education, and the particular grant was for an adult, all in contrast with the schooling of the more impressionable youngsters attending

elementary school in the present case. *See Roemer v. Board of Public Works*, 426 U.S. 736, 753 (1976)(plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971).[6]

(3) *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), is also fully consistent with *Nyquist's* ban on unrestricted state financial aid to religious schools. The allowance there of a sign-language interpreter to a disabled student attending parochial school lends no support whatever to the large unrestricted grants of government money to the religious schools of Cleveland. Far more significant is the fact, noted in the *Zobrest* opinion, that there "no funds traceable to the government ever [found] their way into sectarian schools' coffers." *Id.* at 10. The Court also made the point (at 12), underscored in later cases, that the secular assistance given in *Zobrest* did not relieve sectarian schools "of costs they otherwise would have borne in educating their students." *See also Agostini*, 521 U.S. at 226. Further distinctions of *Nyquist*, principally important here because this Court in that recent decision found it appropriate to make them, need not be traced at length in the case at hand. It seems sufficient that *Zobrest*, on its facts and its reasoning, lends no support to Ohio's Voucher Program.

(4) *Rosenberger v. Rector,* 515 U.S. 819 (1995) though the petitioners invoke it here and there, need not detain the Court long for its asserted bearing on the present case. It is probably sufficient to point out this Court's

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[6] There has been some disagreement within this Court as to what facts ultimately moved the majority in *Witters*. *Compare Mitchell v. Helms*, 530 U.S. 793, 812 n.6 (plurality opinion), *with id.* at 898 n.18 (2000)(Souter, J., dissenting). How the Justices might resolve that divergence is not a matter of consequence for the purposes immediately at hand; the precedential significance of *Witters* for the present case is in any event trivial and attenuated at most.

observations that the money paid in that situation to a printer (i) was a "student activity fee," not tax or other government money, *id.* at 840, and (ii) was not paid to a religious institution as that term is known in the law of the Establishment Clause, *see id.* at 844. And, to put the case quite firmly to one side unhelpful to the present petitioners, the Court observed that it is quite "correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Id.* at 842. Here, of course, the Ohio Program runs headlong and wholesale into those dangers.

(5) *Agostini v. Felton*, 521 U.S. 203 (1997), undoubtedly relaxed somewhat the barriers to aid that may reach sectarian schools, but in ways that ultimately underscore the invalidity of petitioners' position. Though the Court changed somewhat the test for judging Establishment Clause issues, it reaffirmed the continued practice of exploring "whether the aid has the 'effect' of advancing or inhibiting religion." *Id.* at 223. Citing *Witters*, the Court marked its departure "from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid." *Id.* at 225. Still, pivotally for the concerns of the present case, the Court emphasized that in the case it was deciding none of the "funds ever reach[ed] the coffers of religious schools." *Id.* at 228. That remains the pervasive and crucial point of our submissions here. It is in respondents' view as fundamental in today's law as it was for James Madison in making the law, first for Virginia and then for the Nation. It is the core protection -- against the giving without restriction of government money to religious institutions -- that is the central redoubt at which respondents conceive themselves to be defending in this struggle. We believe that neither *Agostini* nor any other case has breached that position.

(6) *Mitchell v. Helms*, 530 U.S. 793 (2000), leaves intact the position respondents are protecting. The

plurality in that case acknowledged the "special Establishment Clause dangers" that exist "when *money* is given to religious schools or entities directly rather than . . . indirectly." *Id.* at 818-19 (italics in original). It spoke at least skeptically of "direct payments" like those involved in *Nyquist* and here. *Id.* at 819 n.8. And it noted that "direct payments of money [were] not in issue in this case" and were not the subject of any rule the plurality was considering. *Id.* at 820. Those expressions, together with the strong reservations and disagreements in the concurrence of Justice O'Connor (joined by Justice Breyer) and the dissent of Justice Souter (joined by Justices Stevens and Ginsburg) leave us a huge distance -- unbridgeable, as respondents submit it should be -- from overruling *Nyquist* and the result it entails for the instant case.

E. Nyquist *Should Not Be Overruled*

A central thesis of this brief, and of that for the respondents joined with us, has been to demonstrate not merely that *Nyquist* was correctly decided but that the circumstances presented herein call *a fortiori* for a similar finding of an Establishment Clause violation.[7] It follows that a reversal of the two courts below would necessitate overruling *Nyquist*. As reflected in learning lately reviewed

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[7] In his brief supporting the petition for certiorari (pp. 12,13), the Solicitor General spoke twice of a "conflict" between the decision of the Sixth Circuit in this case, following *Nyquist*, and the opinion of the Ohio Supreme court in *Simmons-Harris v. Goff*, 86 Ohio St. 3d, 711 N.E. 2d 203 (1999), finding *Nyquist* "undermined" and no longer controlling. As the district court herein observed, and as any runner may read, the Ohio court invalidated the Voucher Program on *state* constitutional grounds so that its extended observations on the federal question became obiter (and unreviewable) dictum. In this sense, the mistaken characterization by the Solicitor General is more than a mere technical solecism. This Court's work to keep the lines of authority clear is not aided by erroneous encouragement to the lower courts, state or federal, to assert a share in this Court's "prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. at 237.

in well considered opinions of the Court, there is no justification for, and strong arguments against, that wrenching kind of action in this case.

The Court reminded us and affirmed for the Nation just shortly ago that the rule of *stare decisis* -- though it "is not an inexorable command, and certainly it is not such in every constitutional case," *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833, 854 (1992) (internal quotation marks omitted) -- is not to be bypassed lightly. Before taking that kind of rare and arresting action, the Court inquires "whether the rule [to be jettisoned] has proven to be intolerable simply in defying practical workability . . . ; whether related principles of law have so far developed as to have left the old rules no more than a remnant of abandoned doctrine . . . ; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 854-55. Nothing in the extensive arguments before the Court approaches any such ground for overruling *Nyquist*.

The familiar constitutional history, including the key roles of Madison and Jefferson, recalled and applied in *Nyquist*, *see* 413 U.S. at 760, had not changed of course in 1973, nor has it changed since then. The sociological facts, including sharp divisions of opinion on the wisdom of the constitutional position, are similarly unchanged. The issue remains, as it was in 1973, a "deeply emotional" one, *see id.* at 797, and the Justices may know as citizens that the danger of "seriously divisive political consequences," *see id.*, viewing our country and the contemporary world generally, is at least as much in evidence today as it was a quarter-century ago. But nobody dares to suggest that pressures of this nature speak for overruling. And we submit, without repeating the arguments that precede and follow this subsection of this brief, that there is nothing resembling a demonstration that *Nyquist* was wrongly decided.

The absence of any showing that *Nyquist* was wrong is a matter of capital importance in this context. An overruling decision "is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong." 505 U.S. at 866. The dissenting Justices, to be sure, thought that in 1973. But the Justices who sit here now, like those who preceded them and those who will follow, need no reminder from partisan counsel that the most destructive message to convey on the subject of *stare decisis* would be that it simply turns on the changing individuals who comprise the Court from time to time.

The question whether to overrule is markedly different from the question whether the issue decided in *Nyquist* would be resolved differently by this Court were it being addressed now "in the first instance." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Here, the principles of *stare decisis* are central in the reckoning and they "weigh heavily against overruling." *Id.* That doctrine "carries such persuasive force that [this Court has] . . . always required a departure from precedent to be supported by some special justification." *Id.* (internal quotation marks omitted). The petitioners present nothing that could be deemed such "special justification." Rather, they do no more than rehearse once again arguments tendered and rejected in *Nyquist*. Far from being "undermined" in the intervening years, that case has been cited over and over again, reflecting its quality as living precedent, either to apply its principles or to define the distinguishable character of other decisions. *E.g.*, *Mitchell*, *supra*, 530 U.S. at 819, n.8; *Agostini v. Felton*, 521 U.S. at 225-26; *Lee v. Weisman*, 505 U.S. 577, 585 (1992); *Texas Monthly v. Bullock*, 489 U.S. 1, 10 (1989); *Allegheny County v. ACLU*, 492 U.S. 573, 592, n.44 (1989); *id.* at 628 (O'Connor, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 273 (1981); *Stone v. Graham*, 449 U.S. 39, 43 (1980); *Larkin v. Grendel's Den*, 459 U.S. 116, 119 (1982);

Committee for Public Educ. v. Regan, 444 U.S. 646, 653 (1980).

As a matter of reason, history, and sound judicial judgment, the principles followed in *Nyquist* should be proclaimed again in this case as profound safeguards for both individual conscience and truly democratic government for our uniquely diverse people.

II. WHERE, AS HERE, A PROGRAM SKEWED TOWARD RELIGION LEAVES LITTLE OR NO CHOICE BETWEEN PAROCHIAL AND NONPAROCHIAL SCHOOLS, PARENTAL "CHOICES" ARE MEANINGLESS OR IMMATERIAL

The district court, addressing the concrete facts of this case rather than abstract generalities, said (State Pet. App. 106a):

> [S]tudents in the Voucher Program have no meaningful choice between attending sectarian or nonsectarian schools. That choice is essentially made for them as a function of the fact that almost all participating schools are religious in nature. Unlike in *Witters*, nearly all state aid under the Voucher Program will flow to religious institutions. It cannot be said that this aid flows to those institutions as a result of the choice of the Program beneficiaries since nearly all the schools participating are religious. Accordingly, it is not true, as it was in *Witters*, that the Voucher Program "is in no way skewed toward religion;" in fact, just the opposite is true here. Thus, *Witters* does not apply to this case because it is not true under the Voucher Program that "aid to religion results from the private choices of individual beneficiaries."

This was and is exactly right. The Court of Appeals agreed (*id.* at 157a-158a).

As against these sound appraisals, the petitioners invoke repeatedly a series of distinguishable cases, extracting scraps of language that cannot serve as useful guides to decision here. They place heavy reliance on *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), which (a) as noted earlier, involved directly a single adult beneficiary (and perhaps could have applied to some more) and (b) as for "choice," gave grantees the ability to select among hundreds of predominantly secular training possibilities and schools for adult education. The contrast with this case is striking.

The petitioners also cite as an illustration of "choice" *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1987), which could scarcely be less in point. It involved assistance for the secular activity of bus transportation and thus was far from the question whether and when assistance for *religious* functions or activities may be permissible, with the Court there warning that "[n]o tax in any amount . . . can be levied to support any religious activities."

Throughout the marshalling of inapposite cases, the petitioners never once condescend upon the repeated occasions when the Court has rejected Establishment Clause claims with the vital observation that in the particular cases "no funds traceable to the government ever find their way into sectarian schools' coffers." *Zobrest v. Catalina Foothills School District*, 509 U.S. at 10 (1972); *Agostini v. Felton*, 521 U.S. at 228; *cf. Mitchell v. Helms*, 530 U.S. at 798 (plurality opinion); *id.* at 848-49 (O'Connor, J. concurring); *Mueller v. Allen*, 463 U.S. at 399; *Rosenberger v. Rector*, 515 U.S. at 842.

Nyquist squarely holds that offering parents a choice between publicly financed religious education and public schooling is insufficient to avoid the constitutional bar against direct cash subsidies to those engaged in religious indoctrination. To hold this a constitutionally valid choice, the Court said, in a passage worth repeating,

> proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools -- a result wholly at variance with the Establishment Clause.

413 U.S. at 782, n.38. None of the petitioners offers any answer to this holding.

The rejection of choice as sufficient grounds for state subsidization of religion has a pedigree far older than *Nyquist*. The Virginia Bill Establishing a Provision for Teachers of the Christian Religion,[8] referred to earlier, allowed taxpayers to choose which church they would have their taxes support, and if they did not wish to fund any church, to have their taxes earmarked for secular educational institutions. It was against this choice-based provision that Madison wrote his Memorial and Remonstrance, and it was the defeat of this bill that lighted the way for the Establishment Clause. While the kind of choice Patrick Henry then offered (primarily, though not wholly, to Christians) would fail on other grounds today, Madison's successful opposition declared a postulate that continues to inform the Establishment Clause: that the

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[8] Supplemental Appendix to the dissenting opinion of Justice Rutledge in *Everson v. Board of Education*, 330 U.S. at 74.

exaction of taxes for religious uses is not to be justified by the use of other public funds for comparable secular uses.

The petitioners seek to submerge that principle, and to avoid the force of *Nyquist*, by arguing that the secular choices of Ohio parents among public schools outside the Voucher Program, including community schools and magnet schools, are more numerous than were those available in New York in 1973. There is no need to wander outside the *Nyquist* record to discover the total of New York public schools available in 1973 in order to dispose of this misconceived and irrelevant contention. The *Nyquist* opinion itself made clear there were thousands of public schools available in New York, *see* 413 U.S. at 768, and that made no more difference in that case than it does here, whatever names the public schools are given from time to time. The *Nyquist* decision, judging the New York program there in issue, compared the number of sectarian private schools (85% of the total) with the number of nonsectarian. *See id.* That is precisely the nature of the comparison followed by the courts below in this case, noting the undisputed figures of 82% sectarian *schools* and 96% sectarian school *students* properly held to be material in this case. All the numbers and descriptions of educational programs wheeled out by the petitioners -- including the undisputed and immaterial assertions about the virtues of sectarian schools -- result only in pointless divergence from the constitutional issue in this case.

In a variant effort to avoid the impact of *Nyquist*, the petitioners purport to find comfort in a subject to which the Court made glancing reference in that case, as in other cases -- the spending of paychecks by government employees or the benefits for veterans under the G.I. Bill of Rights. It may be acknowledged that occasional dicta in this Court's opinions may appear to give superficial support to that effort. *See Nyquist*, 413 U.S. at 756, 782-83 n.38; *Witters*, 474 U.S. at 484-87, 488 n.3; *Rosenberger*, 515 U.S. at 848 (O'Connor, J., concurring), 880 (Souter, J.,

dissenting); *Agostini*, 521 U.S. at 243; *Mitchell*, 530 U.S. at 816 (plurality opinion), 902 (Souter, J., dissenting). But it must be added, with entire deference all around, that the analogy is not a sound one.

The thousands of "choices" for spending a government paycheck or claiming G.I. benefits provide no support for direct government payments for unrestricted uses by institutions 82% or more of which are sectarian. But the flaws in this line of argument run deeper still. In the kinds of cases that concern us, a central initial inquiry goes to the nature of the government *programs* under which public funds are being disbursed -- *e.g.*, to pay ultimately and as an explicit feature of the program for education (as in the present and a majority of the cases) or to assist the handicapped (*Zobrest*; *Witters*). That may not be the end of the inquiry, but it is a critical beginning. Where, as in the case of the government employee's salary or the G.I. Bill, the program as constituted has no relation whatsoever to religion and a valid purpose is fully achieved with the disbursement itself, the Establishment question is never reached. The G.I. Bill, to reward those who had served, was conceived in its inception as a form of added compensation or substitute for lost compensation for the service. *See* H.R. Rep. No. 1418, 78th Cong., 2d Sess. 2 (1944); S. Rep. No. 755, 78th Cong., 2d Sess. 1-3 (1944). Once the government pays the employee, a contractor, the veteran, or another proper recipient, the further course of the money is outside our subject. That is why the question of religious contributions of their pay by government employees appears never to have posed a genuine Establishment Clause question.

Genuine questions do arise when a government program sends disbursements directly, or by an obviously predictable and short route, to sectarian institutions. On the other hand, whatever "choice" the government employee makes for the disposition of his or her salary has nothing to do with the government's reasons for paying it.

It never becomes a question, under the Establishment Clause or otherwise, that the employee may choose to spend the money for religious purposes any more than the choice to use it at the race track, a Las Vegas gambling table, or any other preferred commodity or service. The choice made by the employee is temporally and legally separate from the government's purpose in making the payment.

Another, even less fruitful line of petitioners' arguments is based upon the provision in R.C. § 3313.978(8) for tutorial assistance for public school students. Far from being a substantial counterpart of the vouchers of up to $2,250, this provision of not more than $360 for tutoring of students left behind in Cleveland's desperately poor public schools has the appearance and substance of nothing more than window-dressing. While that characterization is one that should never be lightly made, it fits this situation.

It is ludicrous at best for the Ohio Legislature to have commanded, with an odd show of supposed evenhandedness, that the Superintendent must provide a number of these $360 grants equal to the number of $2,250 grants. Nobody who works simple arithmetic could find a vestige of the fairness or equality that this facade must have been thought by some drafter to simulate.

The inclusion of this add-on as a species of "choice" has an almost macabre quality. The petitioners have described the starved Cleveland public schools throughout this litigation as places of "abysmal educational quality" -- "one of the worst urban school systems in the country." (These latest descriptions from the Senel Taylor brief, pp. 2 and 5.) The aim of any caring parent, they tell us, is to get their children out of these schools. Then, praising the scheme of tutorial grants, they speak of these as boons for "students who choose to remain in the Cleveland public schools" (State Br. 7) or "who elect to remain [or "enroll"]

in the public schools" (Hanna Perkins Br. 20, 26) or "have the option of . . . remaining in the public schools and obtaining a tutorial assistance grant" (Senel Taylor Br. 44-45). This Pickwickian idea of "choice" or "options" reflects the reality that what Cleveland got was (i) continued neglect of its public schools by the State of Ohio, (ii) a scheme of grants for the religious uses of religious schools, and (iii) a fig-leaf option of trivial tutorial assistance grants.

Given the almost exclusively religious-school choice actually available to Cleveland parents, it is hardly surprising that petitioners urge judgment of the Ohio Program on its face, and not in terms of the real-world possibilities it addresses. (State Br. 38; Senel Taylor Br. 34; Hanna Perkins Br. 15.) The preference for such an abstract judgment is especially striking when viewed against the heavy reliance petitioners place on *Witters*, with its wide world of choices among other major distinctions. Beyond the inconsistency in that plea for a facial appraisal, the argument is not meritorious. In considering whether government has acted so as to create an apparent endorsement of religion, we look to how a reasonable observer might react to the actual history and details of the situation. "[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 777 (1995) (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 785-86 (Souter, J., concurring in part and concurring in the judgment). *Mitchell v. Helms*, 530 U.S. at 843 (O'Connor, J., concurring).

Further, under the subject of "choice," we note briefly the suggestion (State Br. 30) that it would be "incongruous" to invalidate the Cleveland Program "while permitting an identical program in another community, with equally troubled schools, where secular private schools command a larger share of the educational

market." The Senel Taylor petitioners undertake a similar argument (Br. 35-36) by proposing a quiz that the Court found it unnecessary to sit for in *Nyquist* -- asking whether the result would vary depending on whether sectarian schools comprised 90% or 50% or a changing percentage from year to year. The answer to these hypotheticals is simply that they lack a foundation in fact or in the law. The Establishment Clause forbids *any* substantial aid for the religious functions of religious schools. The percentage in *Nyquist* was stressed because it was so patently substantial. In any of the imaginary cases the petitioners propose, without regard to games about percentages, direct financial aid like that given in Cleveland to sectarian schools would fairly be called substantial and would violate the Establishment Clause.

As we have noted, the actual world does not cooperate with the Senel Taylor hypotheticals. Nationally, the private sectarian average runs close to the 1973 figure in *Nyquist*. *See* U.S. Br. Amicus 24.[9] Whether it did or not, however, cases would come on for decision as they arose. What is far more important is that the precise percentages are not decisive. The figures in *Nyquist* showed that massive state financing was going to sectarian schools.

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[9] The percentage that religious schools nationally comprise of all nonpublic schools has remained notably stable over the last twenty years, remaining in the 80% range described in *Nyquist* for New York. In 1980 the U.S. Department of Education's National Center for Educational Statistics' *Survey of Private and Elementary and Secondary Schools*, cited in Bruce S. Cooper, *The Changing Demography of Private Schools: Trends and Implications*, 16 EDUCATION AND URBAN SOCIETY 429, 434-35 (1984), reported that 77.3% of the schools were so affiliated. In 1989-1990, 82.7% were religiously affiliated. U.S. Dep't of Education, National Center for Education Statistics, *Private School Universe Survey, 1989-1990* (1992) at 3. In 1999-2000, 78.4% of nonpublic schools were religiously affiliated, U.S. Dep't of Education, National Center for Education Statistics, *Private School Universe Survey, 1999-2000* (2001) at 2.

That is in the end what the figures show here, with no indication that the basic situation will change. For all the reasons reviewed earlier in this brief, that kind of substantial aid, whatever its exact amount or percentage of anything else, is unconstitutional.[10]

Reinforcing still further the conclusion that *Nyquist* turned on fundamental Establishment Clause principles and not on statistics that might vary from year to year, we note the companion case of *Sloan v. Lemon*, 413 U.S. 825, 828 (1973), which the Court described as displaying "no constitutionally significant difference" between the Pennsylvania statute it held unconstitutional there and the New York statute invalidated in *Nyquist*. Addressing the Pennsylvania statute, the Court said (*id.* at 832-33):

> [W]e look to the substance of the program, and no matter how it is characterized its effect remains .he same. The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed

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[10] The State Superintendent's brief, at page 45, asserts, with no citation to the record, that "Columbus, in contrast to Cleveland, boasts roughly equal numbers (about 15 each) of Roman Catholic and non-religious elementary schools." This assertion appears to be contradicted in important respects by the Superintendent's own website, which has been consulted for this purpose by Donald J. Mooney, Jr., Esq., of counsel for respondents, whose examination of that material is reported in his affidavit sworn December 4, 2001, and to be lodged with the Office of the Clerk along with this brief. Upon examination of the Superintendent's website (www.ode.state.oh.us/interactive; OEDdistbuild.htm), it appears that within the municipal boundaries of Columbus, Ohio, there are 14 Roman Catholic elementary schools, 11 elementary schools of other religious denominations, and only eight elementary schools that appear to be nonreligious. The same records show that approximately 90% of the students attending nonpublic elementary schools in Columbus are in religious schools (3,969 in Roman Catholic schools, 1,668 in schools with other religious affiliations, and only 681 students in nonreligious elementary schools).

> as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). In *Lemon v. Kurtzman*, we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support." 403 U.S. at 624. Again today we decline to approach or overstep the "precipice" against which the Establishment Clause protects. We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

Finally, it may fairly be noted that the constant stress by petitioners on "choice" has a deceptive appeal that should not allow deviation from the values really at stake any more than it did when James Madison successfully defeated the appeal of Patrick Henry in Virginia for public payment of ministers' salaries as a matter of choice. The ability to choose has an obvious appeal in many settings as an aspect of freedom. But its role under the Establishment Clause must be and is circumscribed. A majority of the people might at times "choose" to have the government build their churches, pay their clerics, or some day foot the bill for the world's currently fastest growing body of religious law, sharia. These possibilities, seemingly chimeras today, are never remote enough to be ignored. As we look around the world, spatially and temporally, we are reminded of the long view called for by our Constitution. Again, the wisdom of Madison in his Memorial and Remonstrance remains cogent; we must "take alarm at the first experiment on o[illegible]berties." Quoted in *Everson*, Appendix to dissent o[illegible] J., 330 U.S. at 65. Oddly enough, the Ohio Voucher [illegible]ogram (called a "Pilot . . . Program") has been justified repeatedly by its proponents as a useful "experiment" in dealing with contemporary problems of elementary and secondary education (*see* State Pet. App. 117a). It is an experiment that the Nation cannot afford and the Constitution forbids.

III. NEITHER THE FACTS NOR THE LAW SUPPORTS THE STATE'S DEFENSE OF "NEUTRALITY" FOR THE VOUCHER PROGRAM

Nothing respondents argue, under this heading or elsewhere, suggests any doubt as to the value of government neutrality with respect to religion -- neutrality as between or among religions or between religion and nonreligion. Our position, simply stated, is that the facts of this case afford no room for defending the Voucher Program on grounds of neutrality because the Program plainly endorses and promotes religious teaching and

beliefs. There is no basis in Establishment Clause principles for the thought, prominent in petitioners' arguments, that the government may give substantial funds to religious institutions for religious education if it also supports secular education in public schools. Neither this nor any surface appearance of "neutrality" can square the Program with the Establishment Clause.

If the Ohio Legislature could have been thought to be ignorant of the outcome it was addressing in 1995, when it enacted the Voucher Program, it was fully informed in 1999, when it passed the re-enactment now before this Court. Whether the proportions were predictable *ex ante*, as the State's brief would prefer to ask as the exclusive question (Br. 38), it is certainly plain *ex post*, as the State prefers to ignore (Br. 39-41), that the overwhelming majority of schools benefited by the Voucher Program are permeated by religious instruction and indoctrination as the crux of their mission and purpose. And the Court, applying a basic and inevitably *ex post* concept in Establishment Clause cases, has "assessed a law's 'effect' by examining the character of the institutions benefited (*e.g.*, whether the religious institutions were 'predominantly religious') . . . and the nature of the aid that the State provided (*e.g.*, whether it was neutral and nonideological), *see Everson*, *supra*, at 18." *Agostini v. Felton*, 521 U.S. 203, 232 (1997). The "Establishment Clause jurisprudence remains a delicate and fact-sensitive one." *Lee v. Weisman*, 505 U.S. 577, 597 (1992). *See also Rosenberger v. Rector*, *supra*, 515 U.S. at 847 (O'Connor, J., concurring).

Thus, whatever philosophical division there may be within the Court on the weight and meaning of "neutrality" in Establishment Clause cases, the subject is not complex in this case. For the Ohio law, however its drafters worded it, is in fact devoid of anything resembling the requisite neutrality. It is as a matter of plain fact skewed by preponderant grants, sufficient to pay almost the total tuition for voucher students in religious schools where the

teaching and promotion of sectarian doctrine is the central and pervasive educational purpose.[11] A departure from neutrality offends against the freedom of religion, as it did in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993), where the Court said:

> Facial neutrality is not determinative. The Free Exercise Clause, *like the Establishment Clause*, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality . . . . Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.

(Citations omitted; emphasis added.) As noted in the words we have italicized, the deviation from government neutrality in religious matters may violate the Establishment Clause as well as the Free Exercise Clause. It may be malign, as appears to have been true in *Lukumi Babalu Aye*, or less offensively aimed but still outside the neutral bounds marked by the Constitution because it loads the scales for or against religious uses, as in this case and, for example, *Larson v. Valente*, 456 U.S. 228, 247 (1982), and *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). On the other hand, a forbidden abandonment of neutrality may be a violation on grounds defined in terms that include and extend beyond the concept of neutrality. For example, it seems clear

> that a secular purpose and a facial neutrality may not be enough, if in fact

---

[11] "In fact, the scholarship amount is actually *higher* than the tuition costs of most participating schools." (State Br. 40, emphasis in original.)

> the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.

Roemer v. Maryland Public Works Bd., 426 U.S. 736, 747 (1976)(plurality opinion). The Cleveland Voucher Program plainly transgresses the sound limits thus stated.

We have singled out the concept of neutrality for brief separate treatment both to add support for the two courts below and to help set this aside as a supposed defense of the Ohio statute. It is noteworthy in this connection that there is not a single vote in *Mitchell v. Helms* or anywhere else for the notion, pervasive in petitioners' briefs, that acceptable "evenhandedness" or "neutrality" satisfying the Establishment Clause may be achieved by grants of government funds to religious institutions for religious uses on the one hand and grants on the other hand to secular institutions for arguably comparable secular purposes -- specifically, for religious teaching or indoctrination on one side and secular education on the other. Five votes in two of the opinions expressly or essentially repudiate any such thought. *See* 530 U.S. at 848, 855-56 (O'Connor, J., concurring); *id.* at 884, 887, 890-93, 899 (Souter, J., dissenting). And the plurality opinion acknowledges that unrestricted direct grants to religious institutions engaged in religious indoctrination are at best suspect and more probably violative of the Establishment Clause. *See id.* at 809, 814, 820.

In this case, where the preponderant majority of private schools in Cleveland conduct programs "permeated" by the teaching and promotion of religious doctrine, and

where voucher students attending those schools have all, or substantially all, their tuition paid by the State, the facts call readily for an affirmative answer to the ultimate question recently put by the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793, 809 (2000): "whether any religious indoctrination . . . could reasonably be attributed to governmental action." This is indeed a case where the result of the government program in issue is to "convey a message of [government] endorsement of Christianity" and other established religious messages. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring in part and concurring in the judgment). To allow such massive direct funding of such a program violates Establishment Clause principles that remain as vital today as they were in Madison's classic formulations over two centuries ago.

CONCLUSION

On cherished principles at least as old as the First Amendment, applied specifically in the *Nyquist* case and steadily reaffirmed in the Court's Establishment Clause jurisprudence, the decision below is correct. It should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent Of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

HANNA PERKINS SCHOOL, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

SENEL TAYLOR, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

The Ohio Voucher Program authorizes the State to issue tuition voucher checks to parents of selected Cleveland children admitted to private schools registered to participate in the Program—the overwhelming majority of which are sectarian private schools providing a religious education—that the parents then endorse over to the schools. The Establishment Clause Questions Presented are:

1. Whether the moneys the Voucher Program provides to participating sectarian private schools are "properly attributable to the State," *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 489 (1986), as a form of "an impermissible 'direct [State] subsidy' " to the schools, *id.* at 487, or are "a permissible [parental] transfer" to the schools "similar to [a] hypothetical salary donation" by a government employee from a government paycheck to a religious institution, *id.*?

2. Whether the Voucher Program has "the [impermissible] effect of advancing religion by creating a financial incentive to undertake religious indoctrination," *Agostini v. Felton*, 521 U.S. 203, 231 (1997)?

3. Whether the Voucher Program impermissibly "confer[s] a[ ] message of [S]tate endorsement of religion." *Witters*, 474 U.S. at 489?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Statement of Facts	1
B. Proceedings Below	5
SUMMARY OF ARGUMENT	6
ARGUMENT	11
I. THE OHIO VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE THE PROGRAM'S AID FINANCES RELIGIOUS EDUCATION AND INDOCTRINATION AND THAT AID IS "PROPERLY ATTRIBUTABLE TO THE STATE"	11
II. THE OHIO VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE IN TWO ADDITIONAL SEPARATE AND INDEPENDENT WAYS	35
A. The Voucher Program Creates A Financial Incentive For Voucher Program Parents To Choose A Sectarian Private School Providing A Religious Education	35
B. The Voucher Program Creates A Public Perception That The State Is Endorsing Religious Practices And Beliefs	37
III. PETITIONERS' OTHER EFFORTS TO SUPPORT THE OHIO VOUCHER PROGRAM ARE UNAVAILING	38

TABLE OF CONTENTS—Continued

Page

IV. THE CONCLUSION THAT THE OHIO VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE DERIVES FURTHER PERSUASIVE FORCE FROM THE DOCTRINE OF *STARE DECISIS* 42

CONCLUSION 45

TABLE OF AUTHORITIES

CASES Page

Agostini v. Felton, 521 U.S. 203 (1997) ..... *passim*
Bowen v. Kendrick, 487 U.S. 589 (1988) 15, 16
Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968) 33
Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) ..... *passim*
Dickerson v. United States, 530 U.S. 428 (2000) 11, 43, 44
Evans v. Abney, 396 U.S. 435 (1970) 41
Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985) 6, 12, 13, 38
Lee v. Weisman, 505 U.S. 577 (1992) 26
Lemon v. Kurtzman, 403 U.S. 602 (1971) 10, 25, 39, 40, 44
Mitchell v. Helms, 530 U.S. 793 (2000) ..... *passim*
Mueller v. Allen, 463 U.S. 388 (1983) 23, 24, 25, 31, 32
Planned Parenthood v. Casey, 505 U.S. 833 (1992) 43, 44
Radio Officers' Union v. NLRB, 347 U.S. 17 (1954) 20
Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976) 16
Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) 13, 26
Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 2
Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio App. 1997) 2, 31
Sloan v. Lemon, 413 U.S. 825 (1973) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986) ..... *passim*
Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 9, 32, 33, 34, 36

STATUTES

Ohio Rev. Code Ann. § 3313.976(A)(7) (1999) 4
Ohio Rev. Code Ann. § 3313.976(C) (1999) 3

MISCELLANEOUS

GAO Rep. No. 01-914, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee* (Aug. 31, 2001) 3

BRIEF FOR RESPONDENTS DORIS SIMMONS-HARRIS, *ET AL.*

STATEMENT OF THE CASE

A. Statement of Facts

The Ohio Pilot Project Scholarship Program ("Voucher Program" or "Program") authorizes the State to issue tuition voucher checks to the parents of selected children residing within the Cleveland City School District ("CCSD") in kindergarten through eighth grade. State Pet. App. 4a. These tuition voucher checks can only be applied towards the payment of tuition at a *private* school that: (1) is located within the boundaries of the CCSD; (2) is registered to participate in the Program by the Ohio Superintendent of Public Instruction; and (3) has admitted the parents' child to the school in accordance with a set of Program "priority rules"—which, *inter alia*, require the school to give preference to children from low-income families. *Id.* 4a-5a. "The [P]rogram requires participating private schools to cap tuition at $2500 per [voucher] student per year and pays 90% of whatever tuition the school actually charges [within the capped amount] for low-income families; for other families, the State pays 75% of the school's tuition up to a maximum of $1875." *Id.* 4a. The State mails each tuition voucher check—which designates the parents of the student as the payee and the State as the payor—directly to the participating private school, and the parents then endorse the check over to the school. *Id.*

The following factual points about the structure and operation of the Ohio Voucher Program are particularly pertinent:

1. Fifty-six private schools registered to participate in the Program during its first year of operation (*i.e.*, the 1999-2000 school year), and forty-six of those schools—or 82%—were

sectarian. State Pet. App. 5a. Moreover, "the number of available places in sectarian schools is higher than 82%, as many of the sectarian schools are larger and provide a greater number of places for children in the voucher program." *Id.* 26a. Thus, "close to 96% of the [3,761] students enrolled in the [P]rogram for the 1999-2000 school year attended sectarian institutions." *Id.*

The sectarian private school participation figures under the current Ohio Voucher Program are all but identical to those under a predecessor Ohio voucher program that began during the 1996-97 school year and continued to operate during the 1997-98 and 1998-99 school years until that program was ruled invalid on independent state law grounds by the Ohio Supreme Court. *See Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). During the first year of operation of the predecessor voucher program—the terms of which were the same in all pertinent respects as the terms of the current Voucher Program—"[a]pproximately fifty-three private schools registered to participate" in the program, and "approximately eighty percent of these schools were sectarian in nature." *Simmons-Harris v. Goff*, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583, at *2 (Ohio App. 1997).

2. The predominance of sectarian schools in the Ohio Voucher Program universe of participating private schools is due to two factors. The first is that in Cleveland—as in Ohio generally, and in virtually all other jurisdictions in the United States—the substantial majority of all private schools are sectarian schools. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 24.

The second factor is that the Ohio Voucher Program caps the tuition that participating private schools may charge voucher students from low-income families at $2,500 and pays a maximum of 90% (or $2,250) of that capped tuition. *Supra* p. 1. "Practically speaking, th[os]e tuition [and payment] restrictions mandated by the statute limit the ability of

nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." State Pet. App. 25a-26a (emphasis added). As a recent United States Government Accounting Office Report concludes, "the maximum voucher amount ($2,250 for low-income students) established by the Ohio legislature at the beginning of the voucher program appears to have limited the program primarily to low-tuition religious schools." GAO Rep. No. 01-914, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee*, at 25 (Aug. 31, 2001).

3. The Ohio Voucher Program is framed in terms that permit the participation of *public* schools in suburban *public* school districts adjacent to the CCSD that charge tuition to out-of-district residents, "if the superintendent of the district in which such public school is located notifies the state superintendent prior to the first day of March that the district intends to admit [voucher] students . . . for the ensuing school year." Ohio Rev. Code Ann. § 3313.976(C) (1999), *reprinted in* State Pet. App. 174a-75a. But no adjacent suburban public school district—indeed no adjacent suburban public school—ever has participated in the Program. State Pet. App. 5a. It is for the foregoing reason that we have stated as an accurate description of the Program as an operating reality that it is a Program that provides tuition voucher checks that "can only be applied towards the payment of tuition at a *private* school." *Supra* p. 1.

In this instance, the current Ohio Voucher Program situation is identical—and not just nearly identical—to the predecessor voucher program situation. During the three school years that the predecessor program was in operation, no adjacent suburban public school district—indeed no adjacent suburban public school—ever participated in the program. *See* State Pet. App. 63a.

4. "[I]t can generally be said that a central part of each [participating sectarian private] school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience." State Pet. App. 64a.

> The [participating sectarian private] schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects. The sectarian schools also follow religious guidelines, including instruction in religion and mandated participation in religious services. [*Id.* 6a.]

In support of these factual findings, the decisions below provide several illustrative excerpts from the handbooks and mission statements distributed to the public by participating sectarian private schools, *see id.* 6a; 64a-69a—public distributions which the Ohio Voucher Program dictates may not be "false or misleading." *See* Ohio Rev. Code Ann. § 3313.976(A)(7) (1999), *reprinted in* State Pet. App. 174a.[1]

5. The Ohio Voucher Program moneys that flow to participating private schools *are entirely unrestricted*, and may be used by the participating sectarian private schools for whatever purposes the schools deem necessary and appropriate—including the payment of salaries and expenses of school administrators, teachers and other personnel (including members of religious orders) affiliated with the school's religious mission; the purchase of religious icons, prayer books and other materials identified with the school's

[1] In the course of their argument that the participating sectarian private schools are not "excessive[ly]" religious, *see* Hanna Perkins Br. at 45, the Hanna Perkins Petitioners acknowledge that the factual findings quoted in text are entirely accurate. - *See id.* at 44 ("Are the religiously affiliated non-public schools registered to participate in the Ohio Program truly religious? Of course they are. They have prayer, religious symbols, devotional exercises, and seek to instill strong fundamental values.").

religious mission; the maintenance and construction of facilities used for religious purposes; and other expenditures that support or maintain religious education, indoctrination, worship, and other religious activities.

B. Proceedings Below

On cross motions for summary judgment, the District Court held that the Ohio Voucher Program violates the Establishment Clause of the First Amendment to the United States Constitution—finding that "[i]n all pertinent respects, the Voucher Program is factually indistinguishable from the tuition reimbursement program struck down [on Establishment Clause grounds] in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2955 (1973)." State Pet. App. 123a. In so holding, the District Court rejected Petitioners' arguments invoking certain of this Court's post-*Nyquist* Establishment Clause cases—concluding that "[t]his case is unlike any" of those post-*Nyquist* cases. *Id.* 125a; *see also id.* 94a-117a.

The Sixth Circuit affirmed the District Court's Establishment Clause ruling, over the dissent of Judge Ryan. The panel majority agreed with the District Court that *Nyquist* "is on point with the matter at hand," *id.* 13a, and that the post-*Nyquist* Establishment Clause cases relied on by Petitioners are not, *id.* 27a-29a; *see also id.* 17a-23a.[2] Accordingly, the panel majority held that *Nyquist* "governs our result." *Id.* 24a. In dissenting, Judge Ryan took the position that *Nyquist* is not on point, *id.* at 36a-39a; that "the rule of law upon which *Nyquist* was decided has changed" in any event, *id.* 39a; and that the Ohio Voucher Program passes constitutional muster under that "changed" rule of law, *id.* 40a-55a.

The Sixth Circuit denied *en banc* review. *Id.* 166a-67a.

[2] The Sixth Circuit's analysis of this Court's post-*Nyquist* cases encompassed *Mitchell v. Helms*, 530 U.S. 793 (2000), which was decided while this case was on appeal to that Circuit.

SUMMARY OF ARGUMENT

I.

"[A]id to a religious institution unrestricted in its potential uses, *if properly attributable to the State*, is clearly prohibited under the Establishment Clause." *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 489 (1986) (emphasis added) (internal quotations omitted). Such aid violates the "absolute" Establishment Clause prohibition against "government-financed . . . indoctrination into the beliefs of a particular faith." *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985). *Infra* pp. 12-13.

As the Court of Appeals correctly held, the Ohio Voucher Program aid to sectarian private schools providing a religious education *is* properly attributable to the State, and the Program *does* violate the Establishment Clause.

Where a State program makes direct unrestricted government payments to sectarian private schools providing a religious education based on the number of students attending such schools, it is patent that the program provides "aid to [those] religious institutions unrestricted in its potential uses" that is "properly attributable to the State," and it is equally patent that the program violates the Establishment Clause. And, that is true where the State is at the same time providing identical or comparable financial assistance to secular private schools and to the State's free public schools—either through multiple State funding programs or a single comprehensive State funding program. *Infra* pp. 14-17.

Where, as here, aid to sectarian private schools providing a religious education flows through third parties such as students or parents, an inquiry into the structure and operation of the program is necessary to determine whether the aid is "properly attributable to the State." As the Court pointed out in *Witters*, it is the case that "[a]id may have th[e] [impermissible] effect [of "a direct subsidy" to religious

institutions "from the State"] even though it takes the form of aid to students or parents," *Witters*, 474 U.S. at 487, but it also is the case that "the Establishment Clause is not violated every time money previously in the possession of a State is conveyed [by a third party] to a religious institution," *id.* at 486. *Infra* p. 17.

Against this background, the inquiry in a State tuition voucher program case like this one is whether the moneys the voucher program provides to participating sectarian private schools are "properly attributable to the State," *Witters*, 474 U.S. at 489, as a form of "an impermissible 'direct [State] subsidy'" to those schools, *id.* at 487, or are "a permissible [parental] transfer" to those schools "similar to [a] hypothetical salary donation" by a government employee from a government paycheck to a religious institution, *id.* *Infra* pp. 17-18.

Under this Court's decisions in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), its companion case, *Sloan v. Lemon*, 413 U.S. 825 (1973), and *Witters*, the answer to that inquiry is that the moneys the Ohio Voucher Program provides to participating sectarian private schools are "properly attributable to the State" as a form of "an impermissible 'direct [State] subsidy'" to those schools. As was true of the tuition grant programs struck down in *Nyquist* and *Sloan*—and not true of the tuition grant program upheld in *Witters*—the Ohio Voucher Program is so heavily "skewed towards religion," *Witters*, 474 U.S. at 488, as to make it inevitable that, no matter what "private choices," *id.* at 487, individual Voucher Program parents make, a "significant portion of the aid expended under the . . . [P]rogram as a whole will end up flowing to religious education," *id.* at 488. The Ohio Voucher Program dictates that result with the same certainty as would a State program that made direct unrestricted

government payments to the same universe of private schools based on the number of students attending those schools. *Infra* pp. 18-23.

In this respect, the decisions in *Nyquist*, *Sloan* and *Witters* form a coherent doctrinal whole. While the State Petitioners attempt to minimize the Court's Establishment Clause jurisprudence set forth in those decisions by attributing it to "a single decision from a generation ago in *Nyquist*," State Br. at 19, the truth of the matter is that the Ohio Voucher Program is invalid not under some aberrant outdated decision, but under the well-considered teachings of the *Nyquist*, *Sloan* and *Witters* trilogy of decisions. *Infra* pp. 24-25.

In addressing the first Establishment Clause question presented here we follow the approach taken in *Nyquist*, *Sloan* and *Witters*, and treat the Ohio Voucher Program as a separate Program that is to be judged in its own terms. The alternative approach urged by Petitioners—that the Voucher Program should be analyzed and judged as one component part of a single integrated State program to expand the educational options available to low-income Cleveland parents by funding various private *and* public schools "of choice" in Cleveland—is one that *Nyquist* specifically rejected as unsound. The Ohio Voucher Program's tuition grants "are given *in addition to* the right that [Cleveland parents] have to send their children to public schools 'totally at state expense,'" *Nyquist*, 413 U.S. at 782 n.38 (emphasis added), and the Ohio Voucher Program is thus qualitatively different from State programs providing for the funding of the free public schools. "And in any event," the Petitioners' approach "proves too much." *Id.* On Petitioners' approach, and contrary to the most basic Establishment Clause principles, the State would be allowed to make direct unrestricted government payments to sectarian private schools providing a religious education in Cleveland based on the number of Cleveland students attending such schools. *Infra* pp. 26-29.

Petitioners also argue that adjacent suburban public school districts that consistently and uniformly have declined to participate in the current or predecessor Ohio voucher programs should be included along with the participating private schools in assessing the breadth of the educational options available to Voucher Program parents and the nature of their "genuinely independent and private choices," *Witters*, 474 U.S. at 487, under the Program. That argument has no touch with reality, and would, if accepted, make a mockery of the concept of "genuinely independent and private choices" as articulated in *Witters*. *Infra* pp. 29-31.

Since *Witters*, the Court has rejected Establishment Clause challenges to government school-aid programs providing various restricted forms of non-monetary aid. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), *Agostini v. Felton*, 521 U.S. 203 (1997), and *Mitchell v. Helms*, 530 U.S. 793 (2000). Each of these decisions turned on the Court's conclusion that insofar as the evidence showed the restricted government aid provided by the program went solely to secular educational purposes. These cases are thus inapposite where, as here, the government aid takes the form of unrestricted monetary payments that "reach the coffers of religious schools," *Agostini*, 521 U.S. at 228, and are used by the recipient schools to finance their overall programs of religious education and indoctrination. *Infra* pp. 32-34.

II.

The Ohio Voucher Program violates the Establishment Clause in two additional separate and independent ways.

First, the Voucher Program criteria that structure the universe of participating schools so constrain the educational options available under the Program that the great majority of Voucher Program parents must send their children to sectarian private schools providing a religious education in order to obtain the benefits that the Program offers. The

Program criteria thus "have the impermissible effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Agostini v. Felton*, 521 U.S. 203, 231 (1997). *Infra* pp. 35-37.

Second, the Voucher Program is, in its structure and operation, so heavily "skewed towards religion," *Witters*, 474 U.S. at 487, that it inevitably and impermissibly "confer[s] a[ ] message of [S]tate endorsement of religion," *id.* at 489—to no less a degree than if the State had made direct unrestricted government payments to the participating sectarian private schools providing a religious education based on the number of students attending such schools. *Infra* pp. 37-38.

III.

Petitioners make two additional arguments that are squarely foreclosed by this Court's precedents. Contrary to the Taylor Petitioners' argument, the Ohio Voucher Program cannot be upheld on the asserted ground that "the [P]rogram's primary effect is not to subsidize religion, but to broaden educational options for disadvantaged families." Taylor Br. at 28. "[This Court's Establishment Clause] cases" make clear that "such metaphysical judgments" as to *the* primary effect of a government-aid program "are [n]either possible or necessary." *Nyquist*, 413 U.S. at 783 n.39. Nor can the Voucher Program be upheld on Petitioners' argument that the Program is supported by legitimate secular purposes. In holding the tuition grant programs unconstitutional in *Nyquist* and *Sloan* by reason of their impermissible *effect* of advancing religion, the Court recognized both that the programs were supported by legitimate secular purposes and that such purposes cannot save a government-aid program that fails the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), "effect" test. *Infra* pp. 38-40.

Petitioners also attempt to demonstrate that voucher programs are an educationally sound response to the

problems in the Cleveland City School District and other urban school districts, and broach the idea that the Ohio Voucher Program should be upheld on that basis. In fact, Petitioners are wrong as a matter of educational policy—voucher programs are not a solution to the problems of urban education, but rather an impediment to the development and the funding of effective solutions to those problems. But the salient point is that this case does not present the occasion for an educational policy debate. This case must be decided on the basis of the Establishment Clause and what that Clause has to say about government financing of religious education and indoctrination. *Infra* pp. 40-42.

IV.

Because the Ohio Voucher Program is *identical* in all constitutionally-relevant respects to the tuition grant programs struck down in *Nyquist* and *Sloan*, it would be necessary to overrule those decisions in order to sustain the Program. This is unwarranted—first, because *Nyquist* and *Sloan* are well-reasoned decisions solidly grounded in basic Establishment Clause principles—and also because they carry the added force of *stare decisis*. While *stare decisis* "is not an inexorable command," the Court has "always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). There is no such justification here. *Infra* pp. 42-44.

ARGUMENT

I. THE OHIO VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE THE PROGRAM'S AID FINANCES RELIGIOUS EDUCATION AND INDOCTRINATION AND THAT AID IS "PROPERLY ATTRIBUTABLE TO THE STATE"

The Ohio Voucher Program authorizes the State to issue tuition voucher checks to parents of selected Cleveland

children admitted to private schools registered to participate in the Program—the overwhelming majority of which are sectarian private schools providing a religious education—that the parents then endorse over to the schools. The first of the three Establishment Clause questions presented is whether the moneys the Voucher Program provides to participating sectarian private schools are "properly attributable to the State," *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 489 (1986), as a form of "an impermissible 'direct [State] subsidy'" to those schools, *id.* at 487, or are "a permissible [parental] transfer" to the schools "similar to [a] hypothetical salary donation" by a government employee from a government paycheck to a religious institution, *id.*

As we demonstrate below, the answer to this first question is that the moneys the Voucher Program provides to participating sectarian private schools are "properly attributable to the State" as a form of "an impermissible 'direct [State] subsidy'" to those schools. The Voucher Program is structured and operates in a manner that makes it inevitable that, no matter what "private choices," *Witters*, 474 U.S. at 487, individual Voucher Program parents make, a "significant portion of the aid expended under the . . . [P]rogram as a whole will end up flowing to religious education," *id.* at 488. The Voucher Program dictates that result with the same certainty as would a State program that made direct unrestricted government payments to the same universe of private schools based on the number of students attending those schools.

(A) We begin with a bedrock principle that is one of the "few absolutes" of "Establishment Clause jurisprudence"—*viz.*, that "the Clause does absolutely prohibit government-financed . . . indoctrination into the beliefs of a particular religious faith." *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985). *See Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) ("[O]ur decisions 'provide

no precedent for the use of public funds to finance religious activities.'") (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring)) (emphasis added).

In *Witters*, the Court elaborated on that principle in terms that frame the salient issue here:

> [A]id to a religious institution unrestricted in its potential uses, *if properly attributable to the State*, is 'clearly prohibited under the Establishment Clause,' *Grand Rapids*, *supra*, [473 U.S.] at 395, because it may subsidize the religious functions of the institution. [474 U.S. at 489 (emphasis added).]

It is undeniable that the Ohio Voucher Program provides "aid to a religious institution unrestricted in its potential uses" that "subsidize[s] the religious functions of" the institution. Under the Program, participating sectarian private schools receive millions of dollars in such unrestricted aid with which the schools defray the costs of providing a religious education that "indoctrinat[es the schools' students] into the beliefs of a particular faith." *Grand Rapids*, 473 U.S. at 385. *See* State Pet. App. at 64a ("[I]t can generally be said that a central part of each [participating sectarian private] school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrine are an integral part of the entire school experience.").[3]

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[3] To be sure, *amici curiae* Professors Jesse Choper, *et al.* argue that because Ohio "is using fewer tax dollars to pay for an education through the [Voucher Program] than would be used to pay for a child's education at a public school . . . there is strong assurance that the [Voucher Program] will not support the religious mission of any recipient school or result in government indoctrination of religion." Choper Br. at 23. But this is a patent *non sequitur*. It does not follow from the fact that a public school spends $100 per pupil to defray *its* costs in providing a secular education that a sectarian private school that is given $50 by the State to spend per pupil must spend the entire $50 to defray its costs in providing the secular

That being so, the Ohio Voucher Program violates the Establishment Clause if the Voucher Program aid that finances religious education and indoctrination is "properly attributable to the State." *Witters*, 474 U.S. at 489. *See Agostini v. Felton*, 521 U.S. 203, 223 (1997) ("As we have repeatedly recognized, *government* inculcation of religious beliefs has the impermissible effect of advancing religion") (emphasis added).

(B) It is clear that a program pursuant to which a State makes direct unrestricted government payments to sectarian private schools providing a religious education based on the number of students attending such schools provides "aid to [those] religious institution[s] unrestricted in its potential uses" that is "properly attributable to the State." *Witters*, 474 U.S. at 489. And, such a direct-government-per-capita-payment program thus violates the Establishment Clause.

The Court so held in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), in striking down a State of New York "maintenance and repair" grant program "authoriz[ing] direct payments [of $30 or $40 per

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component of its educational program and $0 to defray its costs in providing the religious component. Beyond that, the Choper Brief's argument rests on the premise that a sectarian private school in budgeting and in making expenditures can—and does—divide the school's educational program into a secular component and a religious component, and finances the secular component first. That premise is false. Indeed, sectarian private schools make a point of providing an integrated educational program imbued with the schools' religious teachings. For precisely that reason, this Court stated in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 778 (1973), that "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education." *See also Agostini v. Felton*, 521 U.S. 203, 246 (1997) (Souter, J., dissenting) ("[I]t would be an obvious sham, say, to channel cash to religious schools to be credited only against the expense of 'secular' instruction.").

pupil] to nonpublic schools, virtually all of which are Roman Catholic schools in low-income areas." The Court explained:

> No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. . . . Absent appropriate restrictions on expenditures for [religious] purposes, it simply cannot be denied that this [program] has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools. [413 U.S. at 774.]

See also e.g. Witters, 474 U.S. at 487 (It is "well-settled" that "the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is that of a direct subsidy to the religious school from the State.") (internal quotations omitted); *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) ("[A] direct subsidy [to religious schools based on the number of students attending such schools] would be impermissible under the Establishment Clause."); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (rejecting a facial challenge to a federal program of direct cash grants to institutions providing counseling services to adolescents on the ground that "nothing on the face of the [statute] indicates that a significant portion of the federal funds will be disbursed to 'pervasively sectarian' institutions," *id.* at 610, but remanding the case for consideration of "'as-applied' challenge[s]" to the use of the federal funds for "teaching or promoting religion," which usage "would violate the Establishment Clause," *id.* at 620-22).

It bears particular emphasis that a direct-government-per-capita-payment program violates the Establishment Clause both where the program makes direct per-capita payments *only* to sectarian private schools providing a religious education, and where the program makes direct per-capita payments *on the same or comparable basis* to sectarian

private schools providing a religious education, to secular private schools, and to the free public schools. "The State may not . . . pay for what is actually a religious education, even though . . . it makes its aid available to secular and religious institutions alike." *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 747 (1976) (plurality opinion). *See Nyquist*, 413 U.S. at 774 (striking down on its face New York's "maintenance and repair" grant program of direct grants both to sectarian private schools providing a religious education and secular private schools, and against the background provided by New York's payment for the maintenance and repair of its free public schools); *Bowen*, 487 U.S. at 620-22 (remanding the case for "'as applied' challenges" to the use of federal funds for religious purposes, which usage "would violate the Establishment Clause" notwithstanding the secular uses to which most of the federal funds were being put). *See also Mitchell*, 530 U.S. at 839 (O'Connor, J., concurring) ("[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.") (emphasis in original); *id.* at 840 (recognizing that "neutrality is not alone sufficient to qualify the aid as constitutional") (internal quotations omitted).

It follows from the above that if the State were to institute a comprehensive program designed to increase the educational options for Cleveland children by making direct unrestricted government payments to all Cleveland private and public schools based on the number of Cleveland children attending each such school, the direct payments to the sectarian private schools providing a religious education would be "properly attributable to the State," and the sectarian private school component of the comprehensive program would violate the Establishment Clause. That would be true notwithstanding the fact that the State at the same time and towards the same end was financing "magnet Cleveland public schools" providing a specialized approach or curriculum; "community

Cleveland public schools" operated by independent governing boards as opposed to the School Board for the Cleveland City School District; and traditional Cleveland public schools offering supplemental tutorial assistance.

(C) Having said that much about the well-settled Establishment Clause prohibition against direct unrestricted government aid to religious institutions, we turn now to the complexity introduced where, as here, unrestricted government aid flows to religious institutions through third parties such as students or parents. As the Court pointed out in *Witters*, it is the case that "[a]id may have th[e] [impermissible] effect [of "a direct subsidy" to religious institutions "from the State"] even though it takes the form of aid to students or parents," 474 U.S. at 487, but it also is the case that "the Establishment Clause is not violated every time money previously in the possession of a State is conveyed [by a third party] to a religious institution," *id.* at 486.

In the latter regard, "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary." *Witters*, 474 U.S. at 486-87. A government paycheck provides the employee with legal tender that the employee may spend in any manner and for any purpose that he/she chooses without any government direction or constraint. Because of this unrestricted spending authority, any of the government-paycheck-moneys that religious institutions receive is properly attributable to the employee's "genuinely independent and private choice[ ]"—and not to the government. *Id.* at 487.

The Ohio Voucher Program does not provide the parents of selected Cleveland children with legal tender to spend in any manner that the parents choose—including a donation to a religious institution. Rather, the Program authorizes the State to issue tuition voucher checks to parents of selected

Cleveland children admitted to private schools registered to participate in the Program that the parents then endorse over to the schools. It is this Program feature that generates the legal controversy before the Court.

(D) In resolving that controversy it is helpful to first consider the simplest model of a government tuition voucher program—a program that is structured and operates so that the tuition vouchers can be used at any one of a universe of participating schools composed *entirely* of sectarian private schools providing a religious education. It is plain that the tuition grants provided by this model program are the legal equivalent of direct unrestricted government payments to the sectarian private schools on a per-capita basis.

It is just as inevitable in this model 100%-sectarian-school-universe tuition voucher program as it would be in a direct-government-per-capita-payment program covering those same sectarian schools that the unrestricted government moneys the program makes available will flow to the sectarian schools. To treat the tuition grants in the model program as anything other than "an impermissible 'direct [State] subsidy,'" *Witters*, 474 U.S. at 487, to the sectarian schools would disregard a critical reality—*viz.*, that in structuring the program and setting its terms, it is the government that effectively has determined that the program moneys will be used for the purpose of financing religious education, and that a parent participating in the program has no free "spending authority" to use the tuition grant money for any other purpose.

The foregoing model government tuition voucher program *is* the Ohio Voucher Program with the following exception—the Ohio Voucher Program is structured and operates so that the tuition vouchers can be used at any one of a universe of participating schools *82%* of which (representing an even

higher percentage of the available student places) are sectarian private schools providing a religious education.[4]

The nub of the matter, then, is whether an 82%-sectarian-school-universe tuition voucher program warrants different Establishment Clause treatment than a 100%-sectarian-school-universe tuition voucher program.

(E) 1. We have traced out in some detail the doctrinal route to the foregoing question in order to put it in the proper legal context, but that question is not *res nova* in this Court. To the contrary, it was considered and answered in terms in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and its companion case, *Sloan v. Lemon*, 413 U.S. 825 (1973). Both cases raised Establishment Clause challenges to government programs of tuition grants to parents legally indistinguishable from the Ohio Voucher Program. And, in both cases, the Court concluded that the program aid that financed sectarian private school religious education *was* properly attributable to the State, and thus invalid under the Establishment Clause.

Under the tuition grant program at issue in *Nyquist*, the State of New York made "unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who sen[t] their children to [qualified] nonpublic [elementary or secondary] schools." 413 U.S. at 780. "[A]pproximately

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[4] It bears repeating that the predominance of sectarian schools in the Ohio Voucher Program universe of participating private schools is an inherently stable aspect of the Program, and that there are two reasons for this stability. In the first place, the Program is limited to private schools in Cleveland, and sectarian schools constitute the substantial majority of all such private schools. Second, the Program caps the tuition that participating private schools may charge voucher students from low-income families at $2,500 and pays only 90% of that capped tuition—unquestionably discouraging the participation of secular private schools, which generally have greater tuition needs than sectarian private schools. *Supra* p. 2-3.

85%" of the qualified nonpublic schools within the program were sectarian schools that taught "religious doctrine to some degree." *Id.* at 768.

In holding that New York's tuition grant program violated the Establishment Clause, the *Nyquist* Court began by noting that—owing to the absolute Establishment Clause prohibition on government-financed religious education and indoctrination—"[t]here can be no question that these [tuition] grants could not, consistently with the Establishment Clause, be given directly to sectarian schools." 413 U.S. at 780. "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.*

"The controlling question here, then," the *Nyquist* Court went on to say, "is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result." *Id.* at 781. In answering that question "no," the Court emphasized that "the great majority" of the qualified nonpublic schools were sectarian private schools providing a religious education, and that, therefore, "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.[5] That is so, the Court stated, even though in the case of any individual parent there is "no assurance that the money will eventually end up in the hands of religious schools." *Id.* at 786.

Sloan makes the same point. There, the Court invoked its holding that same day in *Nyquist* to strike down a

[5] Given the *Nyquist* Court's application of an "effect" test, the Court's use of the word "desired" in this context can only be understood as a usage that invokes the common-law rule that one is held to intend or desire the foreseeable consequences of one's actions. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954).

Pennsylvania tuition grant program that "authorize[d] the State[ ] to use tax-raised funds for tuition reimbursements payable to parents who send their children to nonpublic schools," 413 U.S. at 830-31, some 90% of which were "schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith," *id.* at 830 (internal quotations omitted).

In order "to underline the basis for our ruling in these cases," the *Sloan* Court noted the suggestion of the intervenors "that New York's law might be differentiated on the ground that, because tuition grants there were available only to parents in an extremely low income bracket, . . . it would be reasonable to predict that the grant would, in fact, be used to pay tuition," whereas "[s]ince Pennsylvania authorizes grants to all parents of children in nonpublic schools—regardless of income level . . . no such assumption can be made as to how individual parents will spend their reimbursed amounts." 413 U.S. at 831. And, the Court squarely rejected that contention:

> Our decision . . . is *not* dependent upon any such speculation [as to what individual parents might or might not do with their tuition grants]. Instead we look to the substance of the program, and no matter how it is characterized *its effect remains the same*. . . . [A]t bottom its intended consequence is to preserve and support religion-oriented institutions. [*Id.* at 832 (emphasis added).] [6]

As the Court elaborated, "Pennsylvania's law falls under the [Establishment Clause] because *its effect, inevitably*, is to advance religion." *Id.* at 833 n.8 (emphasis added).

2. Foreshadowing the future development of Establishment Clause jurisprudence, the *Nyquist* Court strongly suggested that its invalidation of the New York tuition grant

[6] As to the *Sloan* Court's use of the word "intended" in this context, *see supra* p. 20 n. 5.

program there was not to be taken as invalidating all government tuition grant programs that result in the flow of government money to sectarian private schools providing a religious education. The Court did so by reserving for future consideration the validity of programs such as "the educational assistance provisions of the 'G.I. Bill', 38 U.S.C. § 1651," that afford aid recipients a broad variegated range of secular options in addition to sectarian options. 413 U.S. at 782-83 n.38. "Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.*

In *Witters*, the Court made that suggestion into law—and in so doing illuminated *Nyquist's* Establishment Clause teachings. *Witters* involved a State of Washington vocational tuition grant program for visually-impaired students that resulted in State financing of a blind person's studies at the Inland Empire School of the Bible. The Court found the Washington program constitutionally valid, and did so on the ground that its government tuition grants—which could be applied toward the payment of tuition at a wide and variegated, largely secular, range of educational institutions—were the legal equivalent of government employee paychecks from which an employee could—as a matter of "genuinely independent and private choice[ ]"—pay tuition to a sectarian private school providing a religious education. 474 U.S. at 487.

In reaching that conclusion, the *Witters* Court drew a sharp distinction between the structure and operation of the Washington tuition grant program being upheld, and the structure and operation of the New York tuition grant program struck down in *Nyquist*—noting that the Washington

program, in contrast to the New York program, "is in no way skewed towards religion." 474 U.S. at 488.

> On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.
>
> Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. The function of the Washington program is hardly "to provide desired financial support for nonpublic, sectarian institutions." [*Id.* (quoting *Nyquist*, 413 U.S. at 783).]

In contrast to the aid-recipient parents in *Nyquist* and in *Sloan*, the aid-recipient students in *Witters* had "a huge variety" of educational options, "only a small handful" of which were sectarian educational options. 474 U.S. at 488. Given that range of educational options, and the lack of any basis for treating as inevitable the prospect that a "significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education," *id.*, the analogy of the tuition grants to government employee paychecks held. And, given that range of educational options, the analogy of the tuition grants to direct government subsidies to sectarian private schools providing a religious education failed.[7]

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[7] As Justice Powell observed in his *Witters* concurrence, *see* 474 U.S. at 492, the decision in *Witters* is consistent with not only *Nyquist* and *Sloan* but also with *Mueller v. Allen*, 463 U.S. 388 (1983). That being so—and since *Mueller* (unlike *Nyquist* and *Sloan*) did not involve a tuition

3. The decisions in *Nyquist*, *Sloan* and *Witters* thus form a coherent doctrinal whole. While the State Petitioners attempt to minimize the Court's Establishment Clause jurisprudence set forth in those decisions by attributing it to "a single decision from a generation ago in *Nyquist*," State Br. at 19, the truth of the matter is that the Ohio Voucher Program is invalid not under some aberrant outdated decision, but under the well-considered teachings of the *Nyquist, Sloan* and *Witters* trilogy of decisions. Those teachings in their essence are that a government program of tuition grants to parents/students violates the Establishment Clause where the program is so heavily "skewed towards religion," *Witters*, 474 U.S. at 488, as to make it inevitable that, no matter what "private choices," *id.* at 487, individual aid-recipient parents/students make, a "significant portion of the aid expended under the . . . program as a whole will end up flowing to religious education," *id.* at 488. This is so because the program aid that finances religious education is, in that context, "properly attributable to the State." *Id.* at 489.

We recognize that the *Nyquist, Sloan* and *Witters* decisions do not state the governing law in terms that draw a definite line of demarcation between government tuition grant programs "skewed towards religion" that fail under the Establishment Clause, and those that provide "a huge variety" of educational options, "only a small handful" of which are sectarian educational options, that pass Establishment Clause

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grant program—we simply note at this juncture *Mueller*'s reasoning and result. *See also infra* pp. 31-32. In *Mueller*, the Court upheld against an Establishment Clause challenge a Minnesota statute that entitled eligible parents to deduct from their state income taxes a broad range of education-related expenses—including private school tuition but also including many other expenditures incurred in connection with private and public schooling alike. *See* 463 U.S. at 391 & n.2. In so doing, the *Mueller* Court found that the breadth of the options available to parents under the Minnesota statute rendered that statute "vitally different from the scheme struck down in *Nyquist*." *Id.* at 398.

muster. But that is in no way a mark against those decisions. The government tuition grant program that was before the Court in each case was at or near one or the other pole of the continuum of such programs, and the Court in each case quite properly proceeded by determining the constitutionality of the program before it. As the Court put it in *Witters*:

> The Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application. We acknowledged in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Id.*, at 612, quoted in *Mueller v. Allen*, 463 U.S. 388, 393 (1983). Nonetheless, the Court's opinions in this area have at least clarified "the broader contours of our inquiry," [*Nyquist*, 413 U.S. at 761,] and are sufficient to dispose of this case. [474 U.S. at 485.]

The Ohio Voucher Program is at the same point of the continuum as the New York and Pennsylvania programs struck down in *Nyquist* and *Sloan*, and at the other end of the continuum from the Washington program upheld in *Witters*. Thus, to paraphrase *Witters*, "the Court's opinions in [*Nyquist*, *Sloan* and *Witters* have] clarified 'the broad contours of [the Establishment Clause] inquiry' [in a manner] sufficient to dispose of [the instant] case." [8]

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[8] Because the predominance of sectarian schools in the universe of Ohio Voucher Program participating private schools is attributable in large part to the fact that a substantial majority of all private schools in Cleveland are sectarian schools, the State Petitioners opine that "[e]ven though it struck down the Cleveland program, the Sixth Circuit might well approve, for example, a scholarship component for an educational program in Columbus, because according to recent Ohio survey results, Columbus, in contrast to Cleveland, boasts roughly equal numbers (about 15 each) of Roman Catholic and non-religious elementary schools." State Br. at 45. And, the State Petitioners then add that "[a]ny such line-

(F) 1. In addressing the question of whether the aid that the Ohio Voucher Program provides to participating sectarian private schools is "properly attributable to the State," we have—following the approach taken in *Nyquist*, *Sloan* and *Witters*—treated the Voucher Program as a separate Program that is subject to Establishment Clause analysis and judgment in its own terms.

The Taylor Petitioners, the Hanna Perkins Petitioners, and several *amici curiae* (including the United States) take issue with this approach. It is their position that the Ohio Voucher Program should not be analyzed and judged as a separate Program in its own terms, but rather as one component part of a single integrated State program to expand the educational options available to low-income Cleveland parents by funding various Cleveland schools "of choice," Taylor Br.

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drawing produces significant tensions with post-*Nyquist* understandings of neutrality and entanglement." *Id.* at 46.

At the first level the State Petitioners make the participation question simpler than it is. The predominance of sectarian schools in the Ohio Voucher Program universe of participating private schools also is attributable to the Program's financial disincentive for secular private school participation. *Supra* pp. 2-3. There is thus no assurance that the percentage of sectarian private schools participating in an Ohio Voucher Program for Columbus would be 50%, as the State Petitioners postulate.

Beyond that, and even assuming *arguendo* that the State Petitioners' hypothetical tuition voucher program for Columbus might pass muster under the *Nyquist/Sloan/Witters* principles, it does not follow that those principles are in any way unsound. The State Petitioners' aversion to constitutional doctrine that involves line-drawing is not shared by the Court. As the Court stated in *Lee v. Weisman*, 505 U.S. 577, 598 (1992), "[o]ur jurisprudence in [the Establishment Clause] area is of necessity one of line-drawing." *See also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) ("Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.").

at 48—including not only the private schools participating in the Voucher Program, but also magnet Cleveland public schools providing a specialized approach or curriculum; community Cleveland public schools operated by independent governing boards as opposed to the School Board for the Cleveland City School District; and traditional Cleveland public schools offering supplemental tutorial assistance.[9]

The dispositive response to these Petitioners/*amici curiae* is that their approach was specifically rejected as unsound in *Nyquist*. It was argued there that New York's tuition grant program passed Establishment Clause muster because that program was part of a broader "endeavor" by the State of New York "to provide comparable benefits"—and, perforce, comparable educational options—"to all parents of schoolchildren whether enrolled in public or nonpublic schools." 413 U.S. at 782 n.38. *See also id.* at 788 (arguing that New York's tuition grant program was a constitutionally-permissible "attempt to enhance the opportunities of the poor to choose between public and nonpublic education"). In rejecting that argument, the *Nyquist* Court stated:

> The grants to parents of private school children are given *in addition to* the right that they have to send their children to public schools "totally at state expense." And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause. [413 U.S. at 782 n.38 (first emphasis added; second emphasis in original).]

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[9] Although the State Petitioners also advance this argument, they do so almost as an afterthought—introducing it with the transitional "[m]oreover," and devoting only one paragraph to the argument after an extended discussion of the educational options available to Voucher Program parents under "the [Voucher] Program itself." State Br. at 27-28.

State programs that finance free public schools are qualitatively different from State programs that finance private schools. The former enable the State to carry out its responsibility to establish and maintain schools that provide students with a free public education as a matter of right. The latter provide private entities with funding to establish and maintain schools that provide paying/subsidized students with the option of a private education as an alternative to their right to a free public education.

The argument that State of Ohio funding of all Cleveland schools "of choice" should be treated as a single integrated government funding program fails precisely because of this qualitative difference. Proceeding in this manner would, as stated in *Nyquist*, "prove[ ] too much." If the Ohio Voucher Program's financing of sectarian private school religious education could be constitutionally justified by viewing the Program in conjunction with State programs for financing free public schools "of choice," it follows that a government program of direct unrestricted payments to sectarian private schools, secular private schools and free public schools "of choice" based on the number of students attending such schools also would be constitutionally justified. And, as we have shown, the Court's Establishment Clause cases make it abundantly clear that such a direct-government-per-capita-payment program's financing of sectarian private school religious education would be unconstitutional. *Supra* pp. 14-17.[10]

There is, on the other hand, an unassailable Establishment Clause logic to this Court's consistent practice of analyzing a challenged government tuition grant program in its own

[10] Moreover, as the Brief *Amici Curiae* in Support of Respondents of the Ohio School Associations ably demonstrates, the magnet and community school programs as they currently operate in Cleveland are illusory alternatives to the Voucher Program for the vast majority of low-income Cleveland parents.

terms, and of considering only the parent/student aid-recipient options in spending the tuition grant. Inasmuch as the Establishment Clause is a bar to *government* financial support of religious education and indoctrination—and not a bar to *private-citizen* financial support of religious education and indoctrination—it follows that the first Establishment Clause question posed by tuition grant programs is whether the flow of unrestricted government moneys to sectarian private schools providing a religious education is "properly attributable to the State" or to "the genuinely independent and private choices of aid recipients."

Plainly, that is a question about the spending options available to parents who in fact receive a government tuition grant under the program—and not about the school enrollment options available to all parents in the relevant community, including those parents who do *not* receive a government tuition grant under the program and thus do *not* have any government tuition grant money to transfer to a private school. As the District Court in this case aptly stated, "the concern of the [Establishment] Clause is not whether a party has choices beyond those provided by a state aid program, but whether, when one chooses a state program—perhaps over other choices—he can exercise his options within that program without being steered toward a religious institution." State Pet. App. 119a.

2. In a less far-reaching variant on the foregoing theme, Petitioners and their *amici curiae* note that the Voucher Program permits the participation of adjacent suburban public school districts that charge tuition to out-of-district residents. And, although *no* suburban public school district—indeed no single suburban public school—has *ever* participated in either the current or predecessor Ohio voucher program, Petitioners/*amici curiae* argue that these *non-participating* schools should be included along with the participating schools in assessing the breadth of the educational options

available to Voucher Program parents and the nature of their "genuinely independent and private choices," *Witters*, 474 U.S. at 487, under the Program.

This argument is fatally flawed because it has no touch with reality. The tuition voucher checks provided by the Ohio Voucher Program can *only* be applied towards the payment of tuition *at participating schools*. Plainly, the Voucher Program's permission for adjacent suburban public school districts to participate—which those districts consistently and uniformly have declined to do—does not expand the educational options that are in fact available to Voucher Program parents or alter the nature of their Program "choices."

In this respect, the Petitioners/*amici curiae* who dispute the Court of Appeals' conclusion that the structure of the Ohio Voucher Program creates "a financial disincentive for public schools outside the district to take on [voucher] students," State Pet. App. 26a, miss the point entirely. The Taylor Petitioners, for example, assert that "[t]he premise [for that conclusion] is factually inaccurate," and that "[t]he explanation for [the schools'] nonparticipation must lie elsewhere." Taylor Br. at 39.[11] But, as the Taylor Petitioners

[11] While the Court of Appeals' overall point—that the Voucher Program creates "a financial disincentive" for participation by adjacent suburban public school districts—is correct, the Court of Appeals' numbers—that these schools would receive "a maximum of $2,250" per voucher student if they did participate—are not. (The Taylor Petitioners' calculation that participating suburban public schools would receive the substantially higher per-voucher-student amount "of about $6,544," *see* Taylor Br. at 39, is incorrect as well.)

According to information on the Ohio Department of Education's official web-site, adjacent suburban public schools that participated in the Program would receive, on average, approximately $4,750 per voucher student. *See* Brief *Amici Curiae* in Support of Respondents of the Ohio School Associations. At the same time, the average cost of educating a student in these schools exceeds $9,000. *See id.* Thus, the State's own

themselves add, "[w]hether [the suburban public schools'] motivations [for non-participation] are malign or beneficent . . . should be irrelevant to [the Ohio Voucher] [P]rogram's constitutionality." *Id.*

In terms of "genuinely independent and private choices of aid recipients," *Witters*, 474 U.S. at 487, the dispositive point is this: during the six school years in which the two Ohio voucher programs have been in operation, no parent ever has been able to use a tuition voucher to send his/her child to an adjacent suburban public school. To treat an educational option that exists on paper but not in fact as relevant to the issue of the Voucher Program parents' "genuinely independent and private choices" would make a mockery of that concept as articulated in *Witters*.[12]

In this respect, this case is far removed not only from *Witters* itself, but also from *Mueller v. Allen*, 463 U.S. 388 (1983)—and the decisions below are entirely consistent with *Mueller*'s admonition that the constitutionality of a facially-neutral government-aid program does not turn "on annual reports reciting the extent to which various classes of private citizens claimed [the] benefits . . . to which they are entitled" under the program. *Id.* at 401. Following this Court's lead in *Nyquist*, *Sloan* and *Witters*—the last of which post-dated

numbers confirm that the Voucher Program does indeed create a "financial disincentive" for participation by these schools.

[12] We would also note that the Ohio Legislature could have been under no illusions regarding the prospect that adjacent suburban public school districts would opt to participate in the Ohio Voucher Program, given these school districts' record of total *non-participation* under the predecessor voucher program. Nor was the Ohio Legislature in want of the power to make the adjacent suburban public school districts and their schools participate in the Program. *See Simmons-Harris v. Goff*, *supra*, 1997 WL 217583, at *8. In light of these realities, the Ohio Voucher Program's continued permission for adjacent suburban public school district participation at the district's option is an-all-too-transparent sham.

Mueller—the courts below limited their Establishment Clause inquiry to an assessment of the breadth of the educational options *actually available* to Voucher Program parents. As the District Court put it, proceeding in that way "is very different than annually taking account of the number of [parents] who have availed themselves of a particular option." State Pet. App. 99a. *See also id.* ("[D]etermining whether an aid recipient has neutral options available under a program is not the same as probing how the recipient has chosen to exercise those options.").

(G) Since *Witters*, the Court has considered three Establishment Clause challenges to government school-aid programs providing various restricted forms of non-monetary aid. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000). We confine ourselves to noting these cases because they are too far removed from this case to cast any cross-light on the first Establishment Clause question presented by the Ohio Voucher Program.

In *Zobrest*, the Court held that the Establishment Clause does not prohibit an Arizona school district from providing a sign-language interpreter to accompany a deaf student to a Roman Catholic high school, pursuant to the Individuals with Disabilities Act ("IDEA"). In *Agostini*, the Court held that the Establishment Clause does not prohibit the New York City school district from sending public school teachers to sectarian private schools to provide remedial education to disadvantaged students, pursuant to Title I of the Elementary and Secondary Education Act of 1965. And, in *Mitchell*, the Court held—albeit through two separate opinions—that the Establishment Clause does not prohibit a Louisiana school district from lending educational materials and equipment to sectarian private schools, pursuant to Chapter 2 of the Education Consolidation and Improvement Act of 1981.

The salient point is that the decision in each of these cases turned on a factor that places them in a wholly different Establishment Clause category than *Nyquist*, *Sloan*, *Witters* and the instant case—*i.e.*, the lack of any evidence that the restricted government aid provided by the challenged program was being used at sectarian private schools in violation of the injunction against government-financed religious education and indoctrination.[13] As the *Agostini* Court explained:

> [T]here is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students. [521 U.S. at 226-27.]

See also Mitchell, 530 U.S. at 840 (O'Connor, J., concurring) ("In both *Agostini*, our most recent school-aid case, and *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968), we rested our approval of the relevant programs in part on the fact that the aid had not been used to advance the religious missions of the recipient schools.").[14]

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[13] To be sure, *Zobrest* and *Agostini* both invoke the *Witters* principle that government aid to parents/students that is used at a sectarian private school is not "properly attributable to the State" where the aid is provided under a general program "in no way skewed towards religion." *See Zobrest*, 509 U.S. at 10; *Agostini*, 521 U.S. at 228. But to that extent, *Zobrest* and *Agostini* add nothing to *Witters* itself.

[14] In light of the Court's treatment of *Allen* both in *Mitchell* and in *Nyquist*, *see* 413 U.S. at 781-82 & n.38, 784-85, the State Petitioners' extensive reliance on *Allen*, *see* State Br. at 29, 32, 36, is badly misplaced. Here, unlike *Allen*, it most certainly is the case that Ohio Voucher

It bears particular emphasis that—in marked contrast to the Ohio Voucher Program, and the tuition grant programs in *Nyquist*, *Sloan* and *Witters*—the government aid programs in *Zobrest*, *Agostini* and *Mitchell* did *not* direct any government moneys into "the coffers of religious schools." *Agostini*, 521 U.S. at 228. That basic Establishment Clause difference explains: (a) why the Court in *Nyquist, Sloan and Witters* approached the Establishment Clause question there presented from the analytical perspective of whether the flow of government moneys into "the coffers of religious schools" was "properly attributable to the State" or to "the genuinely independent and private choices of aid recipients"; (b) why that is the proper analytical approach in this case as well; and (c) why the decisions below are entirely consistent in both their analytical approach and in their result with the Court's decisions in *Zobrest*, *Agostini* and *Mitchell*.

In short, it is the *Nyquist/Sloan/Witters* line of cases that is on-point here. And, as we have shown, this case is on all fours with *Nyquist* and *Sloan* and far removed from *Witters*. Under *Nyquist* and *Sloan*, as informed by *Witters*, it cannot be denied that the Ohio Voucher Program aid that finances religious education and indoctrination *is* "properly attributable to the State," and that the Program thus runs afoul of the Establishment Clause.

Program aid has "been used to advance the religious missions of the recipient schools."

II. THE OHIO VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE IN TWO ADDITIONAL SEPARATE AND INDEPENDENT WAYS.

A. The Voucher Program Creates A Financial Incentive For Voucher Program Parents To Choose A Sectarian Private School Providing A Religious Education

Because Ohio Voucher Program aid finances religious education and indoctrination, and because that aid is "properly attributable to the State," the Program violates the Establishment Clause. But the fact that the universe of participating private schools is so heavily skewed towards sectarian private schools providing a religious education means that the Program also violates the Establishment Clause "in a second respect." *Agostini*, 521 U.S. at 230. As the *Agostini* Court explained, "the criteria by which an aid program identifies its beneficiaries . . . might themselves have the [impermissible] effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Id.* at 230-31.[15]

This would, of course, be the case if the religious tenets or practices of the applicants were factored into the process used to allocate the government aid, but *Nyquist*, *Sloan* and *Witters* indicate that a program also can create such a financial

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[15] Although, as we show in text, this second respect is closely related to the first in both factual and doctrinal terms, *Agostini* makes clear that it stands as a *separate* and *independent* ground for holding that the Ohio Voucher Program violates the Establishment Clause. *See Agostini*, 521 U.S. at 230-31 ("Although we examined in *Witters* and *Zobrest* the criteria by which an aid program identifies its beneficiaries, we did so solely to assess whether any use of that aid to indoctrinate religion could be attributed to the State. A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion."). *See also id.* at 234.

incentive if the criteria that structure the universe of participating schools—be they restrictions on the amount of the participating schools' normal tuition that the program will pay for, or restrictions on where the participating schools must be located—so constrain the available program options that the great majority of parents must send their children to sectarian private schools providing a religious education in order to obtain the benefits that the program offers.

In *Nyquist*, the Court found that while the New York tuition grant program criteria left eligible parents "absolutely free" *in theory* to spend their tuition grants on a secular education, the program criteria so narrowly constrained their available program options as *in effect* to create "an incentive [for] parents to send their children to sectarian schools." 413 U.S. at 786. Likewise, in *Sloan*, the Court found that while the Pennsylvania tuition grant program criteria did not "tell[ ] parents how they must spend the amount received," 413 U.S. at 831, the tuition grant benefit reasonably could be viewed "as an incentive to parents to send their children to sectarian schools," *id.* at 832. The *Witters* Court, in contrast, found that the Washington tuition grant program "create[d] no financial incentive for students to undertake sectarian education," because *both* in theory *and* "as a practical matter" eligible students "have full opportunity to expend [their] vocational rehabilitation aid on wholly secular education," and "rather greater prospects to do so." 474 U.S. at 488.[16]

In this second respect, the Ohio Voucher Program once again is on all fours with the programs struck down in *Nyquist* and *Sloan*, and far removed from the program upheld

[16] The Court's post-*Witters* decisions in *Zobrest* and *Agostini* are to the same effect: in both cases, the Court found that the aid program created no incentive to undertake a religious education because the program criteria gave parents the option to use their aid at *any* elementary or secondary school of their choice, be it sectarian or nonsectarian, public or private. *See Zobrest*, 509 U.S. at 9-10; *Agostini*, 521 U.S. at 231-32.

in *Witters*. Here—no less than in *Nyquist* and *Sloan*—the structure and operation of the Voucher Program so narrowly constrain the options that are available to parents who choose to participate in the Program as to leave the great majority of them no option but to send their children to sectarian private schools providing a religious education in order to obtain the benefits of the Program. Thus, "the criteria [of the Ohio Voucher Program] themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination," *Agostini*, 521 U.S. at 231, in violation of the Establishment Clause.

B. The Voucher Program Creates A Public Perception That The State Is Endorsing Religious Practices And Beliefs

A consistent theme of Petitioners and various *amici curiae* is that the Ohio Voucher Program is acceptable under the Establishment Clause because the Voucher Program moneys that flow to sectarian private schools providing a religious education under the Program do so indirectly, thus avoiding what these Petitioners/*amici curiae* claim is the *real* constitutional infirmity in a government program that makes direct payments to such schools on a per-capita basis—*i.e.*, the public perception that the State is endorsing religious practices and beliefs. This argument is doubly defective.

A direct-government-per-capita-payment program violates the Establishment Clause in the first instance because government moneys are *in fact* financing religious education and indoctrination. *Supra* pp. 12-15. To be sure, an *additional* constitutional infirmity in such a government aid program lies in the inevitable public perception that the State is endorsing religious practices and beliefs. But the absence of this additional constitutional infirmity cannot save a government aid program that is for a separate and independent reason unconstitutional.

Beyond that, the argument made by Petitioners/*amici curiae* fails on its own terms, inasmuch as the Ohio Voucher Program does indeed create the public perception that the State is endorsing religious practices and beliefs. Given that over 80% of the schools that receive Voucher Program moneys are sectarian private schools providing a religious education, and that an even higher percentage of the available student places are in such schools, the public perception hardly could be otherwise.

Here again, the Ohio Voucher Program stands in marked contrast to the tuition grant program upheld in *Witters*—where the broad variegated range of educational options available to students, only a small handful of which were sectarian, allowed the Court to conclude that the State *neither* was financing religious education in violation of the Establishment Clause *nor* "confer[ing] any message of [S]tate endorsement of religion" in violation of that Clause. *Witters*, 474 U.S. at 489. *See also id.* at 493 (O'Connor, J., concurring) ("No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief."). *Compare Grand Rapids, supra*, 473 U.S. at 399-400 (O'Connor, J., concurring) ("When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools.").

III. PETITIONERS' OTHER EFFORTS TO SUPPORT THE OHIO VOUCHER PROGRAM ARE UNAVAILING

(A) In a last-ditch effort to support the Ohio Voucher Program, Petitioners make two additional arguments, both of which are squarely foreclosed by this Court's precedents.

1. According to the Taylor Petitioners, our showing that the Ohio Voucher Program has the effect of advancing religion is not in and of itself legally sufficient to establish an Establishment Clause violation. The Taylor Petitioners contend that the Program passes constitutional muster because "the Program's primary effect is not to subsidize religion, but to broaden educational options for disadvantaged families." Taylor Br. at 28. *See also id.* at 14-15.

The proposition that government aid programs are to be analyzed and judged in such a manner under the Establishment Clause was specifically rejected in *Nyquist*. The appellees there, "focusing on the term 'principal or primary effect' which this Court has utilized in expressing the second prong of the three-part [*Lemon v. Kurtzman*] test," argued "that the Court must decide in these cases whether *the* 'primary' effect of New York's tuition grant program is to subsidize religion or to promote [the State's] legitimate secular objectives." 413 U.S. at 783 n.39 (emphasis added). The *Nyquist* Court responded:

> We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it *also* has the direct and immediate effect of advancing religion. [*Id.* at 783-84 n.39 (emphasis added).]

As the *Nyquist* Court elaborated, a law which has "*a* primary effect that advances religion" violates the Establishment Clause. *Id.* at 774 (emphasis added).

2. On a related tack, Petitioners (joined by the United States and other *amici curiae*) argue that government-aid programs such as the Ohio Voucher Program should not be analyzed and judged under the *Lemon v. Kurtzman* "effect" test at all, but rather under the *Lemon v. Kurtzman* "legislative purpose" test *standing alone*. Taking up Judge Ryan's dissent in the court below, they contend that the tuition grant

program in *Nyquist* failed because the New York Legislature's purpose was to assist financially-troubled sectarian private schools, and that the Ohio Voucher Program should pass muster because the Ohio Legislature's purpose was to broaden the educational options available to low-income students who reside within a troubled public school district. *See* State Br. at 17, 41-44; Taylor Br. at 18-19, 25; Hanna Perkins Br. at 45-47. *See also e.g.* United States Br. at 11, 26-27. This argument flies in the face of *Nyquist*.

First, the legislative findings supporting the New York tuition grant program—*e.g.*, the need to promote a "healthy competitive and diverse alternative to public education"; to give "lower-income families" an equal opportunity "to select among alternative educational systems"; and to safeguard against the "aggravat[ion] [of] an already serious fiscal crisis in public education," *see Nyquist*, 413 U.S. at 764-65—parallel the asserted purposes of the Ohio Voucher Program.

Second, in *Nyquist* and in *Sloan*, the Court readily concluded that the challenged tuition grant programs passed the *Lemon v. Kurtzman* "legislative purpose" test, *see Nyquist*, 413 U.S. at 773-74; *Sloan*, 413 U.S. at 829-30, but, as we have seen, struck down those programs because they had the impermissible *effect* of advancing religion. In so doing, the *Nyquist* Court observed that "the propriety of a legislature's purposes may not immunize from scrutiny a law which . . . has a primary effect that advances religion." 413 U.S. at 774.

(B) Finally, Petitioners and various *amici curiae* take leave of the Establishment Clause and its jurisprudence entirely. They attempt to demonstrate that voucher programs provide an educationally sound response to the problems confronting the Cleveland City School District and urban school districts generally, and they broach the idea (if not the formal argument) that the Ohio Voucher Program should be upheld on that basis.

Were this the appropriate forum for an educational policy debate, we would show that much of what Petitioners/*amici curiae* have to say in this regard is inaccurate or misleading. And we would—because it is so much the better part of logic—explain why alleged panaceas that drain sorely-needed funds from public schools to enable a relatively few students to attend private schools are not a solution to the problems of urban education, but an impediment to the development and the funding of effective solutions to those problems. Evidentiary support for this point is found in, for example, the Brief *Amicus Curiae* in Support of Respondents of the National School Boards Association.

But this is not the appropriate forum for an educational policy debate. This case is about the Establishment Clause—and, specifically, what that Clause has to say about government financing of religious education and indoctrination. In that regard, it is "[t]he responsibility of this Court . . . to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations." *Evans v. Abney*, 396 U.S. 435, 447 (1970). The court below was exactly right in stating:

> We recognize the significance that this issue holds for many members of our society. The issue of school vouchers has been the subject of intense political and public commentary, discussion, and attention in recent years, and we would be remiss if we failed to acknowledge the seriousness of the concerns this case has raised. We do not, however, have the luxury of responding to advents in educational policy with academic discourse on practical solutions to the problem of failing schools; nor may we entertain a discussion on what might be legally acceptable in a hypothetical school district. We may only apply the controlling law to the case and statute before us. [State Pet. App. at 10a.]

To be sure, scrupulous judicial enforcement of constitutional limitations may on occasion limit the options that

otherwise would be available to government for dealing with a particular problem, and prevent the implementation of a particular solution that may appear—at least to its proponents—to have great potential. Again, voucher proponents are wrong about that potential, but even if they were right,

> constitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But, constitutional lines are the price of constitutional government. [*Agostini*, 521 U.S. at 254 (Souter, J., dissenting).]

See Nyquist, 413 U.S. at 788-89 ("However great our sympathy . . . for [parents entitled to aid under the New York tuition grant program] . . . and notwithstanding the high social importance of the State's purposes, . . . neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted.") (internal quotations and citations omitted).

IV. THE CONCLUSION THAT THE OHIO VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE DERIVES FURTHER PERSUASIVE FORCE FROM THE DOCTRINE OF *STARE DECISIS*

As we have shown, the Ohio Voucher Program is *identical*—in all respects deemed constitutionally significant by the Court in its Establishment Clause government-aid program cases—to the New York and Pennsylvania tuition grant programs struck down in *Nyquist* and *Sloan*. Accordingly, it would be necessary to overrule *Nyquist* and *Sloan*—and in turn destroy the coherent doctrinal base that those decisions and *Witters* form—in order to sustain the Ohio Voucher Program. This is unwarranted—first because *Nyquist* and *Sloan* are well-reasoned decisions, solidly grounded in basic Establishment Clause principles—and also because, as decisions of this Court, they carry the added force

of *stare decisis*. And, "while *stare decisis* is not an inexorable command, particularly when [the Court is] interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal quotations and citations omitted). In this connection, two points bear emphasis.

First, there is no "special justification" for departing from *Nyquist* and *Sloan* as precedents of this Court. "No evolution of legal principle has left [*Nyquist*'s/*Sloan*'s] doctrinal footings weaker than they were in 1973." *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992). To the contrary, *Witters*—the Court's one post-*Nyquist*/*Sloan* Establishment Clause case involving a government program of tuition grants to parents/students—fully embraces *Nyquist* and *Sloan*, and treats them as setting out the proper legal principles for assessing Establishment Clause challenges to this type of government program. *Supra* pp. 21-24, 36-37.

Equally to the point, the *Nyquist*/*Sloan*/*Witters* legal principles have "in no sense proven unworkable." *Casey*, 505 U.S. at 855 (internal quotations omitted). And, those legal principles do not in terms depend on any "factual assumptions" that "time has overtaken." *Cf. Casey*, 505 U.S. at 860. *See also id.* at 861-64. That is not to say that questions do not remain as to the constitutionality of possible tuition grant programs that are less skewed towards religion than the Ohio Voucher Program and the programs struck down in *Nyquist* and *Sloan*, but more skewed towards religion than the program upheld in *Witters*. *See supra* pp. 24-25. But those are line-drawing questions "within judicial competence." *Casey*, 505 U.S. at 855.

Second, the Court recognized in *Nyquist* and *Sloan* that the cases before it "involve[d] an intertwining of societal and constitutional issues of the greatest importance," 413 U.S.

at 759, and the Court reiterated its "inability to perceive with invariable clarity the 'lines of demarcation in this extraordinarily sensitive area of constitutional law,'" *id.* at 761 n.5 (*quoting Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). *See also Witters*, 474 U.S. at 485. In so doing, the Court recognized that its decisions in *Nyquist* and *Sloan*, like any judicial decision on any such constitutional question, are not irrefutably right (or wrong) in the sense that a mathematical proof is right (or wrong). This lends greater rather than lesser "persuasive force," *Dickerson*, 530 U.S. at 443, to the doctrine of *stare decisis*.

It is precisely where the Court after due deliberation has established a precedent in a sensitive and difficult area of constitutional law that the Court has been most mindful of the need for continuity in the law, most sensitive to the harm to the law worked by the overruling of precedents based on "a present doctrinal disposition to come out differently from the [prior] Court," *Casey*, 505 U.S. at 864, and most insistent that a break in the law's continuity is warranted only by subsequent developments in the Court's jurisprudence that demand such a break. As we have shown, there have been no such subsequent developments in the Court's post-*Nyquist*/*Sloan* Establishment Clause jurisprudence.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

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In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

**On Writ of Certiorari to the
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27 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. THE OHIO PROGRAM IS A RELIGIOUSLY-NEUTRAL PROGRAM OF PRIVATE CHOICE. ... 4

A. True Private Choice 9

B. Religiously-Neutral Criteria 16

II. *NYQUIST* DOES NOT GOVERN THIS CASE..... 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Agostini v. Felton,
521 U.S. 203 (1997)..... 9, 20

Aguilar v. Felton,
473 U.S. 402 (1985)..... 20

Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,
512 U.S. 687 (1994)..... 11, 12

Bowen v. Kendrick,
487 U.S. 589 (1988)..... 13, 14

Committee for Pub. Educ. & Religious Liberty v. Nyquist,
413 U.S. 756 (1973)..... passim

Edwards v. Aguillard,
482 U.S. 578 (1987)..... 13

Everson v. Board of Educ. of Ewing,
330 U.S. 1 (1947)..... 5

Flast v. Cohen,
392 U.S. 83 (1968)..... 8

Good News Club v. Milford Cent. Sch.,
121 S. Ct. 2093 (2001)..... 5, 13

Lee v. Weisman,
505 U.S. 577 (1992)..... 13

Mitchell v. Helms,
530 U.S. 793 (2000)..... 7

Mueller v. Allen,
463 U.S. 388 (1983)..... passim

Planned Parenthood of Southeastern Pa. v. Casey,
505 U.S. 833 (1992)..... 20

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995)..... 6, 7

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973)..... 16

School Dist. of the City of Grand Rapids v. Ball,
473 U.S. 373 (1985)..... 20

Simmons-Harris v. Zelman,
234 F.3d 945 (6th Cir. 2000) 10, 14

Sloan v. Lemon,
413 U.S. 825 (1973)..... 2, 4, 10, 19

Wallace v. Jaffree,
472 U.S. 38 (1985)..... 16

Widmar v. Vincent,
454 U.S. 253 (1981)..... 19

Witters v. Washington Dep't of Servs. for the Blind,
474 U.S. 481 (1986)..... passim

Wolman v. Walter,
433 U.S. 229 (1977)..... 17

Zobrest v. Catalina Foothills Sch. Dist.,
509 U.S. 1 (1993)..... 7, 9

Statutes

R.C. 3313.976(A)(3) 7

R.C. 3313.976(A)(4) 7

R.C. 3313.976(A)(6) 7

R.C. 3313.976(A)(8) 15

R.C. 3319.979(A)(2) 6

Other Authorities

GAO Rep. No. 01-914 *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee* (August 31, 2001) 15

INTRODUCTION

Respondents urge the Court to brush aside the compelling context of the Ohio Program and to focus narrowly on the scholarship component. Little is said about the intertwined socioeconomic and academic problems that Cleveland faced in the mid-1990's and that continue to plague inner-city districts across the country. Respondents instead trumpet an exclusionary approach mandated, as they see it, by *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Under respondents' view, States are disabled—due to the high percentage of religiously-affiliated schools that prevail not only in Cleveland but in much of the nation—from providing a system of genuine choice for parents who qualify under indisputably neutral criteria.

As we demonstrated in our opening brief, however, Ohio's General Assembly, with the full approbation of Governor Voinovich in 1996 and Governor Taft in 1999, responded comprehensively to the needs of Cleveland's low-income families, and fashioned a program that avails itself of virtually every tool potentially available for providing better educational opportunity. From after-hours tutoring for public school students to encouraging surrounding districts to accept Cleveland schoolchildren, Ohio has implemented common-sense, practical solutions to the seemingly intractable problems facing so many inner-city students.

To interdict Ohio's program, respondents perform elaborate, but ultimately unconvincing, contortions of this Court's considerable body of Establishment Clause law. Faced with this Court's emphasis Term after Term on the key elements of true private choice and neutrality, respondents look backward a generation ago and then, in a novel act of legal surgery, graft *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), onto *Nyquist* and

Sloan v. Lemon, 413 U.S. 825 (1973). This is classic pick-and-choose advocacy, plucking language from one setting and planting it elsewhere. It is an approach that studiously neglects this Court's neutrality and private choice teachings—teachings on which policymakers in Ohio (as well as Wisconsin and Florida) have come to rely.

If, as we maintain, Ohio's program satisfies this Court's standards for religiously-neutral programs affording true private choice, then respondents—and the Court of Appeals majority—are in error. On those twin scores, there can be no doubt that the Ohio Program passes muster: first, because program eligibility for both schools and students is determined by religiously-neutral criteria; and, second, because no state money, not one cent of Ohio funding, flows to any religiously-affiliated school without an express parental decision as to what is right for that family's child. This indispensable requirement of a prior, parental decision that is entirely unchannelled by state actors is one that respondents would cavalierly dismiss. But respondents' alternative approach of attributing to Ohio the responsibility for managing the makeup of Cleveland's private-school universe is not only counterintuitive, it tugs at this Court's contrary teachings in *Mueller v. Allen*, 463 U.S. 388 (1983). *Mueller* recognizes authoritatively that individuals in our society may, as a matter of conscience, establish religiously-affiliated elementary schools and that state benefits may flow indirectly to those schools, so long as parents freely choose their services.

In the end, respondents' eloquent calls for freedom of conscience ironically suggest results that are the polar opposite of their rigidly exclusionary approach. Put simply, States need not and should not display exclusion-driven animosity toward duly accredited private schools on the basis of religious affiliation.

ARGUMENT

This case poses a fundamental issue in the nation's struggle to improve the lifetime prospects of its school children: Whether the Constitution forbids state educators from using educational choice as a policy tool for making an immediate difference in the lives of disadvantaged students. That this tool does in fact make a difference is reflected above all in low-income parents' own assessments of the Ohio Program, *see* Brief of State Petitioners ("State Brief") at 10, and similar programs elsewhere. In-depth follow-up studies of the pioneering Milwaukee Parental Choice Program ("MPCP") conclude, for example, that choice-program parents are more satisfied in every respect with their chosen private schools than with their former public schools. *See* Brief *Amicus Curiae* of Wisconsin at 15. Milwaukee parents are far less likely to change their child's chosen school, *id.*, and much more likely to become involved in their child's education, *id.* at 16.

Like their parents, choice-program students are generally more involved in their schools. *See* Brief *Amicus Curiae* of American Education Reform Council ("AERC") at 9-10. And a mountain of evidence demonstrates that classrooms in school-choice programs are, on average, significantly more racially integrated than their public school counterparts. *See* Brief *Amicus Curiae* of Black Alliance for Educational Options at 25-26; Brief *Amici Curiae* of Center for Education Reform, *et al.*, at 26; Brief *Amicus Curiae* of Wisconsin at 16.

Parental satisfaction, student involvement, and racial integration are important, but the critical yardstick for any school is academic performance. It is significant, then, that two independent studies have measured academic gains for the (mostly low-income) Ohio Program students as compared

to their peers. *See* State Brief at 10. Studies of private, means-tested scholarship programs in New York City, Washington, D.C., and Dayton, Ohio, have similarly found academic gains from choice. *See* Brief *Amicus Curiae* of AERC at 7. And three separate studies of the Milwaukee program conclude that MPCP students' performance is as good as or better than that of their public school counterparts. *See* Brief *Amicus Curiae* of Wisconsin at 16-17. In view of such evidence, it would be troubling if the Constitution were to erect, as respondents suggest, a nearly insuperable barrier separating low-income children from the educational opportunities their more affluent peers take for granted. Nothing in the Establishment Clause demands such a socially dysfunctional result.

I. THE OHIO PROGRAM IS A RELIGIOUSLY-NEUTRAL PROGRAM OF PRIVATE CHOICE.

Both sets of respondents seek to resurrect bygone modes of constitutional inquiry. They reject, in particular, the Court's recent articulations of the principles of true private choice, governmental neutrality toward religion, and freedom of conscience. They revert instead to long-discarded notions of constitutionally-mandated hostility between religious and governmental institutions.

Even on their face, respondents' arguments are not just distinct, but somewhat contradictory. The Simmons-Harris respondents contrive a test based on a narrow reading of this Court's decision in *Witters* and a never-before-seen "*Nyquist-Sloan-Witters* trilogy." While acknowledging that the State "issue[s] tuition voucher checks to the parents of selected children," Brief for Respondents Doris Simmons-Harris, *et al.*, ("Simmons-Harris Brief") at 1, the Simmons-Harris respondents still insist that Program scholarships represent impermissible *direct* subsidies to participating

religious schools. Specifically, they allege that the structure of Ohio's program purportedly makes inevitable a flow of significant amounts of aid to schools with religious affiliations. *Id.* at 12. For the Simmons-Harris respondents, school aid programs can be neatly arranged along a continuum defined by the predominance of religious affiliations. One pole of that continuum stands within constitutional limits; the other stands outside. Tellingly, the location of the constitutional tipping-point in the vast expanse in between is nowhere defined. *Id.* at 24-25.

In sharp contrast, the Gatton respondents begin from an opposite (and equally faulty) premise—that the "automatic endorsement to religious schools" of checks initially made payable to parents produces "the parents' rubber-stamped endorsement" of tuition vouchers. Brief of Respondents Sue Gatton, *et al.*, ("Gatton Brief") at 8-9. The Gatton respondents thus insinuate that the Program's payment mechanisms are a sham for disguising direct aid to schools as indirect aid to parents. *Id.* Once the parents' tuition reaches religious schools, the Gatton respondents argue, there are no limitations on the schools' use of that tuition, and, specifically, the schools may "proselytize" participating students. *Id.* at 9-22. The Gatton respondents would reduce the Court's neutrality and private choice tests—the result of a painstaking, decades-long doctrinal advance from *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), to *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001)—to little more than "scraps of language." Gatton Brief at 33. They would then combine the fact that there is a "preponderant majority" of religiously-affiliated schools in Cleveland with their quarrels with the scholarship tuition amounts and conclude that religious teachings in religious schools are in some important sense attributable to the State of Ohio. *Id.* at 46.

Both sets of respondents largely ignore the Ohio Program's studied religious neutrality and its scrupulous protection of rights of conscience and the exercise of true, private choice. Both groups ignore, in particular, the critical distinction between school aid programs that move benefits directly from government to religious schools and those that *permit* benefits to flow to religious schools, but only indirectly and as the result of intermediate, deliberate, private, and truly independent choices of adult citizens.

Most importantly, the Program's payment mechanisms are (contrary to the Gatton insinuations) finely tailored to guarantee parental choice. These payment mechanisms prescribe that individualized scholarship payments, sent by check to participating schools but made out to Program parents, be individually endorsed over by parents to the schools. Program schools with children attending for only parts of a school year—for instance, in cases where students transfer—have their state payments "proportionally reduced." Ohio Revised Code ("R.C.") 3319.979(A)(2). These procedures ensure that schools receive payment only for services rendered and that parents are assisted in getting scholarship checks on time to their intended destinations. They track time-tested expedients used in analogous contexts—for example, the mailing of government reimbursements for medical services directly to service providers instead of indigent patients.

Aside from baseless insinuations, respondents have no answer for our emphasis on the constitutional importance of the private choices entrusted to (and made by) Cleveland parents. As varying opinions from members of this Court teach, private choices that embody citizens' own "independent discretion to put state money to religious use" serve to "break the circuit" between government and religion. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S.

819, 886 (1995) (Souter, J., dissenting) (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-13 (1993); *Witters*, 474 U.S. at 487; and *Mueller*, 463 U.S. at 399-400).

In a similar vein, both sets of respondents ignore the impact of the distinction between direct and indirect aid on perceptions of state endorsement of religion. As noted in our opening brief, State Brief at 21, "[i]n terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools." *Mitchell v. Helms*, 530 U.S. 793, 842-43 (2000) (O'Connor, J., joined by Breyer, J., concurring); *see also Rosenberger*, 515 U.S. at 849 (O'Connor, J., concurring); *Zobrest*, 509 U.S. at 22-23 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting); *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment).

Most importantly, respondents have no answer for the fact that reasonable observers would perceive nothing biased or "sectarian" in Ohio's program, which is rooted in the legitimate, religiously-neutral identification of school districts in need of improvement; a legitimate, religiously-neutral process for approving Program schools based on secular accreditation standards and requirements for admissions and teaching, R.C. 3313.976(A)(3), (4), (6); and, ultimately, a legitimate, religiously-neutral regime of parental choice. The Program thus ensures that Ohio's "governmental involvement" with religion largely begins and "end[s] with the disbursement of funds," *Zobrest*, 509 U.S. at 22 (Blackmun, J., dissenting), and hence that no reasonable grounds exist for concluding "that government is actually endorsing religion," *id.* at 22-23.

Lacking any answer for our reliance on neutrality and private choice, respondents employ variously throughout the Gatton brief no fewer than five standards that, in their view, define the limits of the Establishment Clause. They suggest first that no funds whatsoever may flow to religious institutions. Gatton Brief at 14-16 (citing *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968)). Second, they inconsistently suggest, no *unrestricted* aid may be given. *See, e.g.*, Gatton Brief at 7. Third, they argue, *direct* aid is *per se* impermissible. *See, e.g., id.* at 17. Next, they claim that only *substantial* aid is impermissible. *See, e.g., id.* at 39. And finally, the Gatton respondents suggest aid to religious institutions is prohibited unless it results from "compensation" for service, such as payment under the G.I. Bill. *See id.* at 36-37.

All but one of these standards, as applied by respondents, may be readily dismissed. Specifically, the vocational assistance grants upheld in *Witters* were every bit as much government "funding" and every bit as "direct," "non-compensatory," and "unrestricted" as any scholarship Ohio has given to Cleveland students at religiously-affiliated schools. Acceptance of any one of four of respondents' tests would *a fortiori* overrule *Witters*, while at the same time impugning a host of established programs providing similarly direct, non-compensatory, and unrestricted funding for social services. *See* State Brief at 41.

This leaves respondents entirely dependent on their remaining test—whether aid is "substantial." But this last test is undermined, not just by *Mueller* (where ninety-six percent of benefits went to parents with children in religious schools), but also by bedrock protections for freedom of conscience. The Establishment Clause is offended where government mandates support for religion in a constitutionally relevant sense. Properly applied, this

fundamental principle poses no threat to the social services programs that respondents would put in jeopardy. But that is not because the Constitution overlooks *de minimis* intrusions on rights, as a "substantial aid" test would suggest; rather, it is because neutrality and private choice serve, in Justice Souter's phrase, to "break the circuit" between government and religion.

A. True Private Choice

Respondents' reliance on a substantial aid test dependent on changeable statistics embodying point-in-time summaries of parental choices is fundamentally incompatible with this Court's respect for rights of conscience, specifically citizens' rights to obtain social services in a religious or non-religious setting of their own choosing. This Court long ago refused "to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401. *Mueller* thus declined to "consider these contentions in detail," *id.*, and in neither *Agostini* nor *Zobrest* were they determinative: "*Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school." *Agostini v. Felton*, 521 U.S. 203, 229 (1997); *id.* ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); *see also Witters*, 474 U.S. at 491 n.3 (Powell, J., concurring) (Validity of the program "does *not* depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training.") (emphasis added).

The Simmons-Harris respondents nonetheless place especially heavy reliance on current statistics. They argue that the Court has only upheld programs (like *Witters*) at one pole of the religious-participation continuum, while striking down programs (like *Nyquist* and *Sloan*) at the other end. Simmons-Harris Brief at 24-25. Likewise, the Gatton respondents also rely in part on the share of aid flowing to religious institutions, Gatton Brief at 17, 36, albeit while properly conceding that even *Nyquist* itself did not turn on "statistics that might vary from year to year . . . ," *id.* at 41.

The dispositive counter to either variation on the statistics theme is that here, as in *Mueller*, public money becomes available to religious schools "only as a result of numerous private choices of individual parents of school-age children." *Mueller*, 463 U.S. at 399. No action by Ohio has determined, much less preordained, the relative participation rates of religious and non-religious schools. In fact, a recent survey showed that 80.97 percent of the private schools in Ohio were religiously-affiliated—a figure remarkably close to the eighty-two percent Ohio Program figure that respondents would blame on calculated maneuvering by the Ohio General Assembly. Brief *Amici Curiae* of Florida, *et al.*, at 16-17.

Moreover, as the lower court recognized, yearly snapshot percentages of participating religious schools and percentages of students attending those schools fluctuate considerably. *Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000) (State Petitioners' Appendix ("State Pet. App.") at 5a). For instance, the number of students and schools participating in the Milwaukee program *quadrupled* shortly after the final rejection of the legal challenge to Milwaukee's program. *See, e.g.*, Brief *Amicus Curiae* of Wisconsin at 11. Given these fluctuating percentages, a given year's Program statistics—far from supplying grounds

for finding unconstitutionality—will merely reflect the aggregated results of true private choices as exercised in context of larger (but by no means religiously-motivated) programmatic events, such as the district court's injunction, the cloud of this ongoing litigation, and the implementation of the State's Community School Program.

Not deterred by evidence that Cleveland's citizenry, not Ohio's government, is responsible for the percentage of scholarship monies flowing to religious schools, respondents next offer two additional explanations for why these statistics matter. They suggest first that Ohio should have anticipated—and presumably "remedied"—the figures they find so objectionable, especially the fact that all of the public school districts adjacent to Cleveland thus far have decided against participation in the Program. Gatton Brief at 43; Simmons-Harris Brief at 31 n.12. They then suggest that Ohio—far from anticipating a certain participation profile—actually *created* this profile by offering scholarships with overly low tuition amounts. *See* Simmons-Harris Brief at 3, 30 n.11. Neither point has merit.

As noted above, the Program's share of participating religious schools closely tracks Cleveland's pre-existing religious and educational demographics. Any legislative or judicial attempt to define some purportedly more ideal religious-participation profile and then to conform participation rates to that target profile could lead only to two possible results, both unconstitutional: one-time unconstitutional gerrymandering to achieve pre-determined religious percentages; or repeated unconstitutional gerrymandering responding to religious choices that change year-to-year, and differ jurisdiction-to-jurisdiction. But as this Court made plain in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), any such "gerrymandering" would flatly violate the

Establishment Clause. *See*, *e.g.*, *id.* at 729 (Kennedy, J., concurring).

That respondents' emphasis on percentages leads inevitably to unconstitutional gerrymandering is all the more evident in light of the widely varying numbers and religious affiliations of private schools across, not only Ohio,[1] but the country as a whole. *See* Brief *Amici Curiae* of Florida, *et al.*, at 15-16. Over ninety percent of private schools in Iowa, Kansas, and Nebraska are religiously affiliated, for example, but that number drops to less than fifty percent in Maine, Massachusetts, New Hampshire, Rhode Island, Utah, and Vermont. *Id.* at 15-17. These wide differences in the prevalence of religious education (and, in respondents' view, eligibility for choice-based education) demonstrate that respondents advocate an Establishment Clause at war with itself—a Clause that simultaneously forbids and requires state action aimed at diluting free citizens' pre-existing willingness to affiliate with religious institutions.

Nor do accusations of "proselytizing" add anything of significance to respondents' statistical showing. *See* Gatton Brief at 43. The relevant decisionmakers here are parents, not schoolchildren. *See* State Brief at 25-26. Because adult

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[1] The Gatton respondents skew the data pertaining to religious schools in Columbus. Specifically, they engage in an undercount, limiting artificially their tallies to Columbus schools enrolling students "in at least grades K-3," Lodging for Respondents Sue Gatton, *et al.*, Affidavit of Donald J. Mooney, Jr. at ¶ 5. This is misleading, as there is no such requirement for participation in the Ohio Program. There are five additional non-religious schools in Columbus, not counted by respondents, that serve other grades in the K-8 range and would be eligible for participation if the program were extended to Columbus under its current terms.

parents are in control, respondents entirely miss the mark with their characterizations of Cleveland's religious schools as "permeated by religious instruction and indoctrination." Gatton Brief at 43. So long as Program participation remains a matter of true, parental choice, the Program remains constitutionally distinguishable from non-choice-based programs in which religious observance is "in a fair and real sense obligatory," *Lee v. Weisman*, 505 U.S. 577, 586 (1992), or where people might be misled to think that "the State, in a school setting, in effect *required* participation in a religious exercise," *id.* at 594 (emphasis added).

Contrary to respondents' assertions, this Court has never held that the impressionability of elementary school students is relevant to Establishment Clause analysis where state *inducements* or *compulsion* with regard to religious activity are lacking and, hence, the State itself is not advancing religion. *Good News Club*, 121 S. Ct. at 2105 (discussing *Edwards v. Aguillard*, 482 U.S. 578 (1987)). Indeed, for Ohio to make program eligibility determinations by picking and choosing among duly accredited schools on the basis of whether they engage in someone's definition of "proselytization" would, far from upholding Establishment Clause principles, serve only to unleash constitutional concerns as to excessive entanglement.

Similarly misguided are respondents' suggestions, Simmons-Harris Brief at 9, 31, that we err by stressing the importance of incentives encouraging adjacent public schools to enroll Cleveland students, even though no such schools have taken advantage of this opportunity. In this regard, *Bowen v. Kendrick*, 487 U.S. 589 (1988), in the somewhat analogous setting of a challenge to the Adolescent Family Life Act ("AFLA"), reasoned that the challenge was "undercut by" the AFLA's "*facially neutral* grant requirements," plus "the wide spectrum" of both religious

and nonreligious and public and private "organizations which are *capable of* meeting" those requirements. *Id.* at 610 (emphasis added). Here, as in *Bowen*, the extension of Program eligibility to all immediately neighboring public schools "capable of meeting" applicable requirements represents an important additional badge of constitutionality. Specifically, the fact that these public schools are invited to participate on the very same terms of *independent* institutional choice as their private counterparts reconfirms the Program's commitment to strict evenhandedness, not calibrated pressures seeking preordained results. Once the cloud of this litigation dissipates, the State hopes and expects that one or more adjacent districts will take another look at the financial advantages of participating in the Program and decide to avail itself of this opportunity.

But, even today, with the participation of adjacent public schools lacking, parents' choices are in no way limited to selecting from a menu of religiously-affiliated schools. As Judge Ryan correctly explained below, Cleveland parents have numerous educational options, only one of which is to participate in the scholarship program. *Simmons-Harris*, 234 F.3d at 968 (State Pet. App. at 45a-46a) (Ryan, J., dissenting in part). Parents can also choose to enroll their child in a neighborhood public school, with or without tutorial assistance, in a magnet school, or in a community (charter) school.[2] *See id.*

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[2] The Simmons-Harris respondents seek support from the Brief *Amici Curiae* of Ohio School Boards Association, *et al.*, to argue that magnet and community schools are "illusory" alternatives to the Program. Simmons-Harris Brief at 28 n.10. In making this argument, respondents and the *amici* disregard the significant curricular differences between a magnet school and a conventional public school, and then base their derision of community schools largely on

Notwithstanding Judge Ryan's forceful arguments in this regard, respondents still have cited no evidence that any non-religious Cleveland school has ever declined to participate in the Program, let alone declined to participate because of low tuition amounts. The Simmons-Harris respondents misleadingly suggest that a recent Government Accounting Office ("GAO") study "concluded" that the Program scholarship amount is tied to the tuition of religious schools. Simmons-Harris Brief at 3. In fact, the cited GAO statement is not a "conclusion" at all, but a mere recitation of the Sixth Circuit panel majority's baseless description of the Program. The much more relevant GAO statement is the finding that *all* private schools—religious and non-religious alike—subsidize students' education on their own or with funding from outside sources. *See* GAO Rep. No. 01-914 *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee* at 25 (August 31, 2001).

This point bears emphasis precisely because every other state-funded educational opportunity in Ohio is provided *entirely* at taxpayer expense, without any need for parental or other outside funding. Ohio's overall scheme thus provides strong incentives for parents to choose schools *outside the scholarship program.* Specifically, regardless of the school they choose, Program parents (unlike non-Program parents) must pay at least ten percent of their child's tuition (up to $250) either in cash or, if they lack the resources, in in-kind services. R.C. 3313.976(A)(8). Participating parents, therefore, must not only choose to apply for scholarships in the first instance, but also must make continuing financial sacrifices in order to continue to send their child to a Program school, whether religious or not. In these circumstances, any religious observance, or

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presumptions about the way parents *should*, in their view, make choices for their children.

even "proselytization," is undoubtedly "the product of free and voluntary choice by the faithful." *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985).

B. Religiously-Neutral Criteria

The adult parents of Program children exercise their private and independent choices within the context of a religiously-neutral scheme. As we argued at the outset, *see* State Brief at 29-31, two entirely neutral criteria determine the availability of Program benefits: a federal court order placing a school district under state control and family income. Respondents deride these critical elements of facial neutrality as "abstract," Gatton Brief at 38, but nowhere do they quarrel with the proposition that these stated criteria are religiously-neutral.

Respondents instead focus on scholarship amounts and the "educational purpose[s]" of participating schools, contending that they transform Ohio's solidly neutral regime into one that somehow "loads the scales" in favor of "religious uses," *id* at 44. In fact, unrefuted evidence shows that the Program's high levels of parental satisfaction derive largely from considerations related to foundational matters of safety, educational quality, parental involvement and the like. *See* State Brief at 10-11, 24.

Moreover, the fact that Ohio has exercised its prerogative to assign funding levels for Cleveland scholarships (in the same budgetary manner that it assigns funding for Cleveland public schools) cannot, as a matter of law, undermine the Program's neutrality. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44-55 (1973). And tellingly, whereas the Gatton respondents argue that the scholarship is a "preponderant grant[]" and thus overly generous, Gatton Brief at 44, the Simmons-Harris

respondents contradictorily claim that the amount is too stingy, Simmons-Harris Brief at 3, 30 n.11. As respondents' divided house demonstrates, there is no one "correct" scholarship amount, much less one "correct" amount that can be precisely modulated through judicial interpretation of the Establishment Clause.

In the final analysis, the religious percentages that respondents attribute to the "structure and operation" of Ohio's program, *id.* at 10, 37, existed in precisely the same measure in *Mueller*, where the Court upheld a Minnesota program that allowed ninety-six percent of tax benefits to flow to parents of children attending religious schools. *Mueller*, 463 U.S. at 401. *Mueller* described the challenged program as a means of "facilitating education of the highest quality for *all* children"—private and public school students alike. *Id.* at 395 (emphasis added) (quoting *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part)). *Mueller* emphasized (and the briefing before this Court establishes) that private school alternatives have real, positive impacts on public education; in particular, "[p]rivate schools may serve as a benchmark for public schools, in a manner analogous to the 'TVA yardstick' for private power companies."[3] *Mueller*, 463 U.S. at 395. For twenty years, middle- and upper-income students, parents, and school districts have taken advantage of *Mueller* to expand educational options and, hence, educational performance. Nothing in the Establishment Clause deprives lower-income

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[3] Studies of programs in Florida, Michigan, Arizona, and Milwaukee have documented the positive spillover effects of expanded private school availability on public school performance. *See, e.g.*, Brief *Amici Curiae* of Florida, *et al.*, at 7-8 (Florida); Brief *Amici Curiae* of Rudolph W. Giuliani and John O. Norquist at 20-22 (Milwaukee); Brief *Amicus Curiae* of AERC at 12-14.

families and communities—families and communities with much greater need—from enjoying these same opportunities through scholarship initiatives like the Ohio Program.

II. *NYQUIST* DOES NOT GOVERN THIS CASE.

While respondents continue to lean heavily on *Nyquist*, that decision addresses a much different sort of program—one self-consciously directed to improving the viability of parochial *schools* as opposed to the education of individual *students*. More troubling still, respondents' hard reading of *Nyquist* is irreconcilable with larger, deeply-rooted principles of Establishment Clause jurisprudence.

Our opening brief explains that both respondents and the Sixth Circuit majority below have consistently overlooked "the dispositive distinction that *Nyquist*'s program was intended to 'provide assistance to private *schools*,' [*Nyquist*, 413 U.S.] at 783 (emphasis added), whereas Ohio's is intended to provide assistance to public- and private-school *students*." State Brief at 43. Respondents offer no convincing responses to this crucial distinction.

Respondents do contend, as they did below, that our emphasis on the distinction between aid to *schools* and aid to *students* is inconsistent with *Nyquist*'s ruling that the challenged New York program was enacted for "secular purposes." Gatton Brief at 22 n.4. But *Nyquist* itself indicates the opposite. It makes clear that "secular purposes," as *Nyquist* uses the term, refers to governmental actors' motivations, that is, to their reasons for adopting a given educational program. *Nyquist* holds that, even when acting pursuant to secular motivations, States may not pursue secular goals through means specifically *designed* to bring parochial schools (as institutions) up to governmental conceptions of a model that will appeal to religious parents.

In other words, governments may not enact backward-looking, parochial school improvement regimes, even when prompted by ostensibly secular motivations "like preserving educational diversity, promoting free exercise of religion, and forestalling overcrowding of public schools." State Brief at 43 (quoting *Nyquist*, 413 U.S. at 764-65). Moreover, whereas respondents say that *Sloan v. Lemon* buttresses their reading of *Nyquist* (*see, e.g.*, Simmons-Harris Brief at 20-21; Gatton Brief at 41), in fact, *Sloan* turned on precisely these same distinctions. *Sloan* thus characterizes the Pennsylvania statute it invalidated as, like *Nyquist*'s New York statute, intended "at bottom" "to preserve and support religion-oriented institutions." *Sloan*, 413 U.S. at 832. There is therefore no tension, much less contradiction, between the Court's ruling in either *Sloan* or *Nyquist* and Ohio's forward-looking, much needed aid for disadvantaged students.

The importance of this critical distinction, apparent on the face of *Nyquist*, is further underscored by *Mueller*. While at first glance *Mueller*'s tax deduction program appeared indistinguishable from the tax benefit elements of *Nyquist*'s invalidated program, this Court squarely upheld the *Mueller* program based on two distinctions, both of which apply here. *Mueller* reasoned, first, as we do here, that *Nyquist*'s program sought to maintain an educational *status quo*, that is, to keep existing private-school students in their existing private-school arrangements. *Mueller*, 463 U.S. at 397, 398 (citing *Widmar v. Vincent*, 454 U.S. 253, 274 (1981)). Next, *Mueller* emphasized that *Nyquist*'s tax benefits were unrelated to the amounts actually spent by parents on tuition for their children's education; the *Nyquist* benefits were, therefore, in the nature of an "incentive" to attend private school, as opposed to a vehicle for expanding educational options. *Mueller*, 463 U.S. at 396 n.6 (citing *Nyquist*, 413 U.S. at 790). The Court accordingly drew a dispositive distinction between acceptable programs like

Ohio's, in which benefits are closely tied to the money needed to expand opportunities, and unacceptable "incentives" for private, religious schooling.

In light of these critical distinctions—and the Court's express reservation of judgment on just this case in *Nyquist*'s footnote 38—the Court need not decide whether *Nyquist* remains good law. Nevertheless, this Court's recent Establishment Clause precedents attest that *Nyquist*'s analysis has not withstood the test of time. Indeed, while respondents argue that the evolution of this Court's Establishment Clause jurisprudence has not weakened the "doctrinal footings" of its decision in *Nyquist* thirty years ago, Simmons-Harris Brief at 43, this Court has expressly said otherwise: "[O]ur Establishment Clause jurisprudence has changed significantly since we decided [*School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985)] and [*Aguilar v. Felton*, 473 U.S. 402 (1985)]." *Agostini*, 521 U.S. at 236. A decision to overturn *Nyquist* at this juncture would accordingly rest on far more than "a present doctrinal disposition to come out differently from the Court of 1973." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864 (1992).

CONCLUSION

For these reasons, as well as those set forth in our opening brief, the decision of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Nos. 00-1751, 00-1777 and 00-1779

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF OHIO, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

HANNA PERKINS SCHOOL, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

SENEL TAYLOR, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment prevents a State from providing tuition aid as part of a general assistance program to the parents of children who attend failing public schools and authorizing the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Discussion	10
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Agostini v. *Felton*, 521 U.S. 203 (1997) 3, 7, 8, 15, 17, 18, 19
Bagley v. *Raymond Sch. Dep't*, 728 A.2d 127 (Me.), cert. denied, 528 U.S. 947 (1999) 13
Board of Educ. v. *Mergens*, 496 U.S. 226 (1990) 3
Campbell v. *Manchester Bd. of Sch. Dirs.*, 641 A.2d 352 (Vt. 1994) 13
Capital Square Review & Advisory Bd. v. *Pinette*, 515 U.S. 753 (1995) 16
Committee for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973) 7, 13, 14, 15
Good News Club v. *Milford Cent. Sch.*, No. 99-2036, 2001 WL 636202 (June 11, 2001) 17
Jackson v. *Benson*, 578 N.W.2d 602 (Wis.), cert. denied, 525 U.S. 997 (1998) 10, 12, 13
Kotterman v. *Killian*, 972 P.2d 606 (Ariz. 1999), cert. denied, 528 U.S. 810, 921 (1999) 13
Lamb's Chapel v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) 3
Lee v. *Weisman*, 505 U.S. 577 (1992) 3
Mitchell v. *Helms*, 530 U.S. 793 (2000) 3, 8, 11, 15, 16, 17
Mueller v. *Allen*, 463 U.S. 388 (1983) 3, 8, 16, 17, 19
Rosenberger v. *Rector & Visitors*, 515 U.S. 819 (1995) 16

Cases—Continued: Page

Simmons-Harris v. *Goff*, 711 N.E.2d 203 (Ohio 1999) 6-7, 12
Strout v. *Albanese*, 178 F.3d 57 (1st Cir.), cert. denied, 528 U.S. 931 (1999) 13
Witters v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) 3, 7, 8, 12, 16
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 3, 9, 16

Constitutions and statutes:

U.S. Const. Amend. I (Establishment Clause) ..... *passim*
Ohio Const. Art. II, § 15(D) 7
Child Care and Development Block Grant Act of 1990, 42 U.S.C. 9858a *et seq.* 2
42 U.S.C. 9858n(2) (1994 & Supp. IV 1998) 2
Children's Health Act of 2000, Pub. L. No. 106-310, Div. B, § 3305, 114 Stat. 1212 3
Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 401(c)(2), 115 Stat. 58 3
42 U.S.C. 604a(a) (Supp. IV 1998) 3
42 U.S.C. 604a(a)(2)(B)(ii) (Supp. IV 1998) 2
42 U.S.C. 604a(c) (Supp. IV 1998) 2
42 U.S.C. 604a(e)(1) (Supp. IV 1998) 2
42 U.S.C. 9920 (Supp. IV 1998) 3
Ohio Rev. Code Ann. (Anderson):
§§ 3313.974-3313.979 (1999 & Supp. 2000) 4
§ 3313.975(A) (1999 & Supp. 2000) 4, 6
§ 3313.975(B) (1999 & Supp. 2000) 5
§ 3313.975(C)(1) (1999 & Supp. 2000) 5
§ 3313.976 6
§ 3313.976(A)(1) 4
§ 3313.976(A)(3) 4
§ 3313.976(A)(4) 4
§ 3313.976(A)(6) 4
§ 3313.976(A)(8) 5

Statutes—Continued: Page

§ 3313.976(C) 5
§ 3313.978(A) 5
§ 3313.978(B) 6
§ 3313.978(C)(1) 5
§ 3313.978(C)(3) 6
§ 3313.979 ..... 5, 6

Miscellaneous:

Cleveland City School District Performance Audit (Mar. 1996) 3, 4

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The court of appeals in this case held that the Ohio Pilot Project Scholarship Program violates the Establishment Clause of the First Amendment. That program provides tuition aid and other assistance to the parents of students enrolled in failing public schools in Cleveland, Ohio, and permits the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated.

The court of appeals' decision squarely conflicts with a decision of the Ohio Supreme Court upholding the same pilot program under the Establishment Clause, as well as with a decision of the Wisconsin Supreme Court upholding a similar program. It is in the Nation's interest that that clear conflict be resolved by this Court, so that policymakers may know, without further delay, whether such programs are a constitutionally permissible option for expanding educational opportunity for children enrolled in failing public schools across America, or whether other solutions must be sought for this critical national problem.

Congress has enacted several general assistance programs that make funds available to individuals to enable them to obtain services from private entities, including entities with religious affiliations. For example, under the Child Care and Development Block Grant Act of 1990, 42 U.S.C. 9858a *et seq.*, States may establish programs that provide low-income families with "child care certificates," in the form of a "check or other disbursement," that may be used to purchase services from a private entity, including a provider of "sectarian child care services if freely chosen by the parent." 42 U.S.C. 9858n(2) (1994 & Supp. IV 1998).

Likewise, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. 604a(a)(2)(B)(ii) (Supp. IV 1998), permits States to use federal funds in programs that furnish "certificates, vouchers, or other forms of disbursement" to low-income families to enable them to obtain certain social services. "[R]eligious organizations are eligible, on the same basis as any other private organization, as contractors to provide [such] assistance, or to accept certificates, vouchers, or other forms of disbursement." 42 U.S.C. 604a(c) and (e)(1) (Supp. IV 1998).[1]

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[1] As part of those and analogous programs, Congress has also adopted "charitable choice" provisions intended to eliminate disincentives for religiously affiliated groups to provide services under such programs. See, *e.g.*, Pub. L. No. 106-310, Div. B, § 3305, 114 Stat. 1212; 42 U.S.C. 604a(a), 9920 (Supp. IV 1998).

In addition, Congress has recently enacted legislation that permits parents to use education individual retirement accounts (or IRAs) to pay elementary and secondary school expenses for their children. Under that program, covered expenses include those "incurred in connection with the enrollment or attendance of the designated beneficiary of the trust as an elementary or secondary school student at a public, private, or religious school." Pub. L. No. 107-16, § 401(c)(2), 115 Stat. 58. The program permits individuals to withdraw gains on funds held in an education IRA for covered purposes without having to pay federal income tax.

The United States has participated as a party or as an amicus curiae in numerous cases arising under the Establishment Clause, including most recently in *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993); *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Lee* v. *Weisman*, 505 U.S. 577 (1992); and *Board of Education* v. *Mergens*, 496 U.S. 226 (1990). See also, *e.g.*, *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller* v. *Allen*, 463 U.S. 388 (1983).

STATEMENT

1. More than 75,000 children, most of whom are from low-income families, are enrolled in the Cleveland City School District.[2] In 1995, a federal district court placed that district under the control of the State Superintendent of Public Instruction because of a financial crisis that, in turn, gravely affected the educational performance of schools in the

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[2] In 1996, 72.5% of the students in the Cleveland district were from "economically * * * disadvantaged" families. *Cleveland City School District Performance Audit* 1-4 (Mar. 1996) (*1996 Audit*).

district. The Cleveland district met none of the 18 state standards used to evaluate minimum acceptable performance, and students in the district performed far worse than students in other Ohio public schools. A 1996 report, for example, found that only 9% of the district's high school students passed all four sections of Ohio's ninth grade proficiency test. *1996 Audit* 2-3.

a. In June 1995, in the midst of that educational crisis, the Ohio legislature enacted a "Pilot Project Scholarship Program." Ohio Rev. Code Ann. (ORC) §§ 3313.974-3313.979 (Anderson 1999 & Supp. 2000). The program provides two basic kinds of benefits: (1) scholarships for students who reside in a covered school district to attend a participating public or private school of their families' choosing, and (2) tutorial assistance grants for "an equal number of students * * * attending public school in any such district." ORC § 3313.975(A). The program is limited to "school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent." *Ibid.* The Cleveland district currently is the only school district in Ohio that falls in that category. Pet. App. 4a.[3]

All private schools located within the boundaries of a covered school district are eligible to participate in the program, without regard to whether they are religiously affiliated. ORC § 3313.976(A)(1). To participate in the program, private schools must meet state educational standards, ORC § 3313.976(A)(3), and agree not to discriminate on the basis of race, religion, or ethnic background, and not to advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion, ORC § 3313.976(A)(4) and (6). Public schools located in school districts adjacent to the pilot school district

[3] The "Pet. App." references are to the appendix accompanying the petition in No. 00-1751.

are also eligible to participate in the program. ORC § 3313.976(C).

b. The program provides tuition aid for children in kindergarten through eighth grade. ORC § 3313.975(B) and (C)(1). Funds are distributed in the form of checks. For students who use the scholarship to attend a private school, checks are made payable to the students' parents, but parents are required to endorse the checks over to the school. ORC § 3313.979. For those who use the scholarship to attend an adjacent public school, checks are made payable to the school district itself. *Ibid.* In awarding scholarships, preference is given to "students from low-income families," *i.e.*, families whose income is below 200% of the poverty line. ORC § 3313.978(A). Scholarships may be awarded "to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement." Pet. App. 4a (quoting manual).

Low-income families also receive preferential treatment when it comes to the amount of the scholarships. For low-income families, the program pays 90% of the lesser of the private school's tuition, or an amount up to $2500 determined by the state superintendent each year. ORC § 3313.978(A) and (C)(1). In addition, a private school may participate in the program only if it agrees not to require a low-income family to pay more than the remaining 10% of the applicable tuition. ORC § 3313.976(A)(8). For other families, the program pays 75% of the tuition scholarship up to $1875 (75% of $2500), and there is no cap on the tuition that a private school may charge. ORC §§ 3313.976(A)(8), 3313.978(A).

Once a student is selected to participate in the program and the amount of the tuition scholarship has been set, the student's parents are responsible for selecting and applying for admission to a participating school. ORC § 3313.978(A). Schools are required to admit program students in accor-

dance with criteria established by the state superintendent and the nondiscrimination principle set forth above. ORC § 3313.976. In the 1999-2000 school year, 56 private schools participated in the program, 46 of which were considered religiously affiliated. None of the public schools in districts adjacent to the Cleveland district elected to participate. In that same year, 3700 students participated in the scholarship program, most of whom (96%) enrolled in a religiously affiliated school. Pet. App. 5a.[4] No student who has applied for admission to a nonreligious private school participating in the program has been denied admission. *Id.* at 48a, 51a.

c. The program also provides for tutorial assistance grants for students whose parents choose to keep them in a public school in the covered school district. ORC § 3313.978(B). Students from low-income families receive 90% of the amount charged for assistance (up to $360), while students from other families receive 75% of that amount. ORC § 3313.978(B) and (C)(3). Tutorial assistance grants are made "payable to the parents of the student," and then endorsed over by the parents to the service provider. ORC § 3313.979. The state superintendent must offer as many tutorial assistance grants for families who choose to keep their children in a covered public school as tuition scholarships for families who choose to send their children to a participating private school. ORC § 3313.975(A).[5]

2. In 1996, respondents in No. 00-1751 brought suit in state court, challenging the Ohio program on federal and state grounds. The Ohio Supreme Court held that the program does not violate the Establishment Clause. *Simmons-*

[4] That percentage has fluctuated. At one point, "as many as 22% of the students enrolled in the program attended nonreligious schools." Pet. App. 5a.

[5] In addition to the foregoing pilot program, students within the Cleveland school district are eligible to participate in magnet and community school programs. See Pet. App. 117a n.15.

Harris v. *Goff*, 711 N.E.2d 203, 211 (1999). In so holding, the court rejected the argument that *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), compels a different result, observing that *Nyquist* "has been undermined by subsequent case law that culminated in the [Supreme Court] stating, '[W]e have departed from the rule * * * that all government aid that directly aids the educational function of religious schools is invalid.'" *Id.* at 208 (quoting *Agostini* v. *Felton*, 521 U.S. 203, 225 (1997)).[6] The court also emphasized that "[w]hatever link between government and religion is created by the School Voucher Program is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government." *Id.* at 209 (quoting *Witters* v. *Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 487 (1984)).

The Ohio high court nonetheless concluded that the program violated a provision of the Ohio constitution (§ 15(D), art. II) requiring that no bill shall have more than one subject, because the program was enacted as part of an appropriations bill that also addressed other subjects. 711 N.E.2d at 214-215. The Ohio legislature subsequently reenacted the pilot program in 1999 in a manner that remedied the "one-subject" problem, but did not alter the substance of the provisions discussed above. Pet. App. 7a.

3. a. In July 1999, respondents filed this action in federal district court, seeking to enjoin the program as reenacted on the ground that it violates the Establishment Clause. Two groups of students and schools participating in the program (petitioners in No. 00-1777) intervened to defend the program, and a second suit was filed in the same court challeng-

[6] As discussed pp. 13-14, *infra*, in *Nyquist* this Court held unconstitutional a New York program providing tuition reimbursement and certain other assistance to the parents of children who attended New York private schools, the majority of which were sectarian.

ing the program. The district court consolidated the actions and granted a preliminary injunction against the program. Pet. App. 7a-8a, 128a-132a. After the court of appeals declined to stay that preliminary injunction, this Court granted a stay pending appeal. 528 U.S. 983 (1999); Pet. App. 127a. In December 1999, the district court granted summary judgment for respondents and entered a permanent injunction against the program (*id.* at 61a-126a), finding it "factually indistinguishable from the tuition reimbursement program struck down in [*Nyquist*]." *Id.* at 123a.

b. A divided panel of the Sixth Circuit affirmed. Pet. App. 1a-58a. The majority held that *Nyquist* "governs" this case, reasoning that under the program in *Nyquist* and the one here "parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same, and in both cases, the great majority of schools benefitted by these tuition dollars are sectarian." *Id.* at 24a-25a. Although the majority acknowledged that the Ohio program is "facial[ly] neutral[]," it concluded that the program "has the impermissible effect of promoting sectarian schools." *Id.* at 25a-27a. The majority explained that, in its view, "the tuition restrictions mandated by the statute limit the ability of [private] nonsectarian schools to participate in the program," because of the "lower tuition needs" of many religious schools. *Id.* at 25a-26a. The majority also found it significant that no adjacent public school outside the Cleveland district has participated in the program, *id.* at 2[illegible], and concluded that the Ohio program provides parents with only an "illusory choice" to enroll their children an alternative, nonreligious school. *Id.* at 32a.

The majority rejected the argument that this Court's decisions in *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini*, *supra*; *Mueller* v. *Allen*, 463 U.S. 388 (1983); and *Witters*, *supra*—in which the Court upheld under the Establishment Clause neutral government assistance programs that

indirectly benefitted religiously affiliated organizations—required a different result, reasoning that the "effect" of the Ohio program in this case "is in direct contravention" to those cases. Pet. App. 29a.

c. Judge Ryan dissented from the majority's Establishment Clause ruling. Pet. App. 34a-58a. He concluded that "[t]he New York statute interpreted in *Nyquist* and the Ohio statute before us are totally different in all of their essential respects." *Id.* at 34a; see *id.* at 36a-40a. In addition, although he accepted the correctness of *Nyquist* (*id.* at 40a), Judge Ryan believed that the majority overlooked the teachings "of the Supreme Court's several Establishment Clause decisions handed down in the 27 years since *Nyquist* was decided." *Id.* at 35a. In particular, he reasoned that this Court's more recent decisions, including *Mitchell*, *Agostini*, *Mueller*, *Witters*, and *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), established that "whether public funds find their way to a religious school is of no constitutional consequence if they get there as a result of genuinely private choice." *Id.* at 41a; see *id.* at 40a-43a.

Judge Ryan concluded that the Ohio program affords the parents of students in the Cleveland school district such "a *genuine* choice." Pet. App. 45a; see *id.* at 45a-46a. He rejected the majority's belief—based largely on the percentage of religious compared with nonreligious private schools participating in the program—that the program "creates a forbidden 'incentive' for parents in Cleveland to choose a religious school." *Id.* at 48a. "[T]he indisputable fact," Judge Ryan explained, is "that of *all* the private nonreligious private schools participating in the program, not one has ever turned away a voucher applicant for any reason." *Ibid.*; see *id.* at 51a ("It is [also] indisputable that no nonreligious, private school, or any other school for that matter, has ever been discouraged from participating in the Cleveland voucher program."). Moreover, Judge Ryan noted, "the

Supreme Court has flatly rejected the argument that a high percentage of religious schools participating in a government-aid program is an indicator that the government is engaging in governmental indoctrination of religion." *Id.* at 48a.

DISCUSSION

The petitions for certiorari in this case should be granted. State and federal courts are divided over the constitutionality of educational assistance programs such as the Ohio pilot program invalidated by the court of appeals in this case. The Sixth Circuit's decision squarely conflicts with the decision of the Ohio Supreme Court holding that the same program at issue in this case does not violate the Establishment Clause, as well as with the decision of the Wisconsin Supreme Court in *Jackson* v. *Benson*, 578 N.W.2d 602, cert. denied, 525 U.S. 997 (1998), upholding a similar program.

Numerous States have enacted educational assistance programs similar to the one invalidated in this case, or are considering the enactment of such programs. The court of appeals' ruling in this case—and the decisional conflict that it directly implicates—cast doubt on the validity of those programs, and perhaps as well on other programs that provide aid to individuals on neutral terms and permit the use of that aid to obtain services from private organizations, regardless of the religious or nonreligious character of those organizations. As we have explained above (p. 2), Congress has enacted several assistance programs that share those basic features, while differing in certain other respects.

This Court's guidance is needed as both Congress and the States seek to enable disadvantaged persons to enlist the services of private organizations—without regard to whether such organizations have any religious affiliation—to meet important individual needs and address critical social issues facing the Nation. In particular, as lawmakers and educators search for solutions for economically disadvantaged children enrolled in underperforming or, as in

this case, failing public schools, the Court's guidance is needed concerning whether the type of program challenged in this case is a permissible option for expanding educational opportunity for those children, or whether other solutions must be sought. Most critically, delay in resolving that issue of vital national importance would disserve the interests of the students themselves.

The Court's recent Establishment Clause decisions underscore that the "principles of neutrality and private choice" are key in evaluating whether government assistance programs that may indirectly benefit religion have an impermissible effect of advancing religion. *Mitchell*, 530 U.S. at 810 (plurality opinion); see *id.* at 838-842 (O'Connor, J., joined by Breyer, J., concurring in the judgment). In our view, the court of appeals erred in concluding that the validity of the Ohio program in this case is controlled by *Nyquist*, because of the important differences between the program challenged in *Nyquist* and the program at issue in this case. But, in any event, we believe that the result reached by the court of appeals is out of step with the teachings of this Court's subsequent Establishment Clause decisions. We urge the Court to grant certiorari and clarify the proper application of its precedents in this critical area.

1. The importance of this case is underscored by the conflict of authority over the constitutionality of government programs that provide certificates or disbursements to the parents of children enrolled in underpreforming public schools and permit the parents to use that assistance to enroll their children in a participating private school of their own choosing, religious or not.

That conflict is starkly presented by the divergent rulings of the Ohio Supreme Court and the Sixth Circuit on the constitutionality of the Ohio program at issue in this case. As discussed above, the Ohio Supreme Court held that the material components of that program do *not* violate the

Establishment Clause. In so holding, the Ohio court rejected the argument that this Court's decision in *Nyquist* dictates a contrary conclusion, reasoning that "[t]he *Nyquist* holding has been undermined by subsequent case law." *Simmons-Harris*, 711 N.E.2d at 208. By contrast, the Sixth Circuit—though acknowledging the Ohio Supreme Court's prior ruling, Pet. App. 7a—concluded that the same program *does* violate the Establishment Clause, reasoning that *Nyquist* compels that result. *Id.* at 24a. That clear conflict between the federal court of appeals and the Supreme Court of Ohio over the constitutionality of an important state program in itself weighs heavily in favor of certiorari.

The Sixth Circuit's decision in this case also squarely conflicts with the decision of the Wisconsin Supreme Court in *Jackson*, *supra*. That case involved a challenge to a state tuition aid program (the Milwaukee Parental Choice Program) analogous to the Ohio program at issue here. Like the Ohio program, the Milwaukee program sustained in *Jackson* seeks to offer educational opportunities to low-income families with children enrolled in underperforming public schools. Similarly, the Milwaukee program provides aid to the parents of school children and allows the parents to use that aid to enroll their children in a private school of their own choosing, regardless of whether that school is religiously affiliated. The Wisconsin Supreme Court held that the Milwaukee program does not violate the Establishment Clause, expressly rejecting the argument that the case was "controlled" by *Nyquist*. 578 N.W.2d at 614 n.9.

In so holding, the Wisconsin Supreme Court emphasized that "[a]ny aid provided under the [Milwaukee program] that ultimately flows to sectarian private schools * * * does so 'only as a result of genuinely independent and private choices of aid recipients.'" 578 N.W.2d at 618 (quoting *Witters*, 474 U.S. at 487). In addition, the Wisconsin court rejected the argument that the fact that most (89 out of 122)

of the private schools that participated in the program were sectarian established that the program had an impermissible effect of advancing religion, finding that "[t]he percent of program funds eventually paid to sectarian private schools is irrelevant to our inquiry." *Id.* at 619 n.17. By contrast, in striking down the Ohio program, the Sixth Circuit specifically relied on the fact that a higher percentage of students participating in the program have enrolled in religiously affiliated schools than other schools. Pet. App. 26a.[7]

2. a. That conflict stems in large part from disagreement over the application of this Court's decision in *Nyquist*. That case involved a challenge to a New York program that provided direct grants to private schools for maintenance and repair costs, and that established tuition reimbursement and state income tax deductions for parents who chose to send their children to private schools in New York, the "great majority" of which schools were sectarian. 413 U.S. at 783. Legislative findings established that the program was intended to provide financial support to the State's private schools, and thereby prevent a "massive increase in public school enrollment and costs." *Id.* at 765. This Court held that the program had the impermissible "effect" of ad-

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[7] Other courts have also considered the constitutionality of state tuition aid programs and reached divergent results. Compare, *e.g.*, *Campbell* v. *Manchester Bd. of Sch. Dirs.*, 641 A.2d 352 (Vt. 1994) (state tuition aid program that permits parents to use public funds to enroll their children in an adjacent public school or (sectarian or nonsectarian) private school does not violate the Establishment Clause), with *Bagley* v. *Raymond Sch. Dep't*, 728 A.2d 127, 143 (Me.) (concluding that, in the absence of a provision excluding sectarian private schools from state tuition aid program, the "tuition program would violate the Establishment Clause") (citing *Nyquist*), cert. denied, 528 U.S. 947 (1999); and *Strout* v. *Albanese*, 178 F.3d 57, 61 (1st Cir.) (same), cert. denied, 528 U.S. 931 (1999). See also *Kotterman* v. *Killian*, 972 P.2d 606 (Ariz.) (state tax credit for contributions to scholarship funds that provide tuition for private and religious schools does not violate the Establishment Clause), cert. denied, 528 U.S. 810, 921 (1999).

vancing religion. *Id.* at 780. In so holding, the Court rejected the argument that the tuition-reimbursement and tax-deduction provisions were valid because they simply provided benefits to the parents of children, who in turn chose the school in which to enroll their children. In the Court's view, those provisions "fare[d] no better under the 'effect' test" than the direct-grant provision. *Id.* at 785.

The Ohio program challenged in this case differs in important respects from the program invalidated in *Nyquist*. For example, the purpose of the program in *Nyquist* was to support private schools in New York (most of which were sectarian) and, indeed, a key component of the program included *direct* grants to those schools. 413 U.S. at 780-782 & n.38. By contrast, the purpose of the Ohio program is to create educational opportunities for students enrolled in failing public schools. The program was passed in response to the educational crisis in Cleveland, and is limited to children enrolled in school districts subject to federal court orders. Moreover, the Ohio program in this case, unlike the New York program in *Nyquist*, also provides assistance to parents who choose to keep their children in public schools. As discussed above, the Ohio program guarantees funding for an equal number of grants to parents who prefer to keep their children in public schools and receive tutoring. In addition, the Ohio program provides for tuition aid for students who elect to attend an adjacent public school (although thus far no such school has participated).

Moreover, in *Nyquist*, this Court expressly reserved judgment on the constitutionality of a program "involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." 413 U.S. at 783 n.38 (citation omitted). That question was not necessary to the Court's decision because the only beneficiaries of the New York program were the parents of children who attended private schools and the private schools themselves. By contrast, as we have discussed, the Ohio program in this case provides assistance *both* to parents who elect to enroll their children in a private school *and* to parents who elect to keep their children in public school.

b. Especially in light of this Court's subsequent decisions, we do not believe that *Nyquist* should be understood to render unconstitutional programs like the one that Ohio has adopted for students in failing public schools in Cleveland. As this Court recognized in *Agostoni*, the Court's Establishment Clause jurisprudence has undergone "significant[]" changes in the past few decades, particularly in "the criteria used to assess whether aid to religion has an impermissible effect," the key issue in *Nyquist*. 521 U.S. at 223, 237. Since *Nyquist* was decided, this Court has repeatedly upheld government assistance programs that are "neutral[]" insofar as aid "is offered to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 U.S. at 809 (plurality). Furthermore, "[a]s a way of assuring neutrality, [the Court has] repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.* at 810 (quoting *Agostini*, 521 U.S. at 226); see *id.* at 841-843 (O'Connor, J., joined by Breyer, J., concurring in the judgment).

Accordingly, this Court has repeatedly upheld educational assistance programs that offer aid to a broad class of individuals and that benefit religion only indirectly as a result of the private choices of the program's beneficiaries. For example, in *Zobrest*, the Court held that federal funds could be used to pay for the services of a sign-language interpreter who assisted a deaf child enrolled in a sectarian school, where the funds were made available to a broad class of individuals on neutral terms, without regard to whether the school was public or private, sectarian or nonsectarian.

As the Court explained, "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." 509 U.S. at 10.

Similarly, in *Witters*, the Court upheld a blind person's use of vocational assistance made available under a state program to enroll in a sectarian school. As the Court explained, "[a]ny aid provided under [the] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487. And, in *Mueller*, the Court upheld a state law permitting parents to deduct certain educational expenses from their state income tax, without regard to whether the parents chose to send their children to a public or private—or sectarian or nonsectarian—school. The Court reasoned that "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally." 463 U.S. at 399 (citation omitted).[8]

Since *Nyquist* was decided, this Court has also made clear that a general assistance program does not establish religion in violation of the Constitution simply because more beneficiaries of the program choose to obtain services from a religious rather than nonreligious institution. For example,

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[8] Private choice also helps to ensure that the government is not seen as endorsing religion. As Justice O'Connor has explained, when government aid flows to religious institutions only as a result of the private choices of beneficiaries, it is unlikely that a "reasonable observer" would infer "that the State itself is endorsing a religious practice or belief." *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 848 (1995) (concurring); accord *Mitchell*, 530 U.S. at 843 (concurring in judgment); *Witters*, 474 U.S. at 493 (concurring in part and concurring in the judgment); cf. *Capital Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 774 (1995) (concurring in part and concurring in the judgment).

in *Mueller*, the Court rejected the argument that a state law establishing an income tax deduction for educational expenses had an impermissible effect of advancing religion because the "the bulk"—more than 90%—"of deductions taken [under the program] will be claimed by parents of children in sectarian schools." 463 U.S. at 401. The Court observed that it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Ibid.*

Similarly, in *Agostini*, the Court upheld the use of federal funds to send public school teachers into private schools to provide remedial education to disadvantaged children, despite the fact that more than 90% of the private schools within the jurisdiction of the school board at issue were sectarian. 521 U.S. at 210. In so ruling, the Court emphasized that it was not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.* at 229. See also *Mitchell*, 530 U.S. at 812 n.6 (plurality opinion) (*Agostini* "held that the proportion of aid benefitting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the [Establishment Clause] inquiry."); *ibid.* (discussing *Witters*); cf. *Good News Club* v. *Milford Cent. Sch.*, No. 99-2036, 2001 WL 636202, at *11 n.9 (June 11, 2001) ("When a limited public forum is available for use by groups presenting any viewpoint, * * * we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.").

c. As demonstrated by the decisional conflict discussed above, as well as the opinions of the majority and dissenting judges of the Sixth Circuit panel in this case, guidance is needed from this Court on the application of *Nyquist* to

educational assistance programs, such as the Ohio program in this case, that do not include direct grants to private schools; that offer financial assistance to the parents of students who attend public as well as private schools; and that are enacted in response to specific educational crises in failing public schools. As discussed above, we do not believe that the result in *Nyquist* governs the constitutionality of such a program. But to the extent that *Nyquist* might be applied—as it was by the Sixth Circuit in this case—to strike down the different type of program here, we believe that that decision is at odds with the teachings of this Court's subsequent Establishment Clause decisions.

As the Court recently emphasized in *Agostoni*, only this Court can resolve whether its "more recent cases have, by implication, overruled an earlier precedent." 521 U.S. at 237. To the extent that *Nyquist* is read to cast doubt on the program at issue in this case, we urge the Court to consider whether the assumptions underlying the "effect" analysis in *Nyquist* have been eroded by the Court's subsequent Establishment Clause decisions.

3. In our view, the Ohio program comports with the central tenets of this Court's Establishment Clause jurisprudence. The program distributes educational aid on neutral terms, offering both tuition and tutorial assistance to all students enrolled in a covered school district, without regard to religion. All private schools within a covered district are eligible to participate in the program, without regard to whether they are sectarian or not, as are all public schools in districts adjacent to the covered district. And religious schools may benefit under the program only as a result of the independent and private choice of parents to enroll their children in a participating religious school, rather than send their children to a participating nonreligious school, keep them in public school and obtain tutorial assistance, or avail themselves of one of the other options provided by Ohio

(including magnet or community schools). In these central respects, the Ohio program shares the same key features as the general assistance programs sustained by this Court in *Zobrest*, *Witters*, and *Mueller*.

In reaching a contrary conclusion, the Sixth Circuit pointed to the percentage of students enrolled in the program who elected to use tuition aid to attend a sectarian school. As discussed above, however, this Court has refused to invalidate facially neutral assistance programs based on a statistical analysis of how religious versus nonreligious institutions ultimately fared under those programs. See *Agostini*, 521 U.S. at 210; *Mueller*, 463 U.S. at 401. Moreover, as Judge Ryan pointed out, "there is no evidence that any of the several nonreligious, private schools participating in the program have *ever* rejected a single voucher applicant for any reason," nor is there any evidence "that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive." Pet. App. 51a-52a. Nothing in the record, in other words, establishes that the percentage of students enrolled in private religious schools is the product of anything other than the truly private choice of eligible parents to enroll their children in those schools.[9]

* * * * *

General educational assistance programs similar to the Ohio pilot program at issue in this case are in existence or under consideration in numerous school districts across the

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[9] The Sixth Circuit also relied on the fact that no adjacent public school has participated in the program. Pet. App. 26a. As Judge Ryan explained, however, "there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate." *Id.* at 50a. Moreover, the Ohio program provides that resources must be set aside for an equal number of students who prefer to remain in a public school and receive tutoring.

country, as communities seek to create new opportunities for children enrolled in failing public schools. The Court should grant certiorari and resolve the conflict and confusion among the federal and state courts over whether such programs are a constitutionally permissible means of addressing one of our Nation's most basic charges, the education of its youth.[10]

CONCLUSION

The petitions for a writ of certiorari should be granted on the Establishment Clause question.

Respectfully submitted.

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[10] Petitioners in No. 00-1779 have presented a separate question concerning whether the Sixth Circuit improperly failed to accord preclusive effect to the Ohio Supreme Court's Establishment Clause ruling in *Simmons-Harris*. See Pet. App. 30a-31a. Although we do not take a position on the merits of that issue, we believe that the grant of certiorari should be limited to the question whether the type of educational assistance program challenged in this case violates the Establishment Clause. That is the issue that has divided the state and federal courts, and on which guidance is particularly needed from this Court.

Supreme
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OFFICE OF THE CLERK

No. 00-1751

In the Supreme Court of the United States

OCTOBER TERM, 2001

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF HUGH CALKINS IN SUPPORT OF THE PETITION BUT URGING A NARROWER QUESTION FOR REVIEW

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QUESTION PRESENTED

Is a student voucher plan whose purpose and principal effect is to provide improved education to low-income students in a school district characterized by high rates of educational failure valid under the Establishment Clause, when most of the students using the vouchers attend religiously-affiliated schools?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

CONSENT TO FILING 1

INTEREST OF *AMICUS CURIAE* 2

ARGUMENT 3

I. ON THE RECORD IN THIS CASE, THE WRIT OF CERTIORARI SHOULD BE GRANTED LIMITED TO THE QUESTION WHETHER A STUDENT VOUCHER PLAN WHOSE PURPOSE AND PRINCIPAL EFFECT IS TO PROVIDE IMPROVED EDUCATION TO LOW-INCOME STUDENTS IN A SCHOOL DISTRICT CHARACTERIZED BY HIGH RATES OF EDUCATIONAL FAILURE IS VALID UNDER THE ESTABLISHMENT CLAUSE, WHEN MOST OF THE STUDENTS USING THE VOUCHERS ATTEND RELIGIOUSLY-AFFILIATED SCHOOLS 3

A. This case fairly presents one, and only one, of the two grounds (private choice and principal or primary effect) on which state funding of students in religiously-affiliated schools can be sustained under the Establishment Clause 3

1. Private choice, the ground relied upon by Petitioner, is inappropriate in this case, because this Court's approval of private choice would validate voucher plans which extended to all students in this country. Whether such sweeping plans would violate the Establishment Clause presents questions of fact and law which are not illuminated by the facts of this case, and which have not been briefed by Petitioner 4

2. Principal or primary effect, which has been mentioned but not relied upon by Petitioner, is the ground on which this case should be considered since it permits decision which is directed precisely to the extensive educational shortcomings of the Cleveland Municipal School District, and would not decide issues which are not presented by the facts of this case 4

II. THE REASONS FOR GRANTING THE WRIT OF CERTIORARI ARE COMPELLING 5

A. There is a clear conflict with the decision of the Supreme Court of Wisconsin in *Jackson v. Benson* 5

B. The decision of the Court of Appeals is clearly erroneous. 5

C. The erroneous decision of the Court of Appeals, if not reversed, will have serious adverse consequences 5

D. Failure to grant the writ will, therefore, be a material setback in the national effort to overcome one of the nation's major problems–persistent failure to educate large numbers of young people growing up in major cities 6

III. UNDER ESTABLISHED SUPREME COURT JURISPRUDENCE, THIS COURT WILL NOT FORMULATE A RULE OF CONSITUTIONAL LAW BROADER THAN IS REQUIRED BY THE PRECISE FACTS TO WHICH IT IS TO BE APPLIED 6

IV. THE DECISIONS OF THIS COURT PROVIDE AMPLE SUPPORT FOR RELYING UPON THE PRINCIPAL OR PRIMARY EFFECT GROUND FOR DETERMINING THE VALIDITY OF VOUCHER PROGRAMS UNDER WHICH STATE FUNDS SUPPORT STUDENTS IN RELIGIOUSLY-AFFILIATED SCHOOLS 6

A. The guiding standard in school-related Establishment Clause cases is "principal or primary effect." 6

B. Under the primary effect test, the Cleveland voucher plan is valid, and the decision of the court below should not be allowed to stand 8

V. FOR THE FOREGOING REASONS, THIS COURT SHOULD GRANT A WRIT OF CERTIORARI, LIMITED TO THE VALIDITY, OR NOT, OF THE CLEVELAND VOUCHER PLAN WHEN TESTED UNDER THE PRINCIPAL OR PRIMARY EFFECT STANDARD 10

CONCLUSION. 10

TABLE OF AUTHORITIES

Cases **Page**

Aguilar v. Fenton, 473 U.S. 402 (1985) 8
Ashwander v. Valley Authority, 297 U.S. 288, 347 (1936) 6
Blum v. Yaretsky, et al., 454 U.S. 815 (1981) 10
Board of Education v. Allen, 392 U.S. 236, 243 (1968) 7
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 424 U.S. 908 (1976) 10
Falls City Industries, Inc., v. Vanco Beverage, Inc., 455 U.S. 988 (1982) 10
Jackson v. Benson, 578 N.W.2d 602 (Wisc. 1998) 5
Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1972) 6
Liverpool, N.Y. & P.S.S. Co v. Emigration Commissioner, 113 U.S. 33 (1885) 6
McElroy v. United States, 454 U.S. 815 (1981) 10
Meek v. Pittenger, 421 U.S. 349 (1975) 8
Pacific Gas & Electric Co., et al., v. State Energy Resources Conservation and Development Commission et al., 457 U.S. 1132 (1982) 10
School District of Grand Rapids v. Ball, 457 U.S. 373, 383 (1985) 7
Simmons-Harris v. Zelman, 234 F.3d 945, 948 (6th Cir. 2000) 4
Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 157 (1984) 6
Walz v. Tax Commissioner, 397 U.S. 664 (1970) 7

Statutes

Ohio Revised Code Section 3313.975(B) 9

Other Authorities

James S. Coleman, *et al., High School Achievement* (Basic Books, Inc., New York 1982) 8

IN THE

Supreme Court of the United States

October Term, 2001

No. 00-1751

SUSAN TAVE ZELMAN, Superintendant
of Public Instruction, *et al.*,
Petitioners

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

BRIEF FOR HUGH CALKINS. ESQ., *AMICUS CURIAE* SUPPORTING PETITIONER BUT URGING A NARROWER QUESTION FOR REVIEW

CONSENT TO FILING

This *amicus curiae* brief is filed pursuant to Supreme Court Rule 37.2, with the written consent of all parties in interest. Letters of consent have been filed with the Clerk of this Court.[1]

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[1] Hugh Calkins, the *amicus curiae*, was the author of the entire brief. No person or entity made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

Interest of Amicus. Hugh Calkins, the *amicus,* was a law clerk to Mr. Justice Frankfurter in the 1950-51 term of this Court. He was an elected member of the Cleveland Board of Education from 1965 to 1969. In 1969 he was appointed by President Johnson Chair of the National Advisory Committee on Vocational Education. Upon retirement from the practice of law in 1990, Calkins obtained a teaching certificate and taught in Cleveland elementary schools, and a middle school, for four years. Following that experience, Calkins has devoted his energies to improving education in Cleveland in four principal ways. He has stimulated and helped finance improvement projects in Cleveland schools. He has encouraged improved pre-school and child care/education for children 1 to 5. He has researched and advanced proposals for improved school finance. He assisted in the formation of a charter school in inner-city Cleveland, and has served as Chair of its Board of Trustees for three years.

The interest of the *amicus* in this case is two-fold. (1) The *amicus* believes that the decision of the Court of Appeals for the Sixth Circuit was erroneous, and that the Cleveland voucher plan is a valid and valuable component of an array of programs designed to improve educational opportunity in Cleveland. He further believes that similar programs in other cities with high rates of educational failure would be valid and helpful in overcoming America's critical big city educational problem. (2) The *amicus* believes that the private choice argument relied on by Petitioner raises issues which are not presented by the facts of this case and should not be adopted by this Court in this case. (3) The *amicus* believes it may be useful to this Court for the *amicus* to present the "purpose and effect" approach to decision in the case. It is the approach which is strongly supported by the facts of the case. It avoids the problems created by the private choice view. For reasons which have not been explained, it has been largely ignored by Petitioner.

ARGUMENT

I. ON THE RECORD IN THIS CASE, THE WRIT OF CERTIORARI SHOULD BE GRANTED LIMITED TO THE QUESTION WHETHER A STUDENT VOUCHER PLAN WHOSE PURPOSE AND PRINCIPAL EFFECT IS TO PROVIDE IMPROVED EDUCATION TO LOW-INCOME STUDENTS IN A SCHOOL DISTRICT CHARACTERIZED BY HIGH RATES OF EDUCATIONAL FAILURE IS VALID UNDER THE ESTABLISHMENT CLAUSE, WHEN MOST OF THE STUDENTS USING THE VOUCHERS ATTEND RELIGIOUSLY-AFFILIATED SCHOOLS.

A. THIS CASE FAIRLY PRESENTS ONE, AND ONLY ONE, OF THE TWO GROUNDS ON WHICH STATE FUNDING OF STUDENTS IN RELIGIOULY-AFFILIATED SCHOOLS CAN BE SUSTAINED UNDER THE ESTABLISHMENT CLAUSE.

The two grounds are:

1. Private choice, relied upon by Petitioner, is inappropriate in this case, because this Court's approval of private choice would validate voucher plans which extended to all students in this country. Whether such sweeping plans would violate the Establishment Clause presents questions of fact and law which are not illuminated by the facts of this case, and which have not been briefed by Petitioner.

2. This case presents a factual situation in which the validity or invalidity of the principal or primary effect ground can reliably be determined. The Cleveland Municipal School District is the only district meeting the requirement of the Ohio statute "that [it] has been the subject of a federal court order 'requiring supervision and operational management of the district by the state superintendent.'" *Simmons-Harris v. Zelman,* 234 F.3d 945, 948 (6th Cir. 2000) (hereinafter, "court below"). The record contains ample evidence of the high rate of educational failure among the district's students. See the Petition filed in his case by the State of Ohio, pp. 2-3.

By contrast, the factual setting and record in this case are not well suited to a resolution on the private choice ground. That ground is applicable to all forms of voucher or scholarship plans under which state funds support elementary and secondary students in religiously affiliated schools. A plan to provide a state voucher or scholarship to all elementary and secondary students whose parents want them to attend a religious school would raise the following issues, among others:

1. Is the purpose and primary effect of the plan educational or religious? What is the educational objective to be achieved by permitting students in demonstrably successful traditional public schools, such as those in Scarsdale or Winnetka, to transfer to religious schools? In a state which has authorized charter schools, and thus allowed parents a wide choice of non-religious schools at state expense, what is the educational purpose or effect of using state funds to enable parents to choose religiously affiliated schools as well?

2. If the religious purpose and effect predominate, can compliance with the Establishment Clause be achieved by giving parents a choice whether or not to participate in the program?

3. Would widespread availability of vouchers cause many religious communities to create schools in which the student body would primarily consist of the children of their members, with the result that many religious establishments would, with state support, develop in many parts of the country? Would such a development be contrary to the Establishment Clause?

The record in this case does not contain the facts necessary to respond to these questions, and there is no discussion of these issues in the brief of Petitioner.

II. THE REASONS FOR GRANTING THE WRIT OF CERTIORARI ARE COMPELLING.

A. There is a clear conflict with the decision of the Supreme Court of Wisconsin in *Jackson v. Benson*, 578 N.W.2d 602 (Wisc. 1998). Since this conflict has been discussed extensively in Petitioner's brief at pages 12-17, the discussion will not be repeated here.

B. The decision of the Court of Appeals is clearly erroneous. See the discussion below at pages 6 to 9.

C. The erroneous decision of the Court of Appeals, if not reversed, will have serious adverse consequences:

1. It will cause serious harm to many of the 3800 students now supported in private schools by the Cleveland voucher plan. Some of these students may be able to enroll in one of Cleveland's charter schools. Some will belong to families who will be able to pay the full tuition at the parochial or other private school they attend. Many of these students will be required to enroll in Cleveland Municipal School District schools which are only slowly improving the quality of the education they provide.

2. The erroneous decision of the Court of Appeals, if not reversed, will discourage other states from enacting programs similar to the Cleveland program in cities with educational problems similar to Cleveland's.

D. Failure to grant the writ will, therefore, be a material setback in the national effort to overcome one of the nation's major problems - persistent failure to educate well large numbers of young people growing up in major cities.

III. UNDER ESTABLISHED SUPREME COURT JURISPRUDENCE, THIS COURT WILL NOT FORMULATE A RULE OF CONSTITUTIONAL LAW BROADER THAN IS REQUIRED BY THE PRECISE FACTS TO WHICH IT IS TO BE APPLED.

In his concurring opinion in *Ashwander v. Valley Authority,* 297 U.S. 288, 347 (1936), Mr. Justice Brandeis stated what has become a corner stone of Supreme Court jurisprudence: "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioner,* [113 U.S. 33 (1885)]."

For a more recent application of the principle by this Court, see *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984).

IV. THE DECISIONS OF THIS COURT PROVIDE AMPLE SUPPORT FOR RELYING UPON THE PRINCIPAL OR PRIMARY EFFECT GROUND FOR DETERMINING THE VALIDITY OF VOUCHER PROGRAMS UNDER WHICH STATE FUNDS SUPPORT STUDENTS IN RELIGIOUSLY AFFILIATED SCHOOLS.

A. The guiding standard in school-related Establishment Cause cases is "principal or primary effect."

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1972), the Supreme Court held that a Pennsylvania statute and a Rhode Island statute were invalid under the Establishment Clause of the First Amendment to the Constitution. The challenged statutes provided state funds to private schools, most of which were church-affiliated, to be used to teach secular subjects such as mathematics, modern foreign languages, and physical sciences. In its opinion, written by Chief Justice Burger and joined or concurred in by six other members of the Court, the Court laid down what has become the governing principle:

"Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must

one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz, supra,* at 674."

The authority of this articulation of the governing principle has been recognized recently by the Supreme Court. Justice Kennedy stated in 1992 that "In only one instance, the decision in Marsh v. Chambers, 463 U.S. 783 (1953), has the Court not based its decision on the basic principles described in *Lemon.*" *Lee v. Weissman,* 505 U.S. 577, 603 fn 4 (1992). In his opinion in *School District of Grand Rapids v. Ball,* 473 U.S. 373, 383 (1985), Justice Brennan stated "We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children."

Since this Court has generally accepted legislative recitals as conclusive evidence of purpose, and entanglement rarely arises when the state support is channeled through parents, the governing principle in parent choice cases, such as this one, is the "principal or primary effect" of the challenged legislation.

The authority of *Lemon v. Kurtzman* has been recognized in this case. In its brief at page 13, Petitioner states, "in analyzing the constitutionality of these two programs (those in Wisconsin and Ohio), both the Wisconsin Supreme Court and the Sixth Circuit applied the test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and later precedents of this Court."

A review of all of the cases decided by the Supreme Court subsequent to Lemon relating to state support for church-affiliated schools or their students shows that the outcomes of the cases, although not always the language of the decisions, are consistent with the "principal or primary effect" test, except for three decisions (*Meek v. Pittenger*, 421 U.S. 349 (1975), *Aguilar v. Felton,* 473 U.S. 402 (1985), and *School District of Grand Rapid v. Ball,* 473 U.S. 373 (1985)), which are no longer good law.

B. Under the primary effect test, the Cleveland voucher plan is valid, and the decision of the court below should not be allowed to stand.

Without doubt, the Cleveland voucher plan has both educational and religious effects. Educationally, it provides Cleveland youngsters and their parents with an important alternative to attending Cleveland Municipal School District schools. Most participating children enroll in parochial and other church-related schools. Other students in those schools, who do not participate in the voucher plan, are paying significant tuition and therefore typically are of more middle class, rather than low-income, backgrounds. It was reasonable for the Ohio Legislature to conclude that low-income students, enrolling in the diversified student bodies of more orderly parochial and church related schools, would receive a better education than had they remained in Cleveland public schools. See James S. Coleman *et al., High School Achievement* (Basic Books, Inc. New York 1982) at 195, where the author, a highly regarded educational researcher, describes "evidence that students from different backgrounds achieve at more nearly the same level in Catholic schools than in public (or other private) schools."

The religious effect of the Cleveland voucher plan is equally clear. The size of the subsidy is in many cases more than enough to cover the variable costs of adding students to existing classrooms with existing teachers. The fact that a high proportion of the voucher students are enrolled in preexisting, church related schools, and not in newly created schools (Brief of Petitioner p. 6), and the further fact that non-church-related voucher schools have converted to charter (called "community schools" in Ohio) status once that status was made available (Brief of State Appellants in court below p. 11), are evidence that the voucher is attractive to supplement the income of the existing schools, but inadequate to sustain new private schools. Important religious effects of the plan are that it provides financial support to parents who pay tuition to send their children to fill otherwise empty seats in church-related schools, and that it permits (subject to a required preference for low-income students) up to one-half of the children benefiting from the plan to be middle income students already enrolled in church-related schools. Ohio Rev. Code Section 3313.975(B).

If this Court grants the writ, the issue before it would be: Which of the effects, educational or religious, is "primary"?

On that question, there is no better indicator than the terms of the plan itself. The Ohio Legislature chose to limit the plan to the Cleveland Municipal School District, which it described in a convoluted way to make the legislation nominally general in application. Educational conditions in that district were so deplorable that a court had directed the takeover of the District by the State Superintendent of Public Instruction, and only 9% of the District's students passed all four sections of Ohio's ninth grade proficiency test. (Brief of Petitioner p. 2) If the purpose of the plan had been to encourage church- related education, it would have made no sense to have limited the plan to Cleveland. To the contrary, the limitation demonstrates the genuineness of the legislative purpose to relieve what was probably the most critical educational problem in the state.

What is true of purpose is also true of principal effect. The effect of the plan in giving some financial support to some church-related schools in the Cleveland area is not "primary." Its effect in placing low-income students in orderly classrooms with middle class students and thereby, hopefully, providing a better education where educational improvement is critically needed is its "primary" effect.

The Cleveland voucher plan is therefore valid under the Establishment Clause, and the decision of the Court of Appeals should not be allowed to stand.

V. FOR THE FOREGOING REASONS, THIS COURT SHOULD GRANT A WRIT OF CERTIORARI, LIMITED TO THE VALIDITY, OR NOT, OF THE CLEVELAND VOUCHER PLAN WHEN TESTED UNDER THE PRINCIPAL OR PRIMARY EFFECT STANDARD.

Writs of certiorari limited to one of several issues presented are common in the practice of this Court. See, e.g., *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 455 U.S. 988 (1982); *Blum v. Yaretsky et al.*, 454 U.S. 815 (1981); *McEloy v. United States*, 454 U.S. 815 (1981); and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 424 U.S. 908 (1976).

While less common, this Court has on occasion defined in its own words the questions it wishes the parties to address. See *Pacific Gas & Electric Co., et al. v. State Energy Resources Conservation and Development Commission et al.*, 457 U.S. 1132 (1982), where the Court's order stated:

"Certiorari granted limited to the following questions: Whether petitioners' challenges to the provisions in the 1976 amendments to California's Warren-Alquist Act, Cal. Pub. Res. Code Ann. Sections 25524.1(b) and 25524.2 (West 1977), which condition the construction of nuclear plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available for high-level nuclear waste, are ripe for judicial review, and whether Sections 25524.1(b) and 25524.2 are pre-empted by the Atomic Energy Act of 1954, 42 U.S.C. Section 2011 *et seq*."

CONCLUSION

For the reasons stated above, his Court should grant a writ of certiorari in this case, limited to the validity, or not, of the Cleveland voucher plan when tested under the principal or primary effect standard.

Respectfully submitted,

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Nos. 00-1751, 00-1777, and 00-1779

In the Supreme Court of the United States

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SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

HANNA PERKINS SCHOOL, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

SENEL TAYLOR, ET AL., PETITIONERS

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment prevents a State from providing tuition aid as part of a general assistance program to the parents of children who attend failing public schools and authorizing the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of Argument	7
Argument:	
The Ohio Pilot Scholarship Program Does Not Violate the Establishment Clause of the First Amendment	10
A. The pilot scholarship program was enacted to promote a valid secular purpose	11
B. The pilot scholarship program does not have an impermissible effect of advancing religion	12
C. The court of appeals' "effects" analysis is out of step with this Court's precedents and is not supported by the record in this case	19
D. The court of appeals' reliance on *Nyquist* was misplaced	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Agostini v. *Felton*, 521 U.S. 203 (1997)	*passim*
Board of Educ. v. *Allen*, 392 U.S. 236 (1968)	11
Board of Educ. of Kiryas Joel Village Sch. Dist. v. *Grumet*, 512 U.S. 687 (1994)	21
Bowen v. *Kendrick*, 487 U.S. 589 (1988)	19
Capitol Square Review & Advisory Bd. v. *Pinette*, 515 U.S. 753 (1995)	18
Church of the Lukumi Babalu Aye, Inc. v. *Hialeah*, 508 U.S. 520 (1993)	18, 26
Committee for Public Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973)	6, 9, 26, 27

Cases—Continued: Page

Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327 (1987) 12
Everson v. *Board of Educ. of the Township of Ewing*, 330 U.S. 1 (1947) 13
Good News Club v. *Milford Cent. Sch.*, 121 S. Ct. 2093 (2001) 12, 13, 21
Jackson v. *Benson*, 578 N.W.2d 602 (Wis.), cert. denied, 525 U.S. 997 (1998) 21
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) .....
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 22, 29
Mitchell v. *Helms*, 530 U.S. 793 (2000) ..... *passim*
Mueller v. *Allen*, 463 U.S. 388 (1983) 6, 9, 11, 14, 20, 21, 28, 29
Reed v. *Roberts*, No. 1:73 CV 1300 (N.D. Ohio Mar. 3, 1995) 2
Rosenberger v. *Rectors & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) 12, 13, 24
Simmons-Harris v. *Goff*, 711 N.E.2d 203 (Ohio 1999)..... 5
Widmar v. *Vincent*, 454 U.S. 263 (1981) 4
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 22
Witters v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) ..... *passim*
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 8, 14, 29

Constitution and statutes:

U.S. Const.:
Amend. I (Establishment Clause) ..... *passim*
Amend. XIV 10
Act of June 27, 2001, Pub. L. No. 107-16, § 401(c)(2), 115 Stat. 58 2
Child Care and Development Block Grant Act of 1990, 42 U.S.C. 9858n(2) (1994 & Supp. V 1999) 2
42 U.S.C. 604a(c) (Supp. V 1999) 2
42 U.S.C. 604a(e)(1) (Supp. V 1999) 2

Statutes—Continued: Page

Northwest Territory Ordinance of 1787, ch. 8, Art. III, 1 Stat. 52 29
Personal Responsibility and Work Opportunity Reconciljation Act of 1996, 42 U.S.C. 604a(a)(2)(B)(ii) (Supp. V 1999) 2
20 U.S.C. 5899(a)(2) 2
Ohio Rev. Code Ann. (Anderson 1999):
§§ 3313.974-3313.979 (1999 & Supp. 2000) 3
§ 3313.975(A) (1999 & Supp. 2000) 3, 5, 25, 27
§ 3313.975(B) (1999 & Supp. 2000) 3
§ 3313.975(C)(1) (1999 & Supp. 2000) 3
§ 3313.976 4
§ 3313.976(A) 16
§ 3313.976(A)(3) 3
§ 3313.976(A)(4) 3
§ 3313.976(A)(6) 3
§ 3313.976(A)(8) 3, 14, 23
§ 3313.976(C) 3
§ 3313.978(A) 4
§ 3313.978(B) 4
§ 3313.978(C)(1) 4
§ 3313.978(C)(3) 4
§ 3313.979 ..... 3, 4, 16
§ 3314.01(B) 5
§ 3314.04 5
§ 3314.11 23
§ 3317.02(*l*) (1999 & Supp. 2000) 25

Miscellaneous:

Cleveland City School District Performance Audit (Mar. 1996) 2, 3
Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Private School Universe Survey: 1999-2000* (2001) 24

In the Supreme Court of the United States

No. 00-1751

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL., PETITIONERS

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Ohio Pilot Project Scholarship Program provides tuition aid and other assistance to the parents of children in Cleveland, Ohio, where the inner-city public school system has been found to be seriously deficient. The program permits parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated. The court of

appeals in this case held that the Ohio program violates the Establishment Clause of the First Amendment.

Congress has enacted several programs that make funds available to disadvantaged individuals to obtain services from private entities of their own choosing, irrespective of the religious affiliation, if any, of such entities. See, *e.g.*, Child Care and Development Block Grant Act of 1990, 42 U.S.C. 9858n(2) (1994 & Supp. V 1999); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. 604a(a)(2)(B)(ii), (c), and (e)(1) (Supp. V 1999). In addition, Congress recently enacted a statute that extends certain tax benefits when parents use funds from an education individual retirement account to pay the expenses for their children to attend "a public, private, or religious" elementary or secondary school. Act of June 7, 2001, Pub. L. No. 107-16, § 401(c)(2), 115 Stat. 58.

More generally, the United States has a strong interest in ensuring that States and local governments are afforded the flexibility that the Constitution reserves to them to provide for the education of the Nation's youth. "[E]ducation is fundamental to the development of individual citizens and the progress of the Nation." 20 U.S.C. 5899(a)(2).

STATEMENT

1. More than 75,000 children, the vast majority of whom are from low-income and minority families, are enrolled in the Cleveland City School District. *Cleveland City School District Performance Audit* 1-4 (Mar. 1996) (*1996 Audit*). In 1995, a federal district court, in an ongoing proceeding involving the desegregation of Cleveland public schools, placed that school district under the control of the state superintendent because of a crisis that gravely affected the district's educational performance. See *Reed* v. *Rhodes*, No. 1:73 CV 1300 (N.D. Ohio Mar. 3, 1995); Pet. App. 43a. The Cleveland district failed to meet any of the 18 state standards for minimum acceptable performance, and students in the district

performed at a dismal rate compared with students in other Ohio public schools. See *1996 Audit* 2-3. Sixty percent or more of the students failed to graduate. 5 C.A. App. 1621.

In response to that educational crisis, Ohio enacted its Pilot Project Scholarship Program. Ohio Rev. Code Ann. (ORC) §§ 3313.974-3313.979 (Anderson 1999 & Supp. 2000). The program provides two basic kinds of assistance: tuition aid for students in kindergarten through eighth grade who reside in a covered district to attend a participating public or private school of their families' choosing, ORC § 3313.975(B) and (C)(1); and tutorial aid for "an equal number of students * * * attending public school in any such district," ORC § 3313.975(A). The program is limited to "school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent." *Ibid.* Only the Cleveland school district has met that criterion. Pet. App. 4a.[1]

Any private school located within the boundaries of a covered district, regardless of any religious affiliation it may have, is eligible to participate in the program, as long as it meets state educational standards, ORC § 3313.976(A)(3), and agrees not to discriminate on the basis of race, religion, or ethnic background, or to advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion, ORC § 3313.976(A)(4) and (6). Any public school located in a school district adjacent to the covered district is also eligible to participate. ORC § 3313.976(C).

Tuition aid is disbursed through checks. When the aid is used to enable a student to attend a private school, checks are made payable to the student's parents, who endorse the checks over to their chosen school. ORC § 3313.979. In awarding such aid, families with incomes below 200% of the

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[1] The "Pet. App." references are to the appendix accompanying the petition in No. 00-1751.

poverty line are given priority. ORC § 3313.978(A); Pet. App. 4a. For those low-income families, the program pays 90% of the private school's tuition up to $2250. ORC § 3313.978(A) and (C)(1). Participating schools may not require a low-income family to pay more than the remaining 10% of the tuition. ORC § 3313.976(A)(8). For other families, the program pays 75% of the tuition up to $1875, and there is no tuition cap. ORC §§ 3313.976(A)(8), 3313.978(A).

Parents are responsible for choosing a participating school. ORC § 3313.978(A). Schools that choose to participate are required to admit pilot project students in accordance with criteria established by the State and the nondiscrimination principle. ORC § 3313.976. In the 1999-2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland elected to participate. That same year, 3700 students participated in the scholarship program, most of whom (96%) enrolled in a religiously affiliated school. Pet. App. 5a.[2] There is no evidence that any student who has applied to a nonreligious private school in the program has been denied admission. *Id.* at 51a.

The program also authorizes tutorial assistance for students whose parents choose to keep them in public school. ORC § 3313.978(B). Students from low-income families receive 90% of the amount charged for such assistance (up to $360), and other students receive 75% of that amount. ORC § 3313.978(B) and (C)(3). Tutorial aid grants are made "payable to the parents of the student," then endorsed to the service provider. ORC § 3313.979. The number of tutorial assistance grants offered to families who choose to keep their children in a covered public school must equal the

[2] That percentage has fluctuated. At one point, "as many as 22% of the students enrolled in the program attended nonreligious [private] schools." Pet. App. 5a.

number of tuition scholarships for families who choose to send their children to a private school. ORC § 3313.975(A).

The pilot scholarship program is part of a broader undertaking by the State to enhance the education available to Ohio children, especially those in underperforming public schools. That undertaking includes programs governing community and magnet schools. Community schools are established and funded pursuant to state law, but are run by their own school boards and exist independent of public school districts. ORC §§ 3314.01(B), 3314.04; J.A. 157a-164a. During the 1999-2000 school year, there were 10 start-up community schools in Cleveland, with more than 1900 students. J.A. 161a. Magnet schools are public schools operated by the school district itself that emphasize a particular subject area, teaching method, or service to students. 4 C.A. App. 1304. During the 1999-2000 school year, there were 23 magnet schools in Cleveland, with more than 13,000 students in grades kindergarten through eighth. J.A. 151a-152a; Pet. App. 117a n.15.

2. In 1996, respondents in No. 00-1751 challenged the Ohio program in state court on federal and state grounds. The Ohio Supreme Court held that the program does not violate the Establishment Clause of the First Amendment. *Simmons-Harris* v. *Goff*, 711 N.E.2d 203, 211 (1999). The court emphasized that whatever link between government and religion is created by the program "is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government." *Id.* at 209 (quoting *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986)). The court found, however, that the program violated the "one-subject" requirement of the Ohio constitution because it was enacted as part of a bill addressing many subjects. *Id.* at 214-215. The State cured that legislative defect, while leaving the basic provisions discussed above intact.

3. In July 1999, respondents filed this action in federal district court, seeking to enjoin the program as reenacted on the ground that it violates the Establishment Clause. Petitioners in No. 00-1777 intervened to defend the program, and a second suit was filed against the program. The district court consolidated the actions and issued a preliminary injunction barring implementation of the program. Pet. App. 7a-8a, 128a-132a. After the court of appeals declined to stay that order, this Court granted a stay pending appeal. 528 U.S. 983 (1999). In December 1999, the district court granted summary judgment for respondents and permanently enjoined implementation of the program (Pet. App. 61a-126a), finding that it was unconstitutional under *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), discussed at pages 26-28, *infra*.

4. The Sixth Circuit affirmed. Pet. App. 1a-58a. The court of appeals acknowledged that the pilot program is "facial[ly] neutral[]," but held that it has an impermissible "effect" of advancing religion. Pet. App. 25a. The court pointed to the fact "that 82% of participating schools are sectarian," and was of the view that "the tuition restrictions * * * limit the ability of [private] nonsectarian schools to participate." *Id.* at 25a-26a. The court also attached significance to the fact that no adjacent public school had chosen to participate in the program. *Id.* at 26a. The court declined to consider the "other options available to Cleveland parents such as the Community schools," stating that those options are "at best irrelevant" to this case. *Id.* at 23a.

The court of appeals rejected the State's reliance on decisions such as *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Witters*; and *Mueller* v. *Allen*, 463 U.S. 388 (1983), in which this Court upheld facially neutral school-aid programs that provided an indirect benefit to religious schools only as a result of the private choices of individual aid recipients. The court reasoned that, unlike the programs in those cases, "the Ohio scholarship

program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria." Pet. App. 29a. Instead, the court equated the Ohio program with the one invalidated in *Nyquist*, and held that *Nyquist* "governs." *Id.* at 24a-25a.

Judge Ryan dissented. Pet. App. 34a-58a. He concluded that the "statute interpreted in *Nyquist* and the Ohio statute before us are totally different in all of their essential respects." *Id.* at 34a; see *id.* at 36a-40a. In addition, he reasoned that the "Establishment Clause decisions handed down in the 27 years since *Nyquist* was decided" (*id.* at 35a) underscore that "whether public funds find their way to a religious school is of no constitutional consequence if they get there as a result of genuinely private choice." *Id.* at 41a; see *id.* at 40a-43a. Judge Ryan was of the view that the record in this case demonstrates that the Ohio pilot program affords participants such "a *genuine* choice," *id.* at 45a; see *id.* at 44a-46a, and he thus rejected the proposition that the Ohio program has a forbidden effect.

SUMMARY OF ARGUMENT

In response to the catastrophic and well-documented failure of Cleveland's inner-city public schools, the State of Ohio enacted a pilot scholarship program to provide children in that community an opportunity to avoid the debilitating, life-long consequences of a failed education. The court of appeals erred in concluding that the Establishment Clause of the First Amendment prohibits that program.

The Establishment Clause prevents a State from enacting laws that have the purpose or primary effect of advancing religion. No one disputes that the Ohio program was enacted for the valid and, indeed, compelling secular purpose of providing educational assistance to Ohio children who find themselves in a demonstrably failing public school system. The crux of this case, therefore, is whether the Ohio program nonetheless has the forbidden effect of advancing

religion. In undertaking that inquiry, this Court looks primarily to whether a law results in government indoctrination of religion, or defines aid recipients by reference to religion. *Agostini* v. *Felton*, 521 U.S. 203 (1997). When neither is true, a reasonable observer would be unlikely to draw an inference that the State has endorsed religion by enacting the law.

The determination whether government aid that may benefit religious schools results in government indoctrination turns on "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell* v. *Helms*, 530 U.S. 793, 809 (2000) (plurality). When aid is provided on neutral terms without regard to religion, it is unlikely that a reasonable observer would conclude that *the State* is engaged in indoctrination. The Court has consistently upheld educational assistance programs under which aid may benefit religious schools as a result only of the genuinely independent and private choices of aid recipients. That is true even if, as a result of those choices, such aid directly assists the educational function of religious schools. *E.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

The Ohio pilot scholarship program fits comfortably within that framework. Aid recipients are defined by whether they reside in a failing public school district, not by reference to religion. The only way in which aid may reach religious schools is as a result of truly private choices by parents to enroll their children in such a school. Aid recipients have the full opportunity to expend the aid on a wholly secular education, including by using tuition aid to enroll their children in a participating private nonreligious school, keeping their children in public school and seeking tutorial aid, or forgoing participation in the scholarship program altogether and, instead, sending their children to a magnet or community school. Parental choice, not government indoctrination, is therefore the hallmark of the Ohio program.

The fact that most parents who have participated in the program have opted to use scholarship aid to send their children to a private religious school does not mean that any indoctrination that occurs in such a school may be attributed to the State. This Court already has rejected that line of argument in upholding private-choice programs. *E.g.*, *Agostini*; *Mueller* v. *Allen*, 463 U.S. 388 (1983). For several reasons, it should do the same here. First, even though most participating private schools are religiously oriented, in the 1999-2000 school year 10 of 56 were not. Second, the record establishes that the decisions of individual parents to enroll their children in a private religious school, rather than another school, have been freely made. Third, when considered in the context of the full range of options available to the parents of children in the Cleveland school district, including magnet and community schools, the percentage of parents who have elected to use scholarship aid to send their child to a private religious school is small.

Nor is there any basis to conclude that the Ohio pilot program discourages either private nonreligious or adjacent public schools from participating. Nothing in the record shows that any private nonreligious or adjacent public school has declined to participate in the program because it cannot afford to do so. The fact that more private religious than nonreligious schools participate does not support the court of appeals' "financial disincentive" theory, because, as is true nationwide, there are more private religious than nonreligious schools in Cleveland to begin with.

Committee for Public Education and Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973), does not govern this case. First, whereas the program in *Nyquist* was intended to support private schools statewide, the purpose of the Ohio program is to assist children in a failing public school district, and the program is carefully tailored to that purpose.

Second, unlike the program in *Nyquist*, the Ohio program also provides assistance for parents who choose to keep their children in public school. Moreover, this Court's Establishment Clause jurisprudence has undergone "significant[]" changes since *Nyquist*, particularly in "the criteria used to assess whether aid to religion has an impermissible effect." *Agostini*, 521 U.S. at 223, 237. Today, *Nyquist* must be read in light of those changes.

ARGUMENT

THE OHIO PILOT SCHOLARSHIP PROGRAM DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion." This Court has often been called upon to decide whether a government program that may result in an indirect benefit to religious schools is barred by the Establishment Clause. In undertaking that inquiry, the Court looks, *first*, to "whether the government acted with the purpose of advancing or inhibiting religion," and *second*, to "whether the aid has the 'effect' of advancing or inhibiting religion." *Agostini* v. *Felton*, 521 U.S. 203, 221-223 (1997); see *Mitchell* v. *Helms*, 530 U.S. 793, 807-808 (2000) (plurality); see *id.* at 844-845 (O'Connor, J., joined by Breyer, J., concurring in the judgment). Applying that framework, the Court has consistently upheld government aid to education that is provided to individuals on neutral terms without regard to religion, and that may reach a religious school only as a result of the truly private choices of individual parents or students. As explained below, the Ohio pilot scholarship program comports with those principles, and is not barred by the Establishment Clause.

A. The Pilot Scholarship Program Was Enacted To Promote A Valid Secular Purpose

No one disputes that the scholarship program at issue in this case has a valid secular purpose. The program was enacted in response to a severe educational crisis in Cleveland's inner-city schools, in an effort to rescue Ohio school children in communities where educational assistance is most sorely needed. See pp. 2-3, *supra*; Pet. App. 44a (Ryan, J., dissenting) ("The *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority, public school children from the devastating consequences of * * * the failed Cleveland Schools.").

This Court has recognized that "[a]n educated populace is essential to the political and economic health of any community, and [that] a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated." *Mueller* v. *Allen*, 463 U.S. 388, 395 (1983). The purpose of the Ohio pilot scholarship program is even more focused and, indeed, more compelling. The program is limited to public school districts that are or have been subject to a federal court order placing them under direct state supervision. ORC § 3313.975(A). The Cleveland school district is the only district that has qualified for the program. Pet. App. 4a; J.A. 69a. The need to assist children enrolled in that district has not abated. See 2 C.A. App. 475 (1999 report); 5 C.A. App. 1621 (1999 graduation rate below 33%).

Nor is it surprising, or in any way improper, that the State would choose to give the parents of students enrolled in a demonstrably failed school district the option of using aid to send their children to a private school, including a religiously affiliated school, if they so desire. Private schools have long played an important role in the educational life of American communities. See *Board of Educ.* v. *Allen*, 392

U.S. 236, 247-248 (1968). Where a public school system has failed, it is common sense for a State, in addition to trying to revive that system, to look to private schools as a means of creating educational opportunity for children in the community. And in addressing such a critical problem, it is appropriate for a State to be inclusive, and make *all* schools eligible to participate in some way in the overall effort, irrespective of their particular educational philosophy or mission. Cf. *Good News Club* v. *Milford Central School*, 121 S. Ct. 2093, 2100 (2001); *Rosenberger* v. *Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995).

B. The Pilot Scholarship Program Does Not Have An Impermissible Effect Of Advancing Religion

The Ohio pilot scholarship program also satisfies the "effects" prong of this Court's Establishment Clause jurisprudence.

1. "For a law to have forbidden 'effects' [under the Establishment Clause], it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 337 (1987). In *Agostini*, 521 U.S. at 234, this Court explained that it looks to "three primary criteria" in determining whether a school-aid program has such effects: whether the aid "result[s] in governmental indoctrination"; whether the aid "define[s] its recipients by reference to religion"; and whether the aid creates an "excessive entanglement" between government and religion. See *Mitchell*, 530 U.S. at 808 (plurality); *id.* at 845 (O'Connor, J.).

a. "[W]hether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to government action." *Mitchell*, 530 U.S. at 809 (plurality); see *id.* at 842 (O'Connor, J.); *Agostini*, 521 U.S. at 226. "In distinguishing

between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 U.S. at 809 (plurality); see *id.* at 838 (O'Connor, J.) ("[W]e have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid."); *Good News Club*, 121 S. Ct. at 2104 ("We have held that 'a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* toward religion.'") (citing cases).

As a general rule, indoctrination cannot reasonably be attributed to the government itself when "any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Mitchell*, 530 U.S. at 810 (plurality) (quoting *Agostini*, 521 U.S. at 226); see *id.* at 842-843 (O'Connor, J.). That is true even if, as a result of those choices, the aid in turn "directly assists the educational function of religious schools." *Agostini*, 521 U.S. at 225-226; *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986). In a related vein, when aid may reach a religious school only in that fashion, it is unlikely that a reasonable observer of the program would believe that "the State itself is endorsing a religious practice or belief." *Mitchell*, 530 U.S. at 843 (O'Connor, J.); see *id.* at 835 (plurality); *Rosenberger*, 515 U.S. at 848 (O'Connor, J., concurring); *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment).

The Court recognized the significance of the element of private choice in evaluating the school-aid program challenged in its first modern Establishment Clause case, *Everson* v. *Board of Educ. of the Township of Ewing*, 330 U.S. 1, 18 (1947), where the Court upheld a state program permitting localities to reimburse parents for expenses incurred in transporting their children to school, even if they chose to

send them to a religious school. And since *Everson*, that principle has become deeply ingrained in this Court's Establishment Clause precedents. In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), for example, the Court held that government funds could be used to pay for the services of a sign-language interpreter to assist a deaf child enrolled in a religious school, where the funds were made available to a broad class of individuals on neutral terms, without regard to whether the school was public or private, religious or nonreligious. As the Court explained, "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.* at 10.

Similarly, in *Witters*, the Court upheld a state program that provided funds to disabled individuals to obtain vocational assistance, even where the funds were in turn used by the recipient to enroll in a religious school. As the Court explained, "[a]ny aid provided under [the] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487. And, in *Mueller*, the Court upheld a state law permitting parents to deduct educational expenses from their state income tax, without regard to whether the parents sent their children to a public or private, or religious or nonreligious, school. The Court explained that "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." 463 U.S. at 399 (quoting *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981)). See also *Agostini*, 521 U.S. at 228-229 (Title I program, under which federal funds are distributed to public agencies that provide services directly to low-income students "no matter where they choose to attend school," is analogous to program upheld in *Zobrest*).

b. The second criterion identified in *Agostini* for identifying impermissible effects—whether the aid program defines its recipients by reference to religion—is "closely related to the first." *Mitchell*, 530 U.S. at 813 (plurality). "[T]he manner in which a government-aid program identifies its recipients is important because 'the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination.'" *Id.* at 845 (O'Connor, J.) (quoting *Agostini*, 521 U.S. at 231). The Court has recognized, however, that no such "incentive" is present when "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231. Accordingly, the second *Agostini* criterion is likely to be met, the Court has explained, whenever aid is provided "to *all* eligible children regardless of where they attended school." *Ibid.* (citing, *e.g.*, *Zobrest*, *Witters*, and *Mueller*).[3]

2. a. The Ohio pilot scholarship program fits comfortably within the *Agostini* framework. To take the second consideration first, the Ohio program does not "define its recipients by reference to religion." *Agostini*, 521 U.S. at 234. Both tuition aid and tutorial assistance are made available to participating families on neutral terms that in no way refer to religion. The family of any student in a pilot district

[3] The third *Agostini* criterion—"excessive entanglement" between government and religion—typically exists only when "pervasive monitoring by public authorities" would be necessary to ensure that a program does not involve government inculcation of religion. 521 U.S. at 233. As is true with respect to the other *Agostini* criteria, it is unlikely that there would be any occasion for such monitoring or that such entanglement would be present when aid may flow to religious entities only as the result of the intervening and truly private decisions of aid recipients. In this case, respondents have not seriously challenged the Ohio program under the third *Agostini* criterion, and the court of appeals did not discuss (or rely on) that factor in invalidating the program.

through eighth grade is eligible to participate. ORC § 3313.976(A). The only preference under the program is for low-income families. *Ibid.* All private schools within a pilot district, as well as all public schools in adjacent districts, are eligible to participate as long as they agree to abide by the non-discrimination principle and meet state education standards. ORC § 3313.976(A). "The statute expresses no preference, explicitly or implicitly, either as to the religion of the voucher recipients, or if the recipient chooses a private school, whether the voucher is applied to a religious or nonreligious school." Pet. App. 47a (Ryan, J., dissenting).

Nor does the Ohio pilot program "result in governmental indoctrination." *Agostini*, 521 U.S. at 234. "Each scholarship or grant to be used for payments to a registered private school or to an approved tutorial assistance provider is payable to the *parents* of the student entitled to the scholarship or grant." ORC § 3313.979 (emphasis added); see *Witters*, 474 U.S. at 487. Those funds may reach a private religious school only as a result of the private and wholly independent decision of parents to enroll their children in such a school, rather than to avail themselves of one of the other options available to them under Ohio law.

At the same time, "aid recipients have full opportunity to expend [the] aid on wholly secular education." *Witters*, 474 U.S. at 488. A number of nonreligious private schools participate in the program, and "there is no evidence that any of [those schools] have *ever* rejected a single voucher applicant for any reason." Pet. App. 51a (Ryan, J., dissenting). Nor is there any "evidence in the record that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive." *Id.* at 51a-52a.

The parents of children in the Cleveland school district have other options as well. They may leave their children in public school and seek the tutorial aid that the pilot scholarship program makes available. Or they may forgo assistance under the scholarship program and enroll their children in a magnet or community school, free of charge. See Pet. App. 45a-46a (Ryan, J., dissenting); 4 C.A. App. 1303-1304. The community school system in particular promotes a range of alternatives to the schools operated by the Cleveland school district itself, in addition to local private schools. Indeed, in instituting the community school program, the State recognized that such schools would "provid[e] parents a choice of academic environments for their children and provid[e] the education community with the opportunity to establish limited experimental programs in a deregulated setting." J.A. 42a.[4]

b. The pilot scholarship program thus shares the key features of the educational assistance programs in *Zobrest* and *Witters*. Ohio has singled out a narrow and particularly needy class of citizens for assistance—mostly low-income children in grades kindergarten through eighth who find themselves in a demonstrably unsuccessful educational environment. Only a small fraction (less than 4.5%) of students in the State qualify for that aid, and because there are only about 3700 spaces in the scholarship program, an even smaller percentage (less than 0.3%) of students statewide actually benefit from it. The aid is made available on neutral terms to the parents of students participating in the program. And "[a]ny aid provided under [the] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487.

The private-choice program challenged in this case is on even more solid footing than the one upheld in *Mitchell*.

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[4] The parents also would be free to use the scholarship aid to send their children to an adjacent public school participating in the program, although no adjacent public school district thus far has elected to participate.

Mitchell involved a "per-capita-school-aid program," as distinguished from the "true private-choice programs considered in *Witters* and *Zobrest*." 530 U.S. at 842-843 (O'Connor, J.). Under the program in *Mitchell*, funds were granted to local agencies, which then provided educational assistance directly to public and private schools, including religious schools. The amount of the assistance provided to each school was determined by its enrollment. As the *Mitchell* plurality observed, under such a program, "[i]t is the students and their parents—not the government—who, through their choice of school, determine who receives [the] funds." *Id.* at 830. In the view of the concurring Justices in *Mitchell*, such "a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools." *Id.* at 842-843. Those Justices nonetheless concluded that the per-capita-aid program was constitutional. This case, by contrast, involves th[illegible]e private-choice" type of program. *Ibid.*

[illegible]or similar reasons, the pilot scholarship program "cannot reasonably be viewed as an endorsement of religion." *Agostini*, 521 U.S. at 235; see *Witters*, 474 U.S. at 489. "[W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, '[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief.'" *Mitchell*, 530 U.S. at 843 (O'Connor, J.). That is particularly true with respect to the assistance program challenged in this case. It is undisputed that the program was enacted to throw an educational lifeline to the mostly poor students in Cleveland's public school district after the district had demonstrably failed parents and students in its basic educational mission. Cf. *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995)

(O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment) (A reasonable observer must be deemed to be aware of the "history and context" underlying the program.). The background and targeted focus of the Ohio program thus furnish an extra measure of protection against any inference that the State itself is endorsing religion.

So does the program's experimental nature. In *Bowen* v. *Kendrick*, 487 U.S. 589, 603-604 (1988), for example, this Court concluded that Congress's decision to amend the Adolescent Family Life Act to allow "religious organizations," along with other groups, to provide publicly funded counseling on problems associated with teenage sexuality promoted "the entirely appropriate aim of increasing broad-based community involvement" in addressing those problems, as well as ensuring "increased participation of parents in education and support services, * * * increas[ing] the flexibility of the programs, and * * * spark[ing] the development of new, innovative services." Similarly here, Ohio and the Cleveland school district have taken a number of steps, including the creation of community and magnet schools and the provision of tutorial assistance to public school children, to address the plight of Cleveland's school children. Any objective observer familiar with the situation would reasonably view the pilot scholarship program as one part of a broader undertaking to offer those children a full range of educational opportunities through the combined efforts and innovations of public schools, private schools, community groups, and parents.

C. The Court Of Appeals' "Effects" Analysis Is Out Of Step With This Court's Precedents And Is Not Supported By The Record In This Case

The court of appeals concluded that the Ohio pilot scholarship program has an impermissible effect of advancing religion. The court pointed to the percentage of private

religious schools participating in the program, the supposedly "lower tuition needs" of religious schools, and the fact that (at least so far) no neighboring public school district has chosen to participate in the program. Pet. App. 26a. That reasoning is both legally and factually unsound.

1. This Court has repeatedly held that a general assistance, private-choice program does not have an impermissible effect of advancing religion simply because, in practice, more—even significantly more—beneficiaries of the program choose to obtain services from a religious rather than nonreligious entity. For example, in *Mueller*, this Court rejected the argument that a state law providing an income tax deduction for educational expenses had an impermissible effect because "the bulk"—more than 90%—"of deductions taken [under the program] will be claimed by parents of children in sectarian schools." 463 U.S. at 401. The Court explained that it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Ibid.*[5]

Similarly, in *Agostini*, the Court upheld the use of federal funds to send public school teachers into private schools to provide remedial education to disadvantaged children, even though more than 90% of the private schools within the

[5] That reluctance is called for here. The experience in Cleveland and other localities that have experimented with expanding the educational options available to disadvantaged children in faltering public schools indicates that the number of individuals and types of schools participating in such programs can fluctuate from year to year based on the dynamics of the particular range of options and other factors, including litigation. See J.A. 227a, 234a-236a; note 2, *supra*. Milwaukee, for example, "has seen dynamic growth in the number of nonsectarian schools participating" in its school-choice program, which, like the Ohio program at issue in this case, was established by Wisconsin to create opportunities for the mostly low-income and minority families with children in that community's failing public school system. J.A. 236a.

jurisdiction of the school board at issue were religious. 521 U.S. at 210. In so ruling, the Court emphasized that it was not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.* at 229. See also *Good News Club*, 121 S. Ct. at 2107 n.9; *Mitchell*, 530 U.S. at 812 n.6 (plurality) (*Agostini* "held that the proportion of aid benefitting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the [Establishment Clause] inquiry."); *Witters*, 474 U.S. at 491-492 & n.3 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring); *Jackson* v. *Benson*, 578 N.W.2d 602, 619 n.17 (Wis.), cert. denied, 525 U.S. 997 (1998).

To be sure, a State may not contrive a program to benefit one religion over another, or religion over nonreligion. *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687 (1994). Nor may a State utilize facially neutral terms to advance an impermissible purpose of singling out religion for unfavorable treatment. *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993). But when, as here, the government establishes a neutral program for a concededly valid purpose, and when any aid provided by that program may benefit religion only as a result of the private choices of individual aid recipients, then the *manner* in which individuals exercise that choice does not itself furnish a basis for invalidating the program. See *Agostini*, 521 U.S. at 229; *Mueller*, 463 U.S. at 401. Several facets of the program in this case bolster that conclusion here.

First, as discussed above, parents participating in the pilot scholarship program have the option of using aid to send their children to a private nonreligious school. Although the number has fluctuated, in the 1999-2000 school year 10 private nonreligious schools (representing virtually all of such schools in the Cleveland area) participated in the pilot program. Pet. App. 5a.

Second, there is no evidence establishing that parents who chose to enroll their children in a participating private religious school did so because of any financial incentive created by the program, or any feeling that they lacked a secular alternative. To the contrary, the numerous affidavits in the record establish that parents who opted to use scholarship funds to send their children to a private religious school did so primarily because of the school's educational record, safety, and diversity, or because of the feeling of trust that they had after meeting with teachers or administrators. See, *e.g.*, 00-1777 Pet. App. 80a, 88a, 90a, 97a, 99a, 127a, 141a, 154a, 173a, 175a, 183a, 185a; 3 C.A. App. 657; see also J.A. 69a-71a, 100a-101a. That evidence underscores that the individual choices made under the program were thoughtfully and *freely* made by parents fulfilling their "high duty" to provide for the education of their children. *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923); see *Wisconsin* v. *Yoder*, 406 U.S. 205, 232-233 (1972).

Third, the court of appeals' focus on the relative percentages of religious and nonreligious private schools participating in the program unduly discounts the entire range of options available to parents. As discussed above, parents have several options in addition to the pilot scholarship program. In fact, the vast majority of parents eligible for the scholarship program who have transferred their children out of one of Cleveland's regular public schools have enrolled them in a magnet or community school. See J.A. 207a, 217a; see also J.A. 168a-169a; 5 C.A. App. 1635-1645, 1657-1670 (affidavits of parents indicating that they consider all options, including magnet and community schools, in deciding whether to participate in pilot scholarship program).

The court of appeals dismissed those options as "at best irrelevant" because they were not enacted as part of the pilot scholarship program itself. Pet. App. 23a. That analysis is fundamentally mistaken. The community schools, for example, broaden the universe of nonreligious schools

that are available to Cleveland school children outside the Cleveland public school system. Some private nonreligious schools within the Cleveland district—which could have participated in the pilot scholarship program—have become community schools. J.A. 145a-146a, 217a-218a. In addition, Ohio has established a single "office of school options" to "provide services that facilitate the management of the community schools and the pilot scholarship program," ORC § 3314.11, underscoring the interrelationship between such choice programs. In determining whether the pilot scholarship program has an impermissible effect of advancing religion, there is no reason to ignore the full range of choices provided by the State to the program's beneficiaries, only *one* of which is for parents to accept scholarship aid and enroll their children in a private religious school.

2. The court of appeals' belief that the pilot program discourages participation of private nonreligious schools also does not withstand scrutiny. Citing only a law review article, the court broadly asserted that "religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." Pet. App. 26a. From that premise, the court reasoned that the program's tuition cap (ORC § 3313.976(A)(8)) creates a financial disincentive for private nonreligious schools to accept pilot program students. Pet. App. 26a. That conclusion simply has no support in the record. As Judge Ryan explained, "there is no evidence that any of the several nonreligious, private schools participating in the program have *ever* rejected a single voucher applicant for any reason, including a supposed inability to afford the differential between the value of a $2,500 voucher and the actual cost of a nonreligious, private school." *Id.* at 51a.

The determination whether a challenged government program violates the Establishment Clause often "depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the

Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." *Mitchell*, 530 U.S. at 844 (O'Connor, J.) (quoting *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring)). In undertaking that sensitive task, however, this Court has never suggested that a federal court may invalidate a state law under the First Amendment based on asserted "facts," with no actual foundation in the record before it. The court of appeals erred in doing so here.

In any event, the court of appeals' "financial disincentive" theory is contradicted by the fact that, as the record establishes, several nonreligious private schools in the Cleveland area *do* participate in the pilot program. Pet. App. 5a. The fact that more private religious than nonreligious schools participate in the program does not support the court of appeals' speculation that the program discourages the participation of nonreligious schools. As is true across America, most private schools in the Cleveland area are religiously affiliated to begin with. See Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Private School Universe Survey: 1999-2000*, at 2 (2001) (about 78% of private schools nationwide are religiously affiliated).

The court of appeals' speculation that the tuition cap might create a disincentive for schools to accept students also ignores its unquestionably valid purposes. The cap makes it more likely that low-income families will be able to send their children to a participating private school, whether it is religious or nonreligious. It also encourages private schools that ordinarily charge a higher tuition (and have a student base that can afford such tuition) to do their part to help educate Cleveland's neediest students. The cap applies only to low-income scholarship students. Private schools, both religious and nonreligious, remain free to charge whatever tuition they choose with respect to all their other students—including any pilot scholarship students who are not from low-income families.

3. The court of appeals' reliance (Pet. App. 26a) on the fact that no adjacent public school has elected to participate in the pilot program is similarly flawed. "There is absolutely no evidence in the record to support the majority's argument that the Ohio statute creates a financial 'disincentive' for Cleveland's neighboring, suburban public school districts to participate in the program." *Id.* at 50a (Ryan, J., dissenting); see *id.* at 51a. In fact, the program creates the opposite incentive. As the State has explained, neighboring public schools that elect to participate in the pilot program and accept scholarship students "would receive an *additional* $2,250 in state funding, because scholarship students would be included in each suburban school district's total number of students * * * for purposes of calculating the amount of state funds the district receives." 00-1751 Pet. 15-16 n.2; see ORC § 3317.02(*l*). Even with that financial incentive, however, there are several reasons why suburban public school districts might decline to participate in the pilot scholarship program, including overcrowding in their own schools.

Moreover, even though no adjacent public school has participated in the pilot scholarship program to date, parents eligible to receive scholarships have other public school options available to them. They may keep their children in their current public school and apply for tutorial aid. As discussed above, the program requires that tutorial assistance grants be made available for families who choose to keep their children enrolled in public school in equal number to the tuition scholarships for families who choose to send their children to a participating private school. ORC § 3313.975(A); J.A. 166a. In addition, parents may transfer their children to a public magnet or community school, as thousands of Cleveland parents have done. See p. 22, *supra*.[6]

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[6] The court of appeals concluded that the "Ohio scholarship program is designed in a manner *calculated* to attract religious institutions." Pet. App. 29a (emphasis added). As discussed above, that conclusion is not

D. The Court Of Appeals' Reliance On *Nyquist* Was Misplaced

The court of appeals erred in concluding that this case is "govern[ed]" by this Court's decision in *Nyquist*. Pet. App. 24a. In fact, the significant differences between the program challenged in this case and the one in *Nyquist* only underscore that Ohio has not engaged in an establishment of religion by enacting its pilot scholarship program.

1. *Nyquist* involved a challenge to a New York program that provided direct grants to private schools across the State for maintenance and repair costs, as well as tuition reimbursement and state income tax deductions for parents of children in those schools, the "great majority" of which were religious. 413 U.S. at 783. Findings established that the program was intended to provide financial support to the State's private schools, and thereby prevent a "massive increase in public school enrollment and costs." *Id.* at 765. This Court held that the program had the impermissible "effect" of advancing religion. *Id.* at 780. The Court rejected the argument that the tuition-reimbursement and tax-deduction provisions were valid because they provided benefits to parents, who chose where to enroll their children, finding that those provisions "fare[d] no better under the 'effect' test" than the program's direct grants. *Id.* at 785.

The Ohio program in this case differs in important respects from the New York program in *Nyquist*. First, the overriding purpose of the program in *Nyquist* was to

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supported by the record. Moreover, it conflicts with the undisputed fact that the program has a valid secular purpose. In that regard, this case is nothing like *Lukumi Babalu Aye*—which the court of appeals cited (*id.* at 25a)—where the record "compel[led]" the conclusion that the locality had acted with the improper object of singling out religion for unfavorable treatment. 508 U.S. at 534; see *id.* at 534-538. To the extent that the court of appeals' "effects" analysis is rooted in an inclination on its part to believe that the State acted with an improper purpose, the court's analysis fails for that reason alone.

support *private schools* in New York *en masse*, in response to their deteriorating condition and the resulting pressures on public schools. 413 U.S. at 764-765, 773, 783. Indeed, the program included direct aid to those schools, *id.* at 780-782 & n.38, and the Court concluded that the tuition-assistance grants were "offered as an incentive for parents to send their children to sectarian schools," *id.* at 786. The purpose of the Ohio program, in contrast, is to assist individual students in failing public school districts. Currently fewer than 60 private schools and only a tiny fraction of school children in Ohio participate in the program. The program in this case is focused on the needs of children where schools are failing, not on supporting private schools, as in *Nyquist*.

Second, the overall Ohio program in this case, unlike the New York program in *Nyquist*, also provides options to parents who choose to keep their children in public schools. Ohio guarantees funding for an equal number of grants to such parents to enable their children to receive tutoring, ORC § 3313.975(A), encourages participation of adjacent public school districts in the scholarship program, and funds magnet and community schools that offer innovative alternatives to the regular schools operated by the Cleveland public school system. See pp. 3-5, *supra*.

In *Nyquist*, this Court expressly reserved judgment on the constitutionality of a program "involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." 413 U.S. at 783 n.38 (citation omitted). It was not necessary to address that question in *Nyquist* because the only possible beneficiaries of the New York tuition reimbursement program were the parents of children who attended private schools. By contrast, the Ohio program in this case provides assistance *both* to parents who elect to enroll their children in a private school *and* to parents who elect to keep them in public school. That difference, especially when coupled with the

manifest differences in the purpose and scope of the two programs, distinguishes this case from *Nyquist*.[7]

2. Moreover, *Nyquist* must be read in light of this Court's subsequent decisions. As this Court recognized in *Agostini*, the Court's Establishment Clause jurisprudence has undergone "significant[]" changes over the past two decades, particularly in "the criteria used to assess whether aid to religion has an impermissible effect." 521 U.S. at 223, 237; see *Mitchell*, 530 U.S. at 845 (O'Connor, J.). Since *Nyquist*, this Court has repeatedly upheld government programs that offer aid "to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 U.S. at 809 (plurality). And, "[a]s a way of assuring neutrality, [the Court has] repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.* at 810 (quoting *Agostini*, 521 U.S. at 226); see *id.* at 841-843 (O'Connor, J.); pp. 12-14, *supra*.

In *Mueller*, the dissenters argued that *Nyquist* "established that a State may not support religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students." 463 U.S. at 404. Indeed, they argued that "the Minnesota statute [in *Mueller*] ha[d] an even greater tendency to promote religious education than the New York statute struck down in *Nyquist*, since the percentage of private schools that are nonsectarian is far greater in New York than in Minnesota."

[7] Nothing in *Nyquist* suggests that in order to survive an Establishment Clause challenge a State must *compel* public school participation in a program that provides assistance to the families of students who attend private schools. Nor would there be any doctrinal foundation for such a rule. Nonetheless, under the program in *Nyquist*, public schools were not even authorized to participate (or benefit), whereas under the Ohio program in this case they indisputably are. That distinction makes it less likely that the State may be viewed as endorsing religion by enacting the type of pilot scholarship program at issue here.

Id. at 409 n.3. The Court rejected that analysis, and held that the Minnesota program did not have an impermissible effect. Instead, the Court explained that, "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.* at 399 (citation omitted).[8]

Since *Mueller*, that private-choice principle has become deeply embedded in this Court's Establishment Clause jurisprudence. See, *e.g.*, *Witters*, 474 U.S. at 487; *Zobrest*, 509 U.S. at 10; *Agostini*, 521 U.S. at 226; *Mitchell*, 530 U.S. at 811 (plurality); *id.* at 842-843 (O'Connor, J.). *Nyquist* must be read today in light of that evolution of this Court's Establishment Clause jurisprudence. Because of the significant differences between the Ohio pilot program in this case and the New York program invalidated in *Nyquist*, there is no need for the Court to reconsider the holding in *Nyquist*. But if the Court disagrees, it should hold in this case that, to the extent that *Nyquist* extends to the type of private-choice program in this case, *Nyquist* has been overtaken by this Court's subsequent decisions.

* * * * *

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Meyer*, 262 U.S. at 400 (citing Northwest Territory Ordinance of 1787, ch. 8, Art. III, 1 Stat. 52). The pilot scholarship program challenged in this case was enacted for the commendable, and indisputably secular, purpose of providing the children of

[8] In distinguishing *Nyquist*, the *Mueller* Court also noted that the educational assistance program in *Nyquist* benefitted only the parents of students enrolled in private schools, whereas the program in *Mueller* benefitted the parents of students in private as well as public schools. See 463 U.S. at 398. As discussed above, the program here has the same broad scope as the one in *Mueller*.

predominantly low-income families in Cleveland's failing public school district with an opportunity to obtain the same level of education available to children elsewhere in the State who benefit from greater educational opportunities. The court of appeals erred in invalidating that program on the ground that it establishes religion in violation of the First Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

SUSAN TAVE ZELMAN, *Petitioner*,
v.
DORIS SIMMONS-HARRIS ET AL., *Respondents*.

On Petition For A Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE, AND FOCUS ON THE FAMILY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 3

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT 3

II. THE PETITION SHOULD BE GRANTED BECAUSE STATE AND FEDERAL APPELLATE COURTS ARE SPLIT ON THE CONSTITUTIONALITY OF SCHOOL VOUCHER PROGRAMS UNDER THE ESTABLISHMENT CLAUSE 9

CONCLUSION 13

APR-26-2002 14:14 LN

TABLE OF AUTHORITIES

CASES: Page(s)

Agostini v. Felton, 521 U.S. 203 (1997) 5, 9

Campbell v. Manchester Board of School Directors, 641 A.2d 352 (Vt. 1994) 12

Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 3, 10, 12

Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) 11

Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) 12

Lamb's Chapel v. Center Moriches Union Free School Board, 508 U.S. 384 (1993) 1

Matthew J. v. Massachusetts Dep't of Educ., 989 F. Supp. 380 (D. Mass. 1998) 13

Mitchell v. Helms, 120 S. Ct. 2530 (2000) ..... passim

Mueller v. Allen, 463 U.S. 388 (1983) 3, 8

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 11

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) ..... passim

Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) 11

Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999) 11

Westside Community Schools v. Mergens, 496 U.S. 226 (1990) 1

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 4, 8

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) 4

P.04
APR-26-2002 14:15

APR-26-2002 14:15 LN P.05

INTEREST OF AMICI CURIAE[1]

Focus on the Family is a California nonprofit religious corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations. Dr. Dobson hosts and Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada, and around the world. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month.

Representing Focus on the Family, and appearing on its own behalf as well, is the American Center for Law and Justice (ACLJ). The ACLJ is a nonprofit public interest law firm and educational organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have argued or participated as amicus curiae before this Court in numerous cases presenting Establishment Clause issues. *See, e.g., Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Lamb's Chapel v. Center Moriches Union Free School Board*, 508 U.S. 384 (1993); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

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[1] Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, amici disclose that no counsel for any party in this case authored in whole or part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than amici curiae.

P.06/12

Amici are committed to the principle that parents are responsible for the education of their children and that parents have the right to choose schools that best serve their children's educational needs. Maximizing educational choices for parents is therefore essential, especially for those families who are otherwise unable to afford private school tuition. School vouchers represent a permissible way of leveling the playing field so that all parents can choose the education that suits their values and their children's needs. A state's effort to provide funds to parents so that parents can more effectively choose the education they think best suits their children's needs is not an establishment of religion. Amici are concerned that the federal courts of appeals, including the courts below in this case, are misinterpreting this Court's Establishment Clause jurisprudence to endorse blatant discrimination against religious schools in cases involving generally available educational assistance. School voucher programs that accord the same treatment to religious schools and to secular private schools alike are consistent with this Court's interpretation of the Establishment Clause.

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APR-26-2002 14:23

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in Petitioners' Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Over the course of the last two decades, this Court has considered a number of times the permissible extent of aid to private schools or aid to parents and students to be used to enable a student to attend a private school when a portion of that aid goes to religious schools. Generally speaking, the Court has upheld programs that do not differentiate for eligibility for aid between religious and non-religious schools. For example, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a Minnesota statute authorizing a tax deduction for educational expenses of students attending either public or private schools. The Court distinguished its decision in *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) on the grounds that, unlike the New York statute in *Nyquist*, the Minnesota law permitted all parents, whether their children attended public or private schools, to deduct their children's educational expenses. 463 U.S. at 401-02. This Court also emphasized that under Minnesota's scheme, public funds flow to "sectarian schools only as a result of numerous private choices of individual parents of school-age children." *Id.* at 399. This Court dismissed as insignificant the fact that 96% of the schools involved

P.07/12

were religious in nature. "We would be loath to a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* at 401.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), this Court again stressed the importance of the fact that government funds reached religious school coffers only as a result of independent private choices. The Court held that Washington did not violate the Establishment Clause by providing funding to a blind student who used the funds to attend a Christian college to become a pastor. And, in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), the Court held that a school district could provide a sign language interpreter (at government expense) to a student in a Catholic high school. The program was available for both public and private schools, and was implemented in the sectarian school entirely upon the choice of the student and his parents. 509 U.S. at 3.

In all three of these cases, the programs at issue were neutral with regard to religion. In *Mueller*, tax credits were available for educational expenses incurred at public or religious or non-religious private schools. Likewise, in *Witters* and *Zobrest*, the programs at issue allowed students to use the aid they received at the school of their choice, whether public or private, religious or non-religious.

In 1997, this Court relied in large part on *Mueller*, *Witters*, and *Zobrest* to uphold a federal program that provided public employees to teach remedial classes at

private schools, including religious schools. *Agostini v. Felton*, 521 U.S. 203 (1997). In *Agostini*, the Court set forth the test for determining the constitutionality of aid to private religious schools. Such aid does not violate the Establishment Clause if the aid has a secular purpose and does not have the primary effect of advancing religion. Aid does not have the primary effect of advancing religion if it 1) does not result in governmental indoctrination of religion; 2) does not define its recipients by reference to religion; and 3) does not create an excessive entanglement between government and religion. *See Id.* at 232-34. The Court held that the aid in *Agostini* passed this test because it provided supplemental remedial instruction on a neutral basis to disadvantaged children who attended both public and private schools. *Id.* at 232.

If there was any doubt remaining about the analytical framework to be used in evaluating the constitutionality of government educational assistance programs, it was dispelled last term in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000). In that case, six Members of this Court agreed that the *Agostini* test controlled its Establishment Clause analysis of school aid programs. *See* 120 S. Ct. at 2540 (plurality); *id.* at 2556 (O'Connor, J., Breyer, J., concurring).

Applying this test to Cleveland's school voucher program demonstrates that the program is constitutional under *Mueller*, *Witters*, *Zobrest*, *Agostini* and *Mitchell*. First, the voucher program has a secular purpose — "to save Cleveland's mostly poor, mostly minority, public school children from the devastating consequences of requiring them to remain in the failed Cleveland schools."

APR-26-2002 14:23 LN

P.08/12

Simmons-Harris v. Zelman, 234 F.3d 945, 967 (6th Cir. 2000) (Ryan, J., dissenting).[2]

Cleveland's school voucher system also does not impermissibly advance religion. It is clear on its face that Cleveland's voucher program — one that allows parents to use vouchers at religious or non-religious schools — does not define its recipients by reference to religion. Cleveland's voucher program does not result in governmental "indoctrination" of religion because any indoctrination that occurs is not fairly attributable to governmental action. As Justice O'Connor said, "when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, ' no reasonable observer is likely to draw from the facts... an inference that the state itself is endorsing a religious practice or belief.'" *Mitchell*, 120 S. Ct. at 2559 (O'Connor, J. concurring.) "If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination." *Id.* at 2541 (plurality).

The majority opinion below discredited the array of choices offered under the Cleveland school voucher program because no eligible suburban public schools chose to participate in the program. *See* 234 F.3d at 960. The court also faulted Cleveland's program because 82% of the participating schools are church-affiliated. The court attributed this percentage of religious schools to the

[2] Plaintiffs in this suit did not contest the school voucher program's secular purpose. *See Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 844 n.6 (N. D. Ohio 1999).

program's tuition cap which limited the tuition that schools could charge to participating students.[3] The court speculated that only religious schools could afford to comply with the program's tuition restrictions. 234 F.3d at 959.

First, the court's speculation is unfounded because ten secular private schools participated in the Cleveland voucher program. Even if there were evidence to support this speculation, it has no bearing on the question whether government indoctrination occurs. The focus of the "government indoctrination" inquiry is on the government's actions, not on other private or municipal entities' response to the program. To condition a voucher program's validity under the Establishment Clause on how successfully the program recruits suburban public school participation would be to hinge constitutional analysis on something akin to a heckler's veto. Given the public educational establishment's rabid opposition to the entire concept of school vouchers, it is not surprising that no suburban public schools participate in Cleveland's school voucher program. This Court has refused to countenance the notion that a neutral school aid program's

[3] The court's characterization of this statutory provision implied that participating schools must cap tuition for all students, not just those participating in the voucher program. "The program requires participating schools to cap tuition at $2500 *per student* per year." 234 F.3d at 948 (emphasis added). That sleight of hand buttressed the court's point that secular private schools could not afford to participate in the voucher program. The statute states, however, that the tuition cap applies only "to low-income families participating in the scholarship [voucher] program...." Nothing in the statute prevents a school from charging other students whatever tuition the school desires and the market will bear. *See* Ohio Rev. Code § 3313.976 (A)(8).

APR-26-2002 14:24 LN

constitutionality depends on a statistical composite showing that the "right" kinds of beneficiaries participate in the program. *See Mueller*, 463 U.S. at 401; *Witters*, 474 U.S. at 486-88.

Cleveland's program offers a wide array of choices: Cleveland parents can send their children tuition-free to public schools. They can also send their children to ten secular private schools that participate in the program. They can send their children to a variety of sectarian schools that participate in the program. 234 F.3d at 960. And, they can accept a voucher for their children to obtain special tutorial assistance in the Cleveland schools. *Id.* at 968 (Ryan, J., dissenting). Any support of religious schools is the result of individual choices. Thus, under this Court's decisions in *Mitchell* and *Agostini*, no governmental indoctrination has occurred.

Similarly, the lower court's holding that the Cleveland voucher program creates a financial incentive for parents to send their children to sectarian schools, *see* 234 F.3d at 959-960, cannot be squared with this Court's holding in *Mitchell v. Helms*. The plurality opinion stated that "simply because an aid program offers private schools, and thus religious schools, a benefit they did not previously receive does not mean that the program, by reducing the cost of a religious education, creates, under *Agostini's* second criterion, an 'incentive' for parents to choose such an education for their children." Justices O'Connor and Breyer agreed with the plurality that no financial incentive is present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."

Id. at 2561 (O'Connor, J., concurring) (quoting *Agostin* 521 U.S. at 231). Moreover, as the *Mitchell* pluralit noted, holding that aid automatically creates the forbidde incentive would invalidate all such aid because "any ai will have some such effect." *See id.* at 2544.

By providing vouchers to parents, the governmer does not really create any financial incentive to choos private (including religious) schools over public schools In the absence of a voucher or some other progran defraying the costs of educational expenses, a parent ca choose to send his children tuition-free to a public schoo or to pay tuition at a private school. Thus, withou vouchers, the only financial incentive the governmen creates is the incentive to send children to public schools Vouchers merely remove (or in most cases, reduce) thi incentive by providing the wherewithal to pay all or par of private school tuition. Any incentive to take advantage of the voucher to send a child to private school is not financial (e.g., the desire to send a child to a private school because the school offers a better academic program or a program more suited to the child's needs) and is not created by the state (except, perhaps, where government's inept operation of public schools makes private schools a more attractive option, which obviously ought not be the kind of government action that invalidates vouchers).

The conclusion that merely providing vouchers does not create the forbidden financial incentive discussed in *Agostini* does not change even if the only schools available to parents are religious. A lack of non-religious private schools should not matter because a non-religious alternative still exists — the public school. In any event, there are several secular private schools available to

P.09/12
LN
APR-26-2002 14:25

P.10/12

Cleveland parents under the Cleveland school voucher program. Moreover, as noted above, a voucher does not favor religious schools by creating a financial incentive to send children to public schools. Finally, there is no discrimination against private non-religious schools. So long as the voucher program does not create artificial barriers to entry to the education market, the program does nothing to prevent anybody (whether religiously motivated or not) from opening a private school and taking advantage of the vouchers. In fact, by making private schooling more affordable and therefore more attractive to parents, vouchers may well encourage the establishment of new non-religious private schools.

II. THE PETITION SHOULD BE GRANTED BECAUSE STATE AND FEDERAL APPELLATE COURTS ARE SPLIT ON THE CONSTITUTIONALITY OF SCHOOL VOUCHER PROGRAMS UNDER THE ESTABLISHMENT CLAUSE

The question presented in this case is the subject of diametrically opposed decisions among state and federal appellate courts. The split among the federal and state judiciary on whether school voucher programs violate the Establishment Clause is due to confusion over whether this Court's recent school aid cases, including *Agostini v. Felton*, 521 U.S. 203 (1997) and *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) provide the appropriate analytical framework, or whether the Court's opinion in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) dictates that school voucher programs that include religious schools be struck down. Both the First

and Sixth Circuits have held that *Nyquist* controls the constitutionality of school voucher programs.

In *Strout v. Albanese*, 178 F.3d 57, 62 (1st Cir. 1999), the court held that *Nyquist* required Maine's tuition reimbursement program to exclude sectarian schools from participation. In this case, the Sixth Circuit held that *Nyquist* compelled its conclusion that Ohio's school voucher program was unconstitutional. *See Simmons-Harris v. Zelman*, 234 F.3d at 953; *see also* 72 F. Supp. 2d 834, 848 (district court opinion).

In contrast, three state supreme court decisions have explicitly rejected the analysis adopted by the two lower federal courts in this case, and by the First Circuit. In *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), the court upheld against an Establishment Clause challenge the same voucher program that the Sixth Circuit struck down in this case. Rejecting plaintiffs' argument that *Nyquist* controlled, the Ohio Supreme Court observed: "The *Nyquist* holding has been undermined by subsequent case law that culminated in the court stating, 'we have departed from the rule ... that all government aid that directly aids the educational function of religious schools is invalid.'" 711 N.E.2d at 208 (quoting *Agostini*, 521 U.S. at 225).

In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), the Wisconsin Supreme Court upheld a school voucher program very similar to Ohio's. The program provided qualifying Milwaukee parents a choice of sending their children to public or private schools, including sectarian institutions. For each student attending a private school under the program, the state paid

approximately $2,500 per student to the student's parents. The check was mailed to the private school where the student was enrolled, and the parent then restrictively endorsed the check over to the school. 578 N.W.2d at 608-09. As in this case, a large majority of participating schools were sectarian: of 122 qualifying private institutions, 89 were religious schools. The court nevertheless held that the program did not violate the Establishment Clause. "We reject Respondents' argument that this case is controlled by *Committee for Pub. Educ. and Religious Liberty v. Nyquist*." *Id.* at 614 n.9. Analyzing this Court's recent decisions in *Agostini*, *Mueller*, *Zobrest*, and *Witter*, the court concluded that the Milwaukee Parental Choice Program, "which provides a neutral benefit directly to children of economically disadvantaged families on a religion neutral basis, does not run afoul of any of the three primary criteria the Court has traditionally used to evaluate whether a state educational assistance program has the purpose or effect of advancing religion." *Id.* at 620.

Similarly, in *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994), the Vermont Supreme Court held that a state tuition reimbursement scheme did not violate the Establishment Clause, finding the "case to be governed by *Mueller* and *Witters* and not by *Nyquist*." 641 A.2d at 360. The court reasoned that because the program covers all students whether they attend a public or private school, it "'neutrally provides state assistance to a broad spectrum of citizens [and] is not readily subject to challenge under the Establishment Clause.'" *Id.* (quoting *Mueller*, 463 U.S. at 398-99). *Cf. Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (upholding state tax credit for contributions to scholarship

fund for private schools, even though significant percentage of Arizona private schools were religious); *Matthew J. v. Massachusetts Dep't of Educ.*, 989 F. Supp. 380, 391-92 (D. Mass.1998) (upholding special education assistance for student attending Christian school).

In short, the First and Sixth Circuits' decisions are irreconcilable with the decisions of the Ohio, Wisconsin, and Vermont Supreme Courts. The key to each court's decision was its understanding of *Nyquist*. Interpreting *Nyquist* in a vacuum produced the result that the school voucher program was unconstitutional. Interpreting *Nyquist* in the light of *Mueller*, *Witters*, *Zobrest*, *Agostini*, and *Mitchell* produces the opposite result. As the dissent stated below, even if *Nyquist* retains some vitality after *Mueller* and its progeny, it is clearly distinguishable from school voucher programs such as those in effect in Ohio and Wisconsin. *See* 234 F.3d at 964 (Ryan, J., dissenting). To the extent that *Nyquist* can be understood to cast doubt on the constitutionality of school voucher programs, however, the Court's decisions in *Mitchell*, *Agostini*, *Mueller*, and *Witters* contradict such an interpretation. As it did last term when it granted certiorari in *Mitchell v. Helms* to resolve the inconsistency between *Agostini* and *Meek v. Pittenger* and *Wolman v. Walter*, this Court should grant certiorari in this case to resolve any inconsistency between *Agostini* and *Mitchell*, and *Nyquist*.

P.11/12
LN
APR-26-2002 14:26

CONCLUSION

The decision below directly conflicts with decisions of state appellate courts of last resort, as well as this Court's jurisprudence governing the constitutionality of government educational assistance programs under the Establishment Clause. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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P.12/12
TOTAL P.12
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No. 00-1751

In the

Supreme Court of the United States

SUSAN TAVE ZELMAN, et al.,
Petitioners,

v.

DORIS SIMMONS-HARRIS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, INDEPENDENT VOICES FOR BETTER EDUCATION, TEACHERS FOR BETTER EDUCATION, IRA J. PAUL, AND ROBERT N. WRIGHT IN SUPPORT OF PETITIONERS

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25 pp

QUESTION PRESENTED

Ohio's experimental school choice program provides tax-funded scholarships to low-income children who live in the Cleveland City School District. Parents of children in kindergarten through eighth grade may use the scholarships to pay tuition for those children at the private schools of their choosing, including religious schools. In light of Ohio's program, the question presented is as follows:

Whether the Establishment Clause prohibits Ohio's program from authorizing parents to use the scholarships at any private school, whether religious or not.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. THIS COURT SHOULD ACCEPT THIS CASE TO OVERTURN *LEMON v. KURTZMAN* 8

A. The Application of the *Lemon* Test Has Led to Inconsistent and Confusing Results 9

B. This Court Should Resolve the Two-Tiered System of Establishment Clause Jurisprudence ... 13

II. THIS COURT SHOULD ACCEPT THIS CASE TO REAFFIRM THAT THE DISTRIBUTION OF A GENERAL GOVERNMENT BENEFIT IN A NEUTRAL FASHION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE 16

III. THIS CASE PRESENTS CONSTITUTIONAL ISSUES OF NATIONWIDE IMPORTANCE THAT CAN ONLY BE RESOLVED BY THIS COURT 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Agostini v. Felton, 521 U.S. 203 (1997) ..... passim

Aguilar v. Felton, 473 U.S. 402 (1985) 15

Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968) 10

Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994) 7, 14-15, 17-18

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 5-6, 10-11

County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) 12

Edwards v. Aguillard, 482 U.S. 578 (1987) 8

Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947) 7, 9-10, 16

Holmes v. Bush, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000), *review denied*, 2001 Fla. LEXIS 952 (Apr. 24, 2001) 19

Holmes v. Bush (Circuit Court of the Second Judicial Circuit for Leon County, Florida, Case Nos. CV 99-3370, CV 99-4110) 2, 19

Lamb's Chapel v. Center for Moriches Union Free School District, 508 U.S. 384 (1993) 12

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... passim

Mitchell v. Helms, 530 U.S. 793 (2000) 1-2, 6, 9, 12

TABLE OF AUTHORITIES—Continued

Page

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 1

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 3-4

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) 3-6, 17

Wallace v. Jaffree, 472 U.S. 38 (1985) 8, 17

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 4, 11, 13

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 4, 7, 14, 17

Rules

Supreme Court Rule 37 1

Rule 37.6 1

Miscellaneous

National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* (2001) ... 18

Nina Shokraii Rees, The Heritage Foundation, *School Choice 2000* (2000) 18-19

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation, Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Robert N. Wright respectfully submit this brief amicus curiae in support of Petitioners, Susan Tave Zelman, *et al.*[1] Consent to the filing of this brief has been granted by counsel for all parties. Copies of the general letters of consent have been lodged with the Clerk of the Court.

Amicus Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation matters affecting the public interest. PLF is submitting this brief because it believes its public policy perspective and litigation experience in the area of the First Amendment to the United States Constitution will be of assistance to this Court in its deliberations. PLF has participated in numerous cases before this Court including *Mitchell v. Helms*, 530 U.S. 793 (2000), *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Agostini v. Felton*, 521 U.S. 203 (1997). PLF participated in this case as amicus curiae in the court below.

Amicus Independent Voices for Better Education is a nonprofit, tax-exempt Florida corporation. Together with Teachers for Better Education, its affiliate, this Amicus has more than 1,000 members and supporters consisting of parents and teachers. These groups were formed to improve the quality of education in Florida's public schools. The education reforms they advocate include: limited class size, funding classrooms before administrative functions, the elimination of teacher

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or in part; and, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

tenure, meaningful teacher competency testing, and vouchers for low-income families. Amici Ira J. Paul and Robert N. Wright are teachers in the Florida public schools.

Amici Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Robert N. Wright are also amici curiae in *Holmes v. Bush* (Circuit Court of the Second Judicial Circuit for Leon County, Florida, Case Nos. CV 99-3370, CV 99-4110). *Holmes v. Bush* involves a challenge to Florida's opportunity scholarship program—a school choice plan substantially similar to the Ohio Scholarship Program at issue in this case—as violating the federal Establishment Clause and state law. Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Robert N. Wright have been granted amicus status to support the school choice program before the Florida court.

Amici believe that the issues raised by the case at bar reach far beyond the Cleveland public schools, presenting a question that goes to the heart of education reform programs across the country: Whether a state program that distributes educational assistance to individuals on the basis of neutral criteria violates the Establishment Clause. Amici believe that it does not and have continually litigated on behalf of the public interest to ensure that effective government programs that remain neutral toward religion do not fall victim to Establishment Clause challenges. Yet until this Court overrules *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and confirms that *Agostini v. Felton*, 521 U.S. 203, and *Mitchell v. Helms*, 530 U.S. 793, embody the Establishment Clause analysis applicable to state voucher programs, endless rounds of costly and divisive litigation will continue in this area. Amici file this brief to urge the Court to grant the petition to resolve that question.

STATEMENT OF THE CASE

Ohio's Pilot Project Scholarship Program (Ohio Scholarship Program) first went into effect in the Fall of 1996. It establishes a pilot project for any school district in the state that has been the subject of a federal court order "'requiring supervision and operational management of the district by the state superintendent.'" *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000) (citation omitted). Cleveland is the only school district presently in this category.

The Ohio Scholarship Program provides scholarships to children residing in the Cleveland school district and enrolled in kindergarten through eighth grade. *Id.* In admitting students to the program, preference is given to students from low-income families, which the program defines as families whose income is below 200% of the poverty line. *Id.*

The Ohio Scholarship Program permits the participation of private schools, religious or nonreligious, if they are located within the boundaries of the Cleveland school district and meet the state's secular standards for providing an adequate education for all children in the state. *Id.* Each scholarship awarded is payable to the parents of the student entitled to the scholarship, to be used at whichever participating school has been selected by the student's parents. *Id.*

In 1996, soon after the Ohio Scholarship Program was enacted, lawsuits were filed in state court. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). The Ohio Supreme Court found the program constitutional under the First Amendment's Establishment Clause for at least two reasons: First, it is perfectly neutral. There is nothing about the program that prevents a school from participating, or facilitates its participation, based on its status as religious or nonreligious,

private or public.[2] Second, not one penny of state money goes to a religious school except through the individual choices of participating families. No child is assigned to a religious school—and therefor, no program revenues are received by religious schools—except through the intervening personal choice of the student's parents.

The Ohio Supreme Court's affirmation of the constitutionality of the program was based on a careful review of this Court's Establishment Clause jurisprudence. The court relied primarily on *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and the modified *Lemon* test announced in *Agostini v. Felton*, 521 U.S. 203. However, the Ohio high court found the adoption of the Ohio Scholarship Program had violated the single-subject rule of the state constitution. 711 N.E.2d at 216.

The program was re-enacted in all pertinent respects in 1999. 234 F.3d at 949-50. Some of the same plaintiffs then filed a second lawsuit challenging the program in *federal* court. *Id.* On December 11, 2000, by a narrow 2-1 vote, the Sixth Circuit Court of Appeals, in the opinion below, affirmed a permanent injunction preventing the State of Ohio from operating the Ohio Scholarship Program. Relying on the test set out in *Lemon v. Kurtzman*, 403 U.S. at 612-13, the court of appeals held that the program violates the Establishment Clause on the grounds that it has the primary effect of advancing religion and that it constitutes an endorsement of religion and sectarian education. 234 F.3d at 961.

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[2] The program permits public school districts adjacent to the Cleveland district to participate in the program and receive scholarship payments on behalf of parents, although at present none of these public school districts has enrolled. *Zelman*, 234 F.3d at 949.

The lower court looked to the decisions issued by this Court applying the *Lemon* test and determined the "most persuasive, in that it is on point with the matter at hand, to be *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 . . . (1973)." 234 F.3d at 953. In *Nyquist*, this Court invalidated a tuition-reimbursement and tax credit program where public education assistance was made available only to parents of children in *nonpublic* schools. 413 U.S. at 780. The *Nyquist* Court recognized that such a narrow class of recipients "cannot be squared with the principle of neutrality established by the decisions of this Court." *Id.* at 793. As the dissent noted,

> [t]he purpose of the Ohio statute, on the other hand, is to provide financial help to poverty-level students attending the public schools in Cleveland in order to enable them, if they wish, to attend nonreligious private schools, religious private schools, public schools in neighboring districts that wish to participate in the voucher program, or to obtain special tutoring while remaining in the Cleveland public schools.

Zelman, 234 F.3d at 964-65 (Ryan, J., dissenting).

The Sixth Circuit rejected the Ohio Supreme Court's reasoning that "'the *Nyquist* holding [had been] undermined' by subsequent cases and was thus no longer good law." 234 F.3d. at 949 (citation omitted). Instead, the court below noted that "[t]he Supreme Court has not overturned or rescinded the *Lemon* test even as it has used its framework to shape differing analyses," *id.* at 952, and read this Court's recent pronouncements as illustrating the "flexibility" of the *Lemon* test. *Id.* at 953.

The court of appeals noted that in *Agostini v. Felton*, 521 U.S. at 237, this Court stated:

> "[W]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent" . . . "that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

234 F.3d at 954-55. Although the *Nyquist* opinion has not been overruled, clearly some of its reasoning has been undermined by more recent Establishment Clause jurisprudence.

The Sixth Circuit also recognized that this Court's recent decision in *Mitchell v. Helms*, 530 U.S. 793, was sharply divided. Instead of applying Justice Thomas' plurality opinion upholding the constitutionality of a federally mandated Louisiana program in which the principals of neutrality and private choice were emphasized, the Sixth Circuit applied Justice O'Connor's narrow opinion concurring in the judgment. 234 F.3d at 957. Thus, according to the court below, *Mitchell* requires an inquiry into whether state funds have been diverted to religious uses. *Id.* But this type of diversion inquiry is applicable only in the context of a public program in which the government provides funds directly to religious schools. The diversion inquiry does not apply when the program gives funds to the "student beneficiary;" instead, who "can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education." *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring).

Despite the urging of the dissenting judge to take the case for *en banc* review because of the "immense importance to the Cleveland children who are directly affected, and indeed to the nation," 234 F.3d. at 974 (Ryan, J., dissenting), the Sixth Circuit denied the motion.

SUMMARY OF ARGUMENT

In *Lemon v. Kurtzman*, this Court articulated a three-part test to evaluate possible Establishment Clause violations. *Lemon* stated that, to pass constitutional muster under the Establishment Clause, a statute or government action must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. Until this Court expressly declares that *Lemon* is no longer the law, courts throughout this country will continue to struggle with *Lemon*'s imprecise test.

While this Court has not formally repudiated *Lemon*, its recent decisions have failed to rely on the three-pronged test set forth in that decision. Instead of passing Establishment Clause claims through the three prongs of *Lemon*, this Court has instead asked whether the government's action was a neutral benefit available to all handicapped children, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, or acts neutrally toward religion, *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994). Although this Court modified the *Lemon* test in *Agostini v. Felton*, 521 U.S. 203, it did not expressly overrule *Lemon*. As a consequence, the Nation's lower courts must struggle to apply the confusing and indeterminate *Lemon* test, only to have this Court review those decisions under different constitutional standards. An inefficient and unpredictable two-tiered system of Establishment Clause jurisprudence has resulted.

In recent Establishment Clause cases, this Court has explained that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive an indirect benefit. *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 18 (1947); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1. This Court

should grant certiorari in the present case to declare expressly that the neutrality test laid out in *Agostini*, and not the three-pronged test announced in *Lemon*, should be used to determine whether the Establishment Clause has been violated.

ARGUMENT

I

THIS COURT SHOULD ACCEPT THIS CASE TO OVERTURN *LEMON v. KURTZMAN*

Thirty years ago, in *Lemon v. Kurtzman*, this Court formulated a three-part test for determining whether state aid to sectarian schools complies with the First Amendment: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-13 (citations omitted). This three-pronged test has been the subject of strong criticism by members of this Court.

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional.

Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

> If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it.

Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting).

This Court's Establishment Clause jurisprudence remains in disarray even after its decisions in *Agostini v. Felton*, 521

U.S. 203, and *Mitchell v. Helms*, 530 U.S. 793. Although *Agostini* was heralded as eliminating the chaos of Establishment Clause jurisprudence, the meaning of *Agostini* is not clear. In fact, the subsequent decision in *Mitchell v. Helms* shows that this Court itself is divided on how to interpret and apply *Agostini*. Justice Thomas, writing for a plurality of four in *Mitchell*, cited *Agostini* as establishing that "aid that is offered to a broad range of groups of persons without regard to religion" is neutral and therefore constitutional. 530 U.S. at 809. However, Justice O'Connor disagreed, stating that "[the Court] has never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid." *Id.* at 839 (O'Connor, J., concurring).

The unresolved chaos surrounding this Court's Establishment Clause jurisprudence is a direct result of the doctrinal deficiency of the three-part test of *Lemon v. Kurtzman*. This Court should grant certiorari in the present case to explicitly overrule *Lemon* and put an end to the two-tiered system of Establishment Clause jurisprudence that guides aid-to-education cases.

A. The Application of the *Lemon* Test Has Led to Inconsistent and Confusing Results

Cases decided under the three-pronged *Lemon* test are inconsistent with each other and contradict cases decided prior to the adoption of the test. Nowhere has this inconsistency been greater than in the area of public aid to education programs involving religious schools.

In 1947, this Court in *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, upheld a New Jersey statute authorizing local school districts to reimburse parents for the cost of transporting their children to and from school on public transportation. *Id.* at 17. The reimbursement was available to all parents irrespective of whether their children went to public

or private schools. The Court recognized that general welfare programs neutrally benefitting all persons did not offend the Establishment Clause. *Id.* at 18.

Twenty-one years later, in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968), this Court upheld the constitutionality of a New York statute that required public schools to loan textbooks free of charge to all students, including students attending parochial schools. *Id.* at 238. The *Allen* Court found that the New York statute was a part of a neutrally applied general welfare program. The statute neither advanced nor inhibited religion because the textbooks were merely lent to parochial schools as part of a general program to benefit all schoolchildren regardless of the school attended. *Id.* at 243-44.

In the 1970s, however, this Court moved away from applying a neutrality test to aid-to-education programs. In *Lemon*, the Court examined the constitutionality of a program loaning secular textbooks to private schools and providing salary supplements for teachers. The Court began its inquiry by confessing that

> [c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

Lemon, 403 U.S. at 612. Relying on *Allen*, the Court found that the loan of textbooks was constitutional, while simultaneously holding that the salary supplements resulted in excessive entanglement with religion. 403 U.S at 614.

Applying *Lemon* in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, this Court held unconstitutional a New York program that provided cash for maintenance and equipment to nonpublic schools serving low-income families. The program also provided a partial tuition reimbursement to low-income parents of students in nonpublic

schools and a tax deduction for other parents of nonpublic school students. *Id.* at 764-69. The *Nyquist* Court held there was no way to ensure that the monies received pursuant to the tuition-reimbursement portion of the program, even though received directly by the parents and only indirectly by the schools, would be restricted to secular purposes. *Id.* at 756. The *Nyquist* Court specifically reserved the question of whether the same outcome would be obtained in "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefitted." *Id.* at 782 n.38.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, this Court overturned the Washington Supreme Court and sustained a program that used government funds to provide vocational rehabilitation services to a blind student attending a Christian college. Reaffirming that "the lines of demarcation in this extraordinarily sensitive area of constitutional law" have been only dimly perceived, this Court found no Establishment Clause violation because the aid did not directly subsidize religion. "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487.

From the *Nyquist* decision in 1973 until the *Witters* decision in 1986, this Court attempted to clarify what types of state and federal aid to sectarian schools were permissible. Although various Supreme Court Justices have challenged the

continuing validity of the *Lemon* test,[3] *Lemon* remains the law of the land and courts below must attempt to apply it.

The present chaos of Establishment Clause jurisprudence is highlighted by this Court's application of the retooled *Lemon* test announced in *Agostini v. Felton*, 521 U.S. at 203, 230-33, to the school aid program addressed in *Mitchell v. Helms*, 530 U.S. 793. In *Agostini*, this Court held that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees" who are monitored for religious neutrality in monthly visits. *Agostini*, 521 U.S. at 234-35. The *Agostini* Court stressed that it was not revising "the general principles we use to evaluate whether government aid violates the Establishment Clause." *Id.* at 222. *Agostini* simply modified the analytical framework of the three *Lemon* prongs.

This Court's first opportunity to employ the newly modified purpose and effect test arose three years later in *Mitchell v. Helms*. Yet, the plurality opinion in *Mitchell* applied these tests in a narrow fashion, reaffirming that neutrality would be established if the aid flowing to the religious institution was the result of the private decisions of individuals, not the state.

One need look no further than the facts of this case to see the strange results the *Lemon* test has generated. The Sixth Circuit relied upon the *Nyquist* decision to find the Ohio Scholarship Program unconstitutional; whereas, the Ohio

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[3] *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, JJ., concurring in the judgment in part and dissenting in part).

Supreme Court relied upon *Witters* to find the same program constitutionally sound. It is apparent that the outcome of state aid-to-education programs challenged as violating the Establish Clause is dependent upon which line of cases the lower court chooses to follow, and which line they choose to discount.

In order to end this doctrinal chaos, this Court should grant the present petition and overturn *Lemon*.

B. This Court Should Resolve the Two-Tiered System of Establishment Clause Jurisprudence

Although its subsequent decisions suggest *Lemon* may have fallen out of favor with this Court, the lower state and federal courts are constrained to apply the three-part test until it is expressly overruled. In *Agostini v. Felton*, this Court reminded the lower courts:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, 521 U.S. at 237 (citation omitted).

The uncertainty surrounding the applicability of *Lemon* has led to a two-tiered system of Establishment Clause jurisprudence, with lower courts applying the *Lemon* framework and this Court applying a different test. The discordant results achieved by this split-level system can be seen by evaluating this Court's more recent Establishment Clause cases.

Zobrest v. Catalina Foothills School District, 509 U.S. 1, involved a challenge by a deaf student to a school district's refusal to provide him with a sign-language interpreter to aid in his studies at a parochial high school. The school district contended that the Establishment Clause prohibited it from providing the requested interpreter. The Ninth Circuit applied the *Lemon* test and concluded that the placement of the interpreter in the parochial school would violate the Establishment Clause. *Id.* at 5. This Court reversed that ruling because the provision of interpreters was a neutral benefit available to all handicapped children in the school district, regardless of the sectarian or nonsectarian nature of the school; thus, the Establishment Clause was not violated. *Id.* at 10.

This Court employed a similar analysis in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994). There, taxpayers brought an action challenging the constitutionality of a New York statute that created a special school district for members of the Satmar Hasidim religion. The state trial court found that the statute failed all three prongs of the *Lemon* test and, therefore, violated the Establishment Clause. *Id.* at 695. The state appellate court agreed. *Id.*

Although this Court ultimately agreed with the conclusions of the lower courts, it did so by employing a wholly different analysis. Instead of applying *Lemon*, this Court rested its decision on the fact that the statute in question extended a governmental benefit in a nonneutral fashion.

The judicial inefficiency of using one test throughout the lower courts, only to change the analysis when the case reaches the Nation's Highest Court was not lost on the dissenting Justice.

> [T]he Court's snub of *Lemon* today (it receives only two "see also" citations, in the course of the opinion's description of *Grendel's Den*) is particularly noteworthy because all three courts below (who are not free to ignore Supreme Court precedent at will) relied on it, and the parties (also bound by our case law) dedicated over 80 pages of briefing to the application and continued vitality of the *Lemon* test. In addition to other sound reasons for abandoning *Lemon*, it seems quite inefficient for this Court, which in reaching its decisions relies heavily on the briefing of the parties and, to a lesser extent, the opinions of lower courts, to mislead lower courts and parties about the relevance of the *Lemon* test.

Id. at 750-51 (Scalia, J., dissenting) (citations omitted).

This two-tiered standard was dramatically highlighted in *Agostini v. Felton*, wherein petitioners sought to have this Court reconsider its earlier decision in *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, this Court applied *Lemon* to bar New York City from sending public school teachers into parochial schools to provide remedial education for disadvantaged children under a congressionally mandated program. *Id.* at 404. This ruling forced school districts throughout the Nation to seek creative ways to provide sorely needed educational assistance to children attending parochial schools. *Agostini*, 521 U.S. at 213.

Frustrated with the exorbitant costs of maintaining this program, New York City, along with parents of parochial school students, brought a motion seeking relief from the permanent injunction imposed under *Aguilar*. The Second Circuit Court of Appeals observed that the landscape of Establishment Clause jurisprudence had changed, but felt bound by the precedent of *Aguilar*. *Id.* at 212. Granting certiorari in *Agostini*, this Court announced a new, modified *Lemon* test. Under the new standard, this Court held that the Establishment Clause no longer prohibits state programs from placing publicly employed teachers on the premises of parochial schools in order

to provide remedial and supplemental secular education to disabled and disadvantaged children. *Id.* at 234-35.

In each of these cases the lower courts reviewed the Establishment Clause issue under the *Lemon* test, and in each instance this Court ultimately employed a different standard to determine whether that clause had been violated. Not only is this dual regime inefficient and confusing, it makes the level of constitutional protection indeterminate, varying according to the facts of each case. Until this Court expressly declares that *Lemon* is no longer the law, courts throughout the country will continue to scrutinize fact patterns in search of secular purposes, primary effects, and excessive entanglements. This Court should accept this case to explicitly overrule *Lemon*, to end the current two-tiered system of Establishment Clause jurisprudence, and to hold that so long as the government provides benefits in a neutral manner, the Establishment Clause is not offended.

II

THIS COURT SHOULD ACCEPT THIS CASE TO REAFFIRM THAT THE DISTRIBUTION OF A GENERAL GOVERNMENT BENEFIT IN A NEUTRAL FASHION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

This Court has long recognized that the First Amendment requires the government to remain neutral toward religion.

> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Everson v. Board of Education of the Township of Ewing, 330 U.S. at 18. More recently, the Court has reaffirmed the principle of neutrality in dealing with religion.

> [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest, 509 U.S. at 8.

> [T]he [neutrality] principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.

Kiryas Joel, 512 U.S. at 704.

The Ohio Scholarship Program in the case at bar is an excellent model of the type of government program that survives constitutional scrutiny under a religiously neutral examination. The focus of the program is on low-income families with children trapped in the failing Cleveland public school system, and the scholarship aid is available to students regardless of the public or nonpublic nature of their school of choice. *Zelman*, 234 F.3d at 948. Participation in the Ohio Scholarship Program by educational institutions is based entirely on religiously neutral criteria. *Id.* at 948-49. No preference for parochial schools is given; no preference for secular schools is given. *Id.*

When the government offers a neutral service that is not designed to help religion, the evil sought to be avoided by the Establishment Clause, the establishment of a national church, is not implicated. *See Wallace v. Jaffree*, 472 U.S. at 106 (Rehnquist, J., dissenting). "The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring). The neutrality test ensures that the

government does not favor a particular religion, *id.* at 709; at the same time, the test does not force government to discriminate against religious institutions. This Court should grant certiorari in the present case to reaffirm that wholly neutral aid programs such as the Ohio Scholarship Program fully comply with the requirements of the Establishment Clause.

III

THIS CASE PRESENTS CONSTITUTIONAL ISSUES OF NATIONWIDE IMPORTANCE THAT CAN ONLY BE RESOLVED BY THIS COURT

A reaffirmation by this Court of a neutrality-based Equal Protection standard would have profound beneficial consequences for all American children enrolled in failing public schools. The 2000 National Assessment of Educational Progress disclosed that 63% of black and 56% of Hispanic fourth-graders are below the most basic levels of proficiency in reading. National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* (2001) at 31, 33. Across the country, the school choice movement is securing enactments to improve our failing schools. In 1999, it secured an education tax credit program in Illinois, two new charter school laws, and it continues to gain acceptance at the state level. Amici especially direct the Court's attention to the importance of such a ruling in confirming the constitutional soundness of the Florida A-Plus choice and accountability plan.

Florida was the first state to offer a "money back guarantee" for students trapped in failing schools. The Florida plan allows students statewide who have been enrolled for two out of four years in a failing public school an opportunity to attend a better public, private, or religious school of their choice by providing state-paid tuition scholarships. Governor Bush, in his foreword to *School Choice 2000*, explained the elements of the plan: The state's public schools are graded based on how

well their students perform on tests administered in grades three through ten. When a public school has failed for two years running (that is, when 60% of the school's students score below the basic level in reading, math, and writing) its students are eligible to receive vouchers that enable them to transfer to another public or private school of their choice. Nina Shokraii Rees, The Heritage Foundation, *School Choice 2000* (2000) at v-vii.

Currently, more than 50 students in Pensacola are attending private schools through this program, and more than 70 Pensacola students are using the program to attend higher-performing public schools. Significantly, since the implementation of the Florida A-Plus choice and accountability plan almost two years ago, the number of failing public schools in Florida has dropped from 78 to only 4.

Despite the demonstrated salutary effects of Florida's A-Plus plan for both the state's children and their schools, various plaintiffs immediately filed lawsuits against this program, claiming that it violates both federal and state law. *Holmes v. Bush* (Circuit Court of the Second Judicial Circuit for Leon County, Florida, Case Nos. CV 99-3370, CV 99-4110). Recently, the Florida Supreme Court let stand the decision of the First District Court of Appeals upholding the constitutionality of the state's groundbreaking opportunity scholarship program. 767 So. 2d 668 (Fla. Dist. Ct. App. 2000), *review denied*, 2001 Fla. LEXIS 952 (Apr. 24, 2001). The appellate court decision stated that public funds may be spent in private schools under certain circumstances, including through Florida's A-Plus plan. 767 So. 2d at 675. The case is now back before the trial court. The issue of whether it is permissible for a state to use public funds for student tuition in private schools will be addressed in these cases. Amici urge this Court to grant the present petition for certiorari, in part, to clarify that neutral programs such as the Florida A-Plus plan do not offend the Establishment Clause of the First Amendment.

CONCLUSION

This case provides the Court with an opportunity to overrule *Lemon v. Kurtzman* and restore a degree of consistency to Establishment Clause jurisprudence. In recent decisions, this Court has rejected Establishment Clause claims challenging neutral governmental programs. However, by not explicitly overruling *Lemon*, this Court has constrained the Nation's lower courts to toil under the three-part *Lemon* test, scrutinizing fact patterns in search of secular purposes, primary effects, and entanglements. This Court should grant certiorari in this case and clarify, once and for all, that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive an indirect benefit.

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Respectfully submitted,

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(9)

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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN,
Superintendent of Public Instruction of Ohio, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THIS CASE PRESENTS A QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH IS OF THE UTMOST IMPORTANCE 3

II. STATE AND FEDERAL APPELLATE COURT DECISIONS ARE IN DEEP CONFLICT OVER THE ISSUES PRESENTED BY THIS CASE 7

III. THE SIXTH CIRCUIT'S DECISION BELOW CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES:

Agostini v. Felton, 521 U.S. 203 (1997) 7, 10, 12, 13, 14, 15, 16

Bagley v. Raymond School Dep't, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999) 12

Campbell v. Manchester Bd. of School Directors, 641 A.2d 352 (Vt. 1994) 12

Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973) 3, 12, 15, 16, 17

Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998) 11

Kotterman v. Killian, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999) 12

Lemon v. Kurtzman,, 403 U.S. 602 (1971) 13

Mitchell v. Helms, 530 U.S. 793 (2000) 7, 10, 12, 17

Mueller v. Allen, 463 U.S. 388 (1983) 7, 10, 12, 13, 16

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 7

Strout v. Albanese, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999) 12

Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) 7, 10, 13

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 7, 13

Table of Authorities continued

Page(s)

STATUTES:

Ohio Revised Code

Sect. 3313.976(A)(8) 8
Sect. 3313.978(A) 8
Sect. 3317.02(B),(N) 9
Sect. 3317.03(I)(1) 9
Sect. 3317.08(A)(1) 9
Sect. 3327.061 9

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Friedman, *Capitalism and Friedman* (1962) 5

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Hoxby, The Effects of Private School Vouchers on School Students, *Holding Schools Accountable* (ladd, ed. 1996) 6

Indiana University, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program (1996-1999)* 6

Martin, et al., *Science Achievement in the Primary School Years* (1997) 4

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INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Director of the U.S. Commission on Civil Rights Linda Chavez, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the Reader's Digest and former Director of the Voice of America Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we seek to defend the liberty interests of parents and students in attending the school of their choice.

SUMMARY OF ARGUMENT

This case squarely meets all of the classic criteria for granting a petition for a writ of certiorari, in the boldest and most overwhelming fashion.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief has been granted by the parties. Their letters of consent are enclosed with this brief.

First, this case presents a Federal question that is critically important to the people of this country. A strong, broad, national movement has developed in favor of school choice programs allowing parents and students to use state funds in various forms for the school of their choice, public or private, religious or non-religious. This movement has grown to address a major, urgent problem facing our nation – poorly performing and deteriorating public schools. The movement is grounded in a secular economic analysis of the best means for addressing this problem, as well as a secular political philosophy favoring freedom of choice for its own sake. Legislative success for school choice has now been achieved in several states, and legislation is advancing in many more. In short, the issue of school choice is one of the top policy questions facing our country.

This case presents the question of the constitutionality of a classic school choice measure under the Establishment Clause. Consideration of school choice reforms is now bogged down all over the country in the confusion over this issue. This case presents the question in a clearly defined manner with a well-developed factual record.

Secondly, conflict regarding the proper answer to this question rages among courts all across our land. Indeed, there is a conflict in this very case between the Supreme Court of Ohio and the 6th Circuit Court of Appeals, two courts of equal standing. In addition, while the Supreme Courts of Wisconsin, Arizona, and Vermont agree with Ohio, the Maine Supreme Court and the First Circuit Court of Appeals agree with the Sixth Circuit in this case. Consequently, there is a deep split among state and Federal appellate courts which only this Court can resolve.

Finally, the 2-1 decision of the Court below is in conflict with a major line of decisions of this Court over the past 30 years. The school choice program in this case simply allows

private, religious schools to participate in a general secular framework as one of many options, on the same terms and conditions as everyone else. It is comprehensively neutral in regard to religion, and decisions as to which schools receive state funds are not made by the state, but by the families, primarily low income and minority, eligible to participate in the program.

The majority below found this arrangement unconstitutional based on the older case of *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). But their analysis flies in the face of just about every school financing case under the Establishment Clause decided by this Court since that time.

We predict, in fact, that this case will be used in law schools in future years as the classic example of how to satisfy the criteria for the granting of a petition for a writ of certiorari.

ARGUMENT

I. THIS CASE PRESENTS A QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH IS OF THE UTMOST IMPORTANCE

The failures of our public schools have been a central concern of policymakers all across our country for at least 20 years. An enormous amount of funding is devoted to education in the U.S. each year, over 7% of GDP, with the great majority of that spent on public education.[2] Yet, the performance of public schools in terms of academic achievement has been considered poor as measured by national and international

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[2] U.S. Department of Education, *Digest of Education Statistics 1998* (*http://nces.ed.gov/pubs99/digest98/d98t031.html*).

tests, and other measures.[3] Indeed, on some international tests, U.S. students perform more poorly the longer they are in school.[4]

The problems are most acute in our nation's lowest income areas, particularly among minority students. The most recent national test results show that over half of black and Hispanic 4th graders in the U.S. cannot read at the most basic level.[5] Moreover, the gap in achievement between black and white students has been widening for almost 10 years.[6] Low income and minority schools are also often plagued by violence, physical deterioration, high drop out rates, and drug and alcohol abuse.

To address these critical problems, a strong national movement has developed in favor of school choice programs allowing parents and students to use state funds in various

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[3] See, e.g., National Center for Education Statistics, *The Nation's Report Card: Fourth [illegible]e Reading 2000;* National Center for Education Statistics, *NA[illegible] Reading Report Card for the Nation;* National Center for Education S[illegible]istics, *NAEP 1998 Civics Report Card for the Nation;* Frase, et al., Pursuing Excellence: A Study of U.S. Fourth-Grade Mathematics and Science Acheivement in International Context, *Findings from the Third International Mathematics and Science Study,* Office of Education Research and Improvement, U.S. Dept. of Education (1997) Bourque, et al., 1996 Science performance Standards: Achievement Results for the Nation and the States, *Findings from the National Assessment of Educational Progress*, Office of Education Research and Improvement, U.S. Dept. of Education (1997).

[4] Mulis, et al., *Mathematics and Science Achievement in the Final Year of Secondary School* (1998); Mulis, et al., *Mathematics Achievement in the Primary School Years* (1997); Martin, et al., *Science Achievement in the Primary School Years* (1997).

[5] National Center for Education Statistics, *The Nation's Report Card: Fourth Grade Reading 2000.*

[6] Id.

forms for the school of their choice, public or private, religious or non-religious.[7] This case involves the classic form of providing such funding – school vouchers.

This movement grew out of a secular economic analysis of the best means for addressing this problem.[8] School choice would create competition, forcing public schools to improve or lose students. Parents and students in any event would be able to gravitate to the schools that performed the best, improving overall education results. Most importantly, low income and minority students would be able to choose schools that offered a sound education, enabling them to escape a life of poverty.

Moreover, through the resulting education marketplace, innovative new education ideas could be tried across the country on a decentralized basis. The market would then embrace those that were proven to work best. The market would also offer a diversity of education choices to the public, allowing different parents and students to choose the school that worked best for them.

The school choice movement is also grounded in a secular political philosophy that favors freedom of choice in its own right.[9] Quite clearly, the school choice movement is not about providing aid to religious schools. It is about a secular economic analysis concerning the best means for improving schools, and a secular, freedom-oriented political philosophy.

The school choice experiments and programs that have been adopted are now being extensively studied across the country. These studies indicate that school choice is successful

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[7] See, e.g., Rees, *School Choice: What's Happening in the States 2000.*

[8] See, e.g., Friedman, *Capitalism and Freedom* (1962); Chubb and Moe, *Politics, Markets and American Schools* (1990).

[9] See, e.g., Friedman, *supra*

in improving education, particularly for the most vulnerable low-income and minority children.[10]

In short, the issue of school choice to address our education problems is one of the top policy questions facing the country. However, efforts to adopt school choice programs are bogged down all over the land in confusion over the constitutionality of such programs under the Establishment Clause. Opponents seek to stifle legislative consideration of school choice initiatives on these constitutional grounds.[11] Any school choice initiative that is adopted is smothered in litigation.

This case involves the urgent, critical issue of the constitutionality of school choice programs. It presents the question of the constitutionality of a particular, classic school choice program that is representative of school choice initiatives advancing across the country. The question is clearly framed, with all state law questions previously decided

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[10] Peterson and Hassel, eds., *Learning from School Choice* (1998); Hoxby, The Effects of Private School Vouchers on Schools and Students, *Holding Schools Accountable* (Ladd, ed., 1996); Witte, *The Market Approach to Education: An Analysis of America's First Voucher Program* (2000); Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland (1999);* Indiana University, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program (1996-1999);* Neal, The Effects of Catholic Secondary Schooling on Educational Acheivement, 15 *Journal of Labor Economics* 98 (1997); Evans and Schwab, Do Catholic Schools Make a Difference?, *The Quarterly Journal of Economics* (1995);Coleman, Public Schools, Private Schools, and the Public Interest, 64 *The Public Interest* 1 (1981); Peterson, Myers and Howell, Harvard University Program on Education Policy and Mathematica Policy Research, *An Evaluation of the New York City School Choice Scholarship Program: The First Year* (http:/data.fas.harvard.edu/pepg/NewYork-First.htm.).

[11] See, e.g., *Commonwealth of Pa. Legis. Jrnl.*, Dec. 11, 1991, 175th Sess. at 1928, June 16, 1995, 179th Sess. at 1464.

by the Ohio Supreme Court. The factual record is thoroughly developed to present the question to this Court.

The urgency and importance of the Federal question presented by this case could not be more clear.

II. STATE AND FEDERAL APPELLATE COURT DECISIONS ARE IN DEEP CONFLICT OVER THE ISSUES PRESENTED BY THIS CASE

The importance of the question presented by this case is joined by a deep conflict among state and Federal appellate courts on that question.

Indeed, the conflict is so deep that two appellate courts of equal dignity have split on the question in the very case now presented to this Court. The Ohio Supreme Court originally decided this case in *Simmons-Harris v. Goff*, 711 N.E. 2d 203 (Ohio 1999), as the respondents here first brought this action in state court. The Ohio court rejected respondents' claim that the Cleveland school voucher program violated the Establishment Clause, in direct and complete conflict with the later Sixth Circuit decision below.

The Sixth Circuit ruled that this case was governed by this Court's decision in *Nyquist*. The Ohio Supreme Court ruled that *Nyquist* did not govern, but, rather, that this case was controlled by a later line of decisions of this Court, including *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

The Sixth Circuit held that this case turned on the fact that the great majority of private schools that received the voucher funds were religious, and the great majority of families utilizing the vouchers chose such schools. The Ohio Supreme Court held that this was irrelevant to the constitutional analysis.

Rather, the Ohio Court ruled that the case turned on the fact that the funds were channeled through the choices of parents and students. They determined where the funds went, not the state. But the Sixth Circuit found this unpersuasive.

The Ohio Supreme Court considered the voucher program in the broad context of all the choices offered to parents and students in the Cleveland School district. These parents may choose neighborhood public schools, such schools supplemented by personal tutoring financed by the voucher program, suburban public schools that may choose to participate in the voucher program, community, or charter, schools, private non-religious schools, private religious schools, and, indeed, home schooling. The Sixth Circuit took a very narrow approach, ruling that all other choices except those offered by the by the vouchers themselves were "at best irrelevant". (App.[12] 25a). The Sixth Circuit consequently evaluated the vouchers out of their complete policy context.

The Sixth Circuit misread the state statutory scheme to discern an incentive in the program favoring private religious schools, which does not exist. The statute caps the tuition that may be charged for low income students in the program at $2,500 per year. RC[13] 3313.976(A)(8); 3313.978(A). This includes a maximum of $2,250 from the voucher and $250 paid by the student's family. This is the most that private religious schools can obtain under the program for each low-income student.

The Sixth Circuit concluded that the reason no suburban public school had agreed to participate in the voucher program was that such funding was inadequate for their cost structure.

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12 "App." refers to the appendix provided by the Institute for Justice representing petitioning intervenors Senel Taylor et al.

13 "RC" refers to the Ohio Revised Code.

But the much leaner and cost effective private religious schools could operate under this funding limitation. Consequently, in the Court's view, the program was structured to favor participation by the private religious schools, depriving families of a true choice of schools. (App. 29).

But exactly contrary to the decision of the Sixth Circuit, the statutory scheme provides much more funding for the choice of public schools and is actually skewed to favor those schools over private religious schools. If a family in the Cleveland voucher program chose a suburban public school, that school would receive not only the $2,250 paid by the voucher. It would also receive the state's regular funding allocation for each student in the public schools, which was an additional $4,294 during the 2000-2001 school year. RC 3317.03(I)(1), 3327.061, 3317.08(A)(1), 3317.02(B),(N). Consequently, the suburban public schools would have received $6,544 for each voucher student they enrolled last school year, compared to $2,250 for a private religious school.

In addition, several non-religious private schools participate in the voucher program. But these schools have the additional option of registering as community, or charter, schools, an option not available to private religious schools. Community schools receive over $4,500 in funding per student each year, and offer Cleveland parents another full schooling choice. RC 3317.02(B),(N); Affidavit of Steven Puckett, para. 14; Declaration of David P. Zanotti.[14] Of course, Cleveland parents can also always choose the Cleveland public schools, which received $7,097 in state funding per student in the last school year. Id.

Finally, a low-income family that chooses a private religious school under the voucher program must pay 10% of

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14 All nonpublished materials cited in this brief are admitted into the record.

the school's tuition up to $250 per year. All families above this income level must pay still more, as the vouchers will pay only 75% of school tuition up to a maximum payment of $1,875, leaving the families responsible for all costs above that. But families pay nothing if they choose a private non-religious school in the community school program, a Cleveland public school, or a suburban public school.

Consequently, the Sixth Circuit read the statutory framework applying to the choices of parents in the Cleveland school system exactly backwards. Rather than favoring private religious schools, the statutory framework disfavors those schools. In contrast, the Ohio Supreme Court did not misread the state's statutory framework and found no incentive favoring the choice of private religious schools.

The Sixth Circuit concluded that "unlike *Mitchell, Agostini, Witters, and Mueller,* the Ohio Scholarship Program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria." App. 32-33. In direct contrast, the Ohio Supreme Court ruled that the voucher plan maintained strict neutrality in regard to religion, based precisely on *Agostini, Mitchell, Witters,* and *Mueller.*[15]

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[15] Regardless of whether the decision of the Ohio Supreme Court should have amounted to collateral estoppel on the Establishment Clause issue before the Sixth Circuit, the state Supreme Court did rule on the question, and not merely issue dicta. The court went on to strike down the voucher statute because it was enacted as part of the state budget violating the state constitution's single subject rule. But the court then stayed its ruling on the point to give the legislature time to reenact the voucher plan in a separate stand alone bill, which it did. By issuing this stay, the court made the part of its ruling upholding the voucher plan on the Establishment Clause issue fully operative. Indeed, how could the court issue a stay to leave in place an unconstitutional violation of the Establishment Clause? The stay required a ruling on the Establishment Clause issue to make any legal sense.

The Wisconsin Supreme Court agreed with the Ohio court, and thoroughly disagreed with the Sixth Circuit, in ruling on a Milwaukee voucher plan remarkably similar to the plan in Cleveland. *Jackson v. Benson,* 578 N.W.2d 602 (1998).

Like the Ohio plan, the Wisconsin plan provided vouchers to students from low-income families stuck in failing public school districts. Parents would again receive the vouchers and endorse them over to the school of their choice. Just like in Ohio, most of the schools participating in the Wisconsin plan were religiously affiliated. Wisconsin also made no effort to restrict the use of voucher funds to non-religious activities.

Like the Ohio court, the Wisconsin court ruled this program constitutional because it "provide[s] public aid to both sectarian and non-sectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion, and (2) only as a result of numerous private choices of the individual parents of school children." 578 N.W.2d at 617. The court consequently found the voucher plan in complete

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Moreover, if the court did not rule on the Establishment Clause issue, then what happened to that issue in the case? Issuing the stay to keep the voucher statute in place until the single subject problem could be remedied meant that the court did not dispose of the case on the single subject question. The voucher plan still remained in place and the court had to issue a ruling on its constitutionality under the Establishment Clause, which it did. That Establishment Clause issue is now fully settled in the Ohio courts, which is why the respondents started anew in the Federal courts rather than going to back to state court.

Indeed, Respondents could have sought certiorari based on the Ohio Supreme Court's ruling because the Ohio legislature remedied the single subject problem before the time for requesting certiorari from this Court had expired. Respondents decided themselves to start over in the Federal courts.

In any event, the Ohio Supreme Court has told us what it thinks about the Establishment Clause issue in this case, and it is in deep conflict with the Sixth Circuit on the question

accord with the criteria established in *Agostini*. Again like the Ohio court, the Wisconsin court distinguished *Nyquist* because the program in that case directed aid "exclusively to private schools and their students," Id. at 614 n.9, while the Wisconsin plan followed the Ohio plan in providing funding to both public and private school students.

The Wisconsin Court also rejected the Sixth Circuit argument that the voucher plan was unconstitutional because the great majority of participating schools were religious, reflecting this Court's precedents in *Mueller, Agostini,* and *Mitchell.* 578 N.W.2d at 619n.17. Again following the Ohio court, the Wisconsin court also examined the full range of options available to public school students in Milwaukee, not just the choices available with voucher funds. In the context of this full range of choices, the Milwaukee program was clearly neutral towards religion. 578 N.W.2d at 614n.9, 618.

The Vermont Supreme Court, in *Campbell v. Manchester Bd. of School Directors,* 641 A.2d 352 (1994), and the Arizona Supreme Court, in *Kotterman v. Killian,* 972 P.2d 606, *cert. denied,* 528 U.S. 921 (1999), have joined Wisconsin and Ohio in upholding the constitutionality of school choice programs. In contrast, the Maine Supreme Court, in *Bagley v. Raymond School Dep't,* 728 A.2d 127, *cert. denied,* 528 U.S. 943 (1999), and the First Circuit Court of Appeals, in *Strout v. Albanese,* 178 F.3d 57, *cert. denied,* 528 U.S 931 (1999) have joined the Sixth Circuit in finding school choice programs unconstitutional under the Establishment Clause.

This deep conflict among appellate courts across the country is creating confusion and gridlock in the critical area of education reform. Only this court can perform the critical task of resolving this conflict, and enabling education reform to move forward.

III. THE SIXTH CIRCUIT'S DECISION BELOW CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT

The dissent below clearly elucidates exactly how the 2-1 decision there flagrantly contradicts established precedents of this Court.

Judge Ryan's dissenting opinion in fact shows that the Ohio voucher plan clearly satisfies the criteria established by this Court in *Agostini* to determine the constitutionality of public funding for education initiatives involving the private sector. *Agostini* established three criteria for determining whether such publicly funded initiatives have the primary effect of advancing religion, which would make the initiative unconstitutional under the traditional Establishment Clause test of *Lemon v. Kurtzman,* 403 U.S. 602 (1971). These three criteria are:

> (1) whether the public financing in the program results in government indoctrination;
>
> (2) whether the program defines its recipients by reference to religion;\
>
> (3) whether the government financing creates an excessive entanglement between government and religion.

521 U.S. at 234.

As Judge Ryan notes, a long line of precedents of this Court establishes that there is no indoctrination of religion where the funds go to parents and students who make a "genuinely independent and private choice" to direct their share of the funds to a particular private religious school. App. 50-51. These precedents include *Mueller, Witters, Zobrest, Agostini,* and *Mitchell.*

That is precisely the situation in the Ohio voucher plan in this case. As discussed, parents and students choose the school to receive the voucher funds, and the parent signs the voucher over to the school. That decision is made in the context of the broadest possible array of choices for Cleveland parents, again including staying in their own neighborhood public school, supplementing that education with private tutoring financed at least in part by the voucher program, choosing a private, non-religious charter or community school, choosing a suburban public school that has agreed to participate in the program, choosing a non-religious private school with a voucher, and home-schooling, in addition to the choice of using the voucher for a private, religious school. As Judge Ryan aptly states, "It is difficult to imagine a statute that could afford its voucher recipient a broader spectrum of educational choice." App. 51.

The Ohio voucher plan also clearly does not define its recipients by reference to religion. Recipients become eligible for the plan if they reside in the Cleveland public school district, which has been chosen for the new program because of its dismal educational performance. Those eligible are granted a first priority to participate in the program if their family income is less than 200% of the poverty line. The voucher plan also prohibits participating schools, including private, religious schools, from using any religion test for admission. Clearly, eligibility for the program is defined wholly in terms of religiously neutral, secular criteria, with no reference to religion.[16]

Therefore, the Ohio voucher plan is constitutional under *Agostini,* decided just four years ago.

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[16] No one in this litigation has suggested that the Ohio plan involves an excessive government entanglement with religion. It has also been conceded that the purpose of the Ohio plan is not to advance religion, but the wholly secular one of meeting the educational needs of children in failing public schools, particularly low-income and minority children.

But the majority opinion below all but ignored *Agostini* and held that the factually distinguishable and doctrinally outdated, almost 30 year old *Nyquist* decision governs this case. *Nyquist* found a New York state program to aid private schools unconstitutional. But the explicit purpose of that program was to provide funding for financially troubled, predominantly religious private schools, to avoid a costly influx of their students into public schools. The purpose of the Ohio voucher plan, by contrast, is to provide assistance primarily to low income students trapped in poorly performing public schools to obtain a better education through a broad range of public and private alternatives.

Moreover, the New York program considered in *Nyquist* provided direct financial grants to New York's private, mostly religious schools. The Ohio voucher plan provides no such grants. Rather, it again provides assistance to parents and students and they direct the funds to the school of their choice.

In addition, *Nyquist* explicitly reserved decision on "a case involving some form of public assistance (e.g. scholarships) made available generally without regard to the sectarian/non-sectarian or public/non-public nature of the institution benefited." 413 U.S. at 782n.30. That reserved issue is precisely the issue presented to by the Ohio plan. Through that plan, assistance is provided generally to families in poorly performing public schools, from which they can benefit regardless of whether they choose to improve their education in sectarian or non-sectarian and public or private schools. Consequently, *Nyquist* cannot govern this case because it explicitly reserved the question presented by this case.

Most importantly, the criteria and analysis of *Nyquist* have now been modified by the string of school financing cases decided since then. *Agostini* explicitly crystallized these changes with the establishment of a new analytical framework with new criteria. The majority below clearly should have

used this new framework rather than the outdated *Nyquist* decision. By obtusely ignoring *Agostini* and going back to *Nyquist*, the majority below seems to be resisting and ultimately flouting *Agostini*, effectively rewriting the law this Court thought it had established there.

Following *Nyquist* rather than *Agostini*, the majority below relied heavily on the fact that the great majority of private schools participating in the voucher plan are religiously affiliated, and the great majority of voucher students attend those schools. The majority below ruled that this fact meant that the voucher plan had the primary effect of aiding religion in violation of the Establishment Clause.

But this again flatly contradicts the post-*Nyquist* decisions of this Court. The tax deductions available in *Mueller* were used in the same overwhelming proportion for expenses related to private religious schools. But the Court held that this was irrelevant to the constitutionality of the program, saying

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stand in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

463 U.S. at 401.

Similarly, in *Agostini* over 90% of the private schools participating in the program at issue were religious. The Court nevertheless held that the constitutionality of the program did not turn on the proportion of participating schools that are religious. The Court said, "Nor are we willing to conclude that the constitutionality of an aid program depends upon the

number of sectarian school students who happen to receive the otherwise neutral aid." 521 U.S. at 229.

This makes eminent sense. Otherwise, the constitutionality of a school choice framework would vary by geographic location, more likely to be upheld in more secular Massachusetts than in more religious South Carolina. The constitutionality of a particular program in a particular place might also vary over time, as different private schools opened or closed. This would be a highly unprincipled and uncertain approach to constitutional analysis, dependent on rapidly changing facts in different contexts.

Frankly, the majority opinion below seems to conflict with every major Establishment Clause school financing case since *Nyquist*. We urge this Court to reassert the primacy of its precedents.

CONCLUSION

This case classically satisfies all of the requirements for granting a petition for a writ of certiorari. Consequently, the American Civil Rights Union urges the Court to grant the requested petition.

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No. 00-1751

IN THE SUPREME COURT OF THE UNITED STATES

SUSAN TAVE ZELMAN, Superintendent of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE SIXTH CIRCUIT'S DECISION FAILS TO CONSIDER RECENT ESTABLISHMENT CLAUSE JURISPRUDENCE OF THIS COURT AND CONFLICTS WITH *MITCHELL V. HELMS* AND *AGOSTINI V. FELTON.* 5

II. THE SIXTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF STATE COURTS OF LAST RESORT. 9

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH THE COURT SHOULD DECIDE SO THAT THE STATES MAY DEVELOP AND ENACT VALID LEGISLATION WHICH MEETS THEIR RESPONSIBILITIES TO PROVIDE A QUALITY EDUCATION TO THEIR CHILDREN. 12

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Agostini v. Felton,
521 U.S. 203 (1997). 2,6,7,8,9

Anderson ex rel. Anderson v. Canton Mun. Separate Sch. Dist., 232 F.3d 450 (5th Cir. 2000) 12

Bush v. Holmes, 767 So. 2d 668
(Fla. 1st DCA 2000). 3,12

Comm. for Pub. Educ. and Religious Liberty v. Nyquist,
413 U.S. 756 (1973). 2,6,7,8

Comm. for Pub. Educ. & Religious Liberty v. Regan,
444 U.S. 646 (1980). 6

Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) 3,9

Jenkins v. Missouri, 216 F.3d 720 (8th Cir. 2000) 12

Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) 3,10

Lemon v. Kurtzman, 403 U.S. 602 (1971). 6,9

Meek v. Pittenger, 421 U.S. 349 (1975) 6

Mitchell v. Helms, 530 U.S. 793 (2000). 2,3,6,7,8,9

Mueller v. Allen, 463 U.S. 388 (1983) 11

Santosky v. Kramer, 455 U.S. 745 (1982) 13

Simmons-Harris v. Goff, 711 N.E.2d 203
(Ohio 1999) 3,5,11

Simmons-Harris v. Zelman, 234 F.3d 945
(6th Cir. 2000). 4,5

Wolman v. Walter, 433 U.S. 229 (1977) 6

Zelman v. Simmons-Harris, 528 U.S. 983 (1999) 5

Zobrest v. Catalina Foothills Sch. Dist.,
509 U.S. 1 (1993). 9

STATUTES

20 U.S.C. § 5899 (2000) 12

Fla. Stat. § 229.0537 14

Fla. Stat. § 229.05371 14

H.B. 21, Fla. Leg. (2001) 15

Ch. 99-398, Laws of Fla. (1999) 12,14

Ch. 2001-82, Laws of Fla. (2001) 14

Ohio Rev. Code Ann. § 3313.976 (2001) 10

Ohio Rev. Code Ann. § 3313.979 (2001) 10

Wis. Stat. Ann. § 119.23 (1999) 10

MISCELLANEOUS

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Caroline Hoxby, *Choice Evidence*, WSJ, (Jun. 7, 2001) *at* http://www.WSJ.com 15

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INTEREST OF THE *AMICI*

The *amici* States are bound by their own constitutions to provide for the education of their children and have a fundamental interest in assuring the quality of their children's education.[1] The *amici* States have a direct interest in this case because the Sixth Circuit's decision not only invalidates an important component of educational program opportunities now available to the States, but inhibits the ability of the States to develop other meaningful and innovative programs which address the complex problems of their educational systems and meet the contemporary educational needs of their children.

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[1] Each State constitution makes specific provision for education. *See* Ala. Const. Art 14,§256, Alaska. Const. Art 17,§1, Ariz. Const. Art 11,§8, Ark. Const. Art 14,§1, Cal. Const. Art 9,§1, Colo. Const. Art 9,§2, Conn. Const. Art 8,§1, Del. Const. Art 10,§1, Fla. Const. Art 9,§1, Ga. Const. Art 8,§1, Haw. Const. Art 11,§1, Idaho Const. Art 9,§4, Ill. Const. Art 10,§1, Ind. Const. Art 8,§1, Iowa Const. Art 9,§1, Kan. Const. Art 6,§1, Ky. Const. Art 6,§1, La. Const. Art 8,§1, Me. Const. Art 8,§1, Md. Const. Art 8,§1, Mass. Const. Pt. 2,C5,§2, Mich. Const. Art 8,§1, Minn. Const. Art 13,§1, Miss. Const. Art 8,§201, Mo. Const. Art 9,§1a, Mont. Const. Art 10,§1, Neb. Const. Art 7,§1, Nev. Const. Art 11,§1, N.H. Const. Pt.2, Art 83, N.J. Const. Art 8,§4, N.M. Const. Art 12,§1, N.Y. Const. Art 11,§1, N.C. Const. Art 9,§1, N.D. Const. Art 8,§1, Ohio Const. Art 6,§2, Okla. Const. Art 13,§1, Or. Art 8,§2, Pa. Const. Art 3,§4, R.I. Const. Art 1,§12, S.C. Const. Art 11,§3, S.D. Const. Art 8,§1, Tenn. Const. Art 11,§12, Tex. Const. Art 1,§1, Utah Const. Art 10,§1, Vt. Const. Ch.11, §1, Va. Const. Art 8,§1, Wash. Const. Art 9,§1, W.Va. Const. Art 12,§2, Wis. Const. Art 10,§1, Wyo. Const. Art 1,§23.

SUMMARY OF THE ARGUMENT

The Sixth Circuit, in a divided panel decision, held that the Ohio Pilot Project Scholarship Program violated the Establishment Clause because the Program had the primary effect of advancing and endorsing religion. In reaching this decision the panel majority failed to consider and properly apply the recent Establishment Clause jurisprudence of this Court. Moreover, the panel majority mistakenly relied on an earlier and distinguishable decision of this Court and failed to recognize that the Ohio Program comports with the constitutional criteria of neutrality required by this Court in resolving Establishment Clause challenges.

Conflict with Decisions of the Court. The Sixth Circuit decision conflicts with the recent Establishment Clause jurisprudence of *Mitchell v. Helms*, 530 U.S. 793 (2000), and *Agostini v. Felton*, 521 U.S. 203 (1997), where this Court carefully delineated the appropriate criteria for reviewing constitutional challenges to state educational programs which may provide state aid to private schools. The Sixth Circuit's decision mistakenly relies on the Court's earlier opinion in *Commission for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) where the Court found that state funds that directly pay for maintenance and repair of private schools, both religious and nonreligious, as well as state grants, tuition reimbursement, and income tax benefits to parents of children attending New York nonpublic schools violated the Establishment Clause. *Nyquist* is distinguishable from the Ohio Program both factually and legally. In addition, the Sixth

Circuit's decision does not properly apply the criteria prescribed in *Mitchell,* specifically that the validity of a state educational program under the Establishment Clause is determined by whether funds for education are allocated to a sectarian institution through a *private choice* made through participation in a *neutral program*. *Mitchell v. Helms*, 530 U.S. 793, 794 (2000).

Conflict with State Courts of Last Resort. The Sixth Circuit's decision conflicts with decisions[2] of other State courts of last resort:

- *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (school choice program allowing use of state monies for private school education did not violate state or federal constitutional establishment of religion provision.)

- *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (tax credit for parents whose children attended private schools did not violate the Establishment Clause.)

- *Simmons-Harris v. Goff*, 711 N.E.2d 203, (Ohio 1999) (concluding in dicta that the original Ohio Program did not violate the Establishment Clause.)

Need to Resolve the Conflicts. This case presents an

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[2] *See also Bush v. Holmes*, 767 So. 2d 668 (Fla. 1st DCA 2000) (holding that the Florida Opportunity Scholarship Program complies with state constitutional provisions for a uniform system of public education and remanding for consideration of Establishment Clause challenge.), *rev. denied*. __ So. 2d. __ (Fla. 2001).

important federal question which needs to be resolved because it impacts the ability of the States to develop innovative educational programs to provide for the education of their children. In our federalist system it is important that the States be permitted to meet educational challenges with innovative and meaningful solutions. In addition to Ohio, other states, including Florida, continue to develop programs which extend educational opportunities to their children in nonpublic school settings. The States need to be able to enact constitutionally valid programs with the assurance that they comply with criteria enunciated by this Court. Otherwise, the continued threat of invalidation of such programs by federal courts undermines the educational stability of the children enrolled in these programs and further exacerbates the problems the programs were enacted to solve.

The Court should grant Ohio's Petition and resolve this important federal issue.

ARGUMENT

The federal challenge in this case was instituted after the 1999 re-enactment of the Ohio Pilot Project Scholarship Program. The Program was initially enacted in 1995 following an order by the United States District Court mandating that the Cleveland school district be placed under state management.[3] The Ohio General Assembly implemented the school choice program to address a crisis in the public school system of Cleveland. The program was designed to award scholarships on a preferential basis to low-income families whose children would otherwise be consigned to attend failing public schools.

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[3] Brief of State Appellants at 2, *Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000)(No. 00-3055,00-3060, 00-3063)*

The Program was initially challenged in state court. On May 27, 1999, the Ohio Supreme Court found that the statute implementing the Program violated the state constitution's single-subject requirement, but the Court stated that the Program did not violate the federal Establishment Clause. *Simmons-Harris v. Goff*, 711 N.E. 2d 203 (Ohio 1999).

The Ohio General Assembly then reenacted the Program, and the Respondents immediately thereafter instituted this action in federal court. On August 25, 1999, the federal district court entered a preliminary injunction enjoining the operation of the Program. *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725 (N.D. Ohio 1999). On October 19, 1999, an application for stay of the district court injunction was filed with this Court, which application was granted on November 5, 1999. *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999). On December 20, 1999, the district court entered summary judgment permanently enjoining the operation of the Program as violative of the Establishment Clause, but stayed the order pending Sixth Circuit review. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 865 (N.D. Ohio 1999). Timely appeal was filed in the Sixth Circuit Court of Appeals which, in a divided panel decision, affirmed the district court. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

I. THE SIXTH CIRCUIT'S DECISION FAILS TO CONSIDER THE RECENT ESTABLISHMENT CLAUSE JURISPRUDENCE OF THIS COURT AND IS IN CONFLICT WITH *MITCHELL V. HELMS* AND *AGOSTINI V. FELTON.*

This Court has always regarded neutral treatment of religious and nonreligious students alike as the centerpiece of its school-aid Establishment Clause jurisprudence. For a brief time

in the 1970's, in a series of three cases, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), the Court struck down several school-aid measures on the premise that aid to the school as a whole impermissibly advances the school's religious mission. That was the closest this Court has ever come to adopting a "no-aid" principle applicable to religiously affiliated schools; however, times have changed and so has this Court's approach to Establishment Clause adjudication. Since then this Court has retreated from that premise and cast doubt on any continuing viability of those 1970's cases in a whole range of later cases, beginning with *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980), and culminating in *Agostini v. Felton*, 521 U.S. 203 (1997) and *Mitchell v. Helms*, 530 U.S. 793 (2000).

In its recent Establishment Clause jurisprudence, this Court has carefully delineated the appropriate criteria to be considered in resolving challenges asserted under the Establishment Clause to state educational programs that may provide aid to private schools. Last term in *Mitchell v. Helms*, 530 U.S. 793 (2000), this Court rejected an Establishment Clause challenge to a Louisiana program which channeled federal funds for educational materials and equipment to parochial schools. The Court reaffirmed the application of the relevant *Lemon* criteria enunciated in *Agostini v. Felton*, 519 U.S. 203 (1997) for determination of Establishment Clause challenges: 1) whether the program has a secular purpose; and 2) whether the program has the primary effect of advancing or inhibiting religion.

In *Mitchell*, Justice Thomas, in the plurality opinion, focused on the neutrality of the program. The plurality found that there is no Establishment Clause violation when educational

aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made equally available to both secular and religious beneficiaries on a nondiscriminatory basis. *See Mitchell*, 530 U.S. at 809. Justice O'Connor, in her concurring opinion, recognized that neutrality, while primary to the Establishment Clause analysis, is one of several factors to consider. *See id.* at 839. Clearly, however, both the plurality and the concurrence expressed continued adherence to the modified framework set out in *Agostini*. Ultimately, the plurality found that the Louisiana program determined eligibility for aid neutrally, without regard for the religious affiliations, or lack thereof, of the schools. Finally, the Court found that aid was based on the private choices of the parents and students as to which schools to attend.

These same principles of neutrality are equally applicable to the Ohio Pilot Project Scholarship Program. Eligibility for schools in the Program is not dependent on religious affiliations, or lack thereof, and participation is determined by the schools themselves. Recipients of the scholarships make their own independent and private choices regarding both participation in the Program and choice of schools. Participating schools must admit students on a nondiscriminatory basis in accordance with the rules of the State Superintendent. The scholarships are payable to the parents to be used at the participating school selected by them. Clearly, the Ohio Program has been crafted in accordance with the criteria of this Court to have a neutral effect on religion.

The panel majority of the Sixth Circuit, however, instead of following the Court's carefully modified criteria which was applied in *Mitchell* and *Agostini*, chose to go back to the Court's earlier decision in *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756 (1973), and

mistakenly construed that decision as controlling. As pointed out in Judge Ryan's dissent in the panel opinion, even if the *Nyquist* Establishment Clause analysis remains viable after 27 years and several decisions of this Court, the New York program invalidated in *Nyquist* is distinguishable in all essential respects both legally and factually from the Ohio Pilot Project Scholarship Program.

First, the continued viability of the *Nyquist* analysis is questionable. As Justice O'Connor stated in her concurring opinion in *Mitchell,* "We also concluded in *Agostini*, however, that the specific criteria used to determine whether government aid has an impermissible effect had *changed*." (emphasis supplied) 521 U.S. at 223. Accordingly, the panel majority's overriding reliance on *Nyquist*, and their failure to consider subsequent changes regarding the specific criteria to determine this issue, undermines their analysis. Second, *Nyquist* is clearly distinguishable. *Nyquist* involved a New York educational assistance program the stated purpose of which was to provide direct aid to both religious and nonreligious private schools because their closing would force public schools to absorb their students. The aid involved direct grants of state funds for building maintenance and repair, tuition reimbursement for some low-income parents whose children were already attending private schools, and tax relief for parents of students already attending private schools who were otherwise ineligible for tuition reimbursement.

The Court has expressly recognized that government aid that assists religious schools is not per se invalid. In *Agostini* the Court upheld a City of New York program which allowed public school teachers to provide remedial education in parochial schools. The Court recognized that there cannot be an absolute severance between church and religion and that bringing a public school teacher into a parochial school is not

an unequivocal merger of church and State. 521 U.S. at 221. In deciding this case the court modified the *Lemon* test,[4] to define an Establishment Clause violation as one in which the practice 1) results in government indoctrination, 2) defines its recipients by religion, and 3) creates excessive entanglement. 521 U.S. at 234. The third prong is not at issue in this case.

As it did in *Agostini* and *Mitchell*, this Court again confronts the question whether a generally available, religiously neutral program of wholly secular governmental benefits violates the Establishment Clause because a portion of the benefits aid children attending religious schools. The answer to that question, *amici* submits, is that it does not. The key to that answer is this Court's repeated and consistent declaration "that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge because sectarian institutions may also receive an attenuated financial benefit." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). In contrast with these clearly enunciated principles, the decision of the Sixth Circuit stands in stark conflict with recent Establishment Clause jurisprudence of the Court.

II. THE SIXTH CIRCUIT DECISION IS IN CONFLICT WITH DECISIONS OF STATE COURTS OF LAST RESORT.

Courts in Wisconsin, Arizona, and Ohio have examined the issue of school choice and upheld the constitutionality of these States' programs. In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), the Wisconsin Supreme Court held that the Milwaukee Parental Choice Program allowing use of state

[4] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

monies for private school education did not violate state or federal constitutional establishment of religion provisions. In the Milwaukee program, as in the Ohio program *sub judice*, there are no restrictions once a scholarship is awarded as to choice of school. Both programs allocate money directly to the parents for endorsement to the *school of their choice*.[5] In Wisconsin, as in Ohio, the choice of institution is limited only by registration in the program. All schools within a specified geographical area, private or public, secular or sectarian, that comply with secular education standards as well as anti-discrimination, health and safety standards are eligible.[6] Thus, the Ohio program facially meets the same constitutional standards for religious neutrality and private choice that were upheld by the Wisconsin Supreme Court and should be adjudged in the same fashion.

The Arizona Supreme Court in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) held that a tax credit for parents who sent their children to private schools was not a violation of the Establishment Clause. In *Killian*, the court found that the program's *primary purpose* was to provide education for children, a valid secular goal. Although not specifically a scholarship case, the Establishment Clause reasoning underlying the Arizona program is clearly analogous to that underlying the Ohio program. Both programs had a facially apparent secular purpose evident in the statute governing the program. In the Arizona case, the program was one designed to expand educational options by "mak[ing] quality education available to

[5] Wis. Stat. §119.23 (1993) provides that the "superintendent shall pay to the parent or guardian of each pupil enrolled in a private school..." and Ohio Stat. § 3313.979 provides that "each scholarship...to be used for payments to a registered private school...is payable to the parents of the student."

[6] Wis. Stat. §119.23 and Ohio Stat. § 3313.976.

all children within the state." *Id.* at 611. In the Ohio case, the program was designed to promote educational availability regardless of socioeconomic status. The court in Arizona viewed Arizona's program as serving a valid secular purpose not in contravention with the Establishment Clause[7] and the legislative purpose behind Ohio's statute is clearly in agreement.

In the antecedent case in Ohio, *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), the Ohio Supreme Court held the voucher statute invalid on procedural grounds. In dicta, however, the court commented that the program did not violate the Establishment Clause except as to a provision giving scholarship priority to students whose parents belonged to a specific religious group. *Id.* at 210. This provision, however, the court asserted was severable thus not rendering the entire program invalid on Establishment Clause grounds.[8] The Ohio legislature removed that statutory language in the 1999 re-enactment and in so doing has removed any previous issue in Establishment Clause controversy and rendered the Ohio legislation analogous to that upheld in Wisconsin and Arizona.

Pending litigation in Florida presents these same questions. In 1999, the Florida Legislature enacted the Florida Opportunity Scholarship Program which provides scholarships

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[7] The Arizona court cited *Mueller v. Allen*, 463 U.S. 388, 395 (1983) asserting that "a state's decision to defray the cost of educational expenses incurred by parents *regardless of the type of schools ...attend[ed] evidences a purpose that is both secular and understandable.*" (emphasis added)

[8] The Ohio court determined that the provision allowing discriminatory selection was not so intertwined with the scope of the statute "as to make it impossible to give effect to the apparent intention of the Legislature if...stricken out." 711 N.E.2d at 210.

to students attending failing schools. *See* Ch. 99-398, Laws of Fla. The constitutionality of the Florida Program was challenged on both state and federal grounds. *See Bush v. Holmes*, 767 So. 2d 668 (Fla. 1st DCA 2000), *rev. denied* ___ So. 2d ___ (Fla. 2001). While the Florida Opportunity Scholarship Program withstood a state constitutional challenge, the federal Establishment Clause challenge is currently pending on remand to the trial court.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH THE COURT SHOULD DECIDE SO THAT STATES MAY DEVELOP AND ENACT VALID LEGISLATION WHICH MEETS THEIR RESPONSIBILITIES TO PROVIDE A QUALITY EDUCATION TO THEIR CHILDREN.

Congress acknowledges and "...reaffirms that the responsibility for control of education is reserved to the States and local school systems and other instrumentalities of the States..." *See* 20 U.S.C. § 5899(b) (2000). Moreover, the States each have their own separate constitutional responsibilities to provide for the education of their children. *See* note 1 *supra*. In order to meet these responsibilities the States must overcome a wide array of complex and challenging problems including poor academic performance, student discipline, teacher shortages, fiscal instability, and cultural distinctions[9], as well as complying with judicial oversight.[10]

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[9] *See* Department of Education, *Education Reforms and Students at Risk* , available at http://www.ed.gov/pubs/EdReformStudies/EdReforms; Education Week on the Web, *The Urban Challenge*, (Jan.8, 1998), *at* http://www.edweek.org/sreports/QC98.

[10] *See e.g., Anderson ex rel. Anderson v. Canton Mun. Separate Sch. Dist.*, 232 F.3d 450 (5th Cir. 2000); *Jenkins v. Missouri*, 216 F.3d 720, 733 (8th Cir. 2000); Kelly Thompson Cochran, *Beyond School Financing:*

Development of innovative and meaningful educational programs is essential to the States' role in meeting these challenges and providing a quality education to their children.

In our federalist system the States should, in the absence of a clear constitutional violation, be encouraged to develop innovative solutions to such complex problems and "...try novel social and economic experiments..." *Santosky v. Kramer*, 455 U.S. 745, 773 (1982) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting)). In Florida, as in other states, there is an ongoing legislative effort to develop new and meaningful educational programs which meet the changing needs of children in contemporary society by affording educational opportunities in nontraditional, including nonpublic, settings.

Despite a massive investment of public and private resources, little progress has been made toward delivering successful educational opportunities to certain populations of children, and the vast majority of the children served by the most inadequate public schools lack the financial resources to exit the system. Some help is available through programs offering private funding, but this is not the panacea for the public school system. In Florida, for example, the Children's Scholarship Fund in Miami and Tampa Bay supports a total of eight hundred children with average scholarships of $1,000 per child. Children First America in Central Florida supports ninety children and the Miami Inner City Angels provide funds for forty children. Statewide these organizations and others provide an average scholarship amount of $1,639 for a total outlay of

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Defining the Constitutional Right to an Adequate Education, 78 N.C.L.Rev. 399 (2000).

$2,180,000 in private funding.[11]

In Florida, as in other states, there is an ongoing effort to develop new and meaningful educational programs to meet these children's needs. Florida is the first state to enact statewide voucher programs. The 1999 Opportunity Scholarship Program (§ 229.0537, Fla. Stat.), which was passed as part of a broader package of public education reforms emphasizing standards and accountability (Chapter 99-398, Laws of Florida), allows children in failing public schools either to attend higher performing public schools or to attend participating private schools at state expense. Under that program, 58 children assigned to two failing Pensacola elementary schools have received scholarships to attend private schools and another 78 students are using the program to go to better public schools.

Florida has initiated programs dedicated to students with disabilities as well. The 2001 John McKay Scholarships for Students with Disabilities Program (§ 229.05371, Fla. Stat., Ch. 2001-82, Laws of Fla.) started in 1999 as a pilot program and is now available statewide for public school students with disabilities for whom an individual education plan has been written whose parent is dissatisfied with the student's progress. Nine hundred and eighty students were able to take advantage of this program last year and that number is expected to reach 2,000-3,000 for the next school year.[12] These statistics clearly demonstrate that a need exists for the flexibility inherent in a variety of school choice programs. Additionally, the 2001 Florida Legislature created a corporate income tax credit for

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[11] Patrick J. Heffernan, Ph.D., President, Floridians for School Choice *at* http://www.floridachild.org.

[12] *See generally* http://www.opportunityschools.org outlining the programs available in Florida.

corporations that wish to make monetary donations to nonprofit scholarship funding organizations established to provide scholarships to students from families that meet the income eligibility guidelines for free or reduced price lunch meals under the National School Lunch Act. H.B. 21, Fla. Leg. (2001) (awaiting signature by the Governor).

Although it is too early to assess the effect of these new programs on students choosing to attend new schools, it is already clear that the 1999 Opportunity Scholarship Program is spurring badly needed efforts to improve student performance in Florida's public schools.[13] Many public schools lengthened the school year, provided after school and Saturday tutorials, and devoted greater time to reading, writing, and mathematics. The school performance grades for the 2000-01 school year reflect that no school in the state has a failing grade.[14]

While the contours of the various States' school choice programs differ, they tend to share certain features: (1) funds are placed at the disposal of parents in the form of vouchers, scholarships, or tax credits; (2) private schools are added to the range of educational options; and (3) aid is targeted to students who are economically disadvantaged, disabled students whose parents are not satisfied with their progress, and/or students trapped in failing public schools.

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[13] *See e.g.*, Caroline Hoxby, *Choice Evidence*, WSJ, (Jun. 7, 2001), *at* http:// www.WSJ.com; Carol Innerst, *Competing to Win: How Florida's A+ Plan has Triggered Public School Reform*, (Apr. 2000), The Center for Education Reform *at http://www.edreform.com/school_choice/* compete. htm; Jay P. Greene, *An Evaluation of the Florida A+ Accountability and School Choice Program, (Feb. 2001)*, Manhattan Institute for Policy Research *at* http://www.manhattan-institute. org/html/cr_aplus.htm.

[14] Florida Department of Education 2000-2001 School Accountability Report *at* http://www.firn.edu/doe/schoolgrades.

These programs hold promise both for enhancing the quality of education received by the children who exercise alternative options and for stimulating public school reform that benefits all the other children. The demand for educational options is overwhelming.[15] Today, millions of children are consigned to public schools that are not providing them with a good education.[16] Fortunately, school choice programs are giving thousands of children the opportunity to receive a better education and are forcing systemic public school reform. *Amici* ask this Court to take care not to displace the children in these existing programs and not to jeopardize the potential for other efforts so that more of our children have access to enhanced educational options.

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[15] Florida has a myriad of education resources in addition to the OSP and Scholarships for Children with Disabilities. Bright Futures Scholarships, Charter Schools, and College Reach-out Programs are just a sample of the variety available in Florida and these programs demonstrate how flexible options can work to provide education for all students. *See* http://www.floridachild.org.

[16] Education Week on the Web provides an interesting statistical analysis of factors affecting education in urban America including, but not limited to, family history, financial status, teacher qualifications, and class size. *See* http://www.edweek.org/sreports/qc98/challenges/tables/ta-n.htm.

CONCLUSION

Continued federal constitutional challenges to the validity of innovative state educational programs and the uncertainties resulting from conflicting Establishment Clause jurisprudence undermine the stability of the educational progress of children participating in such programs. The *amici* States urge the Court to grant Ohio's Petition and resolve this important federal issue.

Respectfully submitted,

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Nos. 00-1751, 00-1777, and 00-1779

In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL., PETITIONERS

v.

DORRIS SIMMONS-HARRIS, ET AL., RESPONDENTS

HANNA PERKINS SCHOOL, ET AL., PETITIONERS

v.

DORRIS SIMMONS-HARRIS, ET AL., RESPONDENTS

SENEL TAYLOR, ET AL., PETITIONERS

v.

DORRIS SIMMONS-HARRIS, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

1. Whether a school choice program that provides tuition support for parents who choose to send their children to private schools, both sectarian and non-sectarian, violates the Establishment Clause of the First Amendment to the Constitution?

2. Whether the Sixth Circuit's application to the States of an expansive interpretation of the Establishment Clause is incompatible with this Court's recent federalism jurisprudence?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

REASONS FOR GRANTING THE WRIT 2

I. THE SIXTH CIRCUIT'S DECISION THREATENS THE MORAL EDUCATION THAT OUR NATION'S FOUNDERS THOUGHT CRITICAL IN A REPUBLICAN FORM OF GOVERNMENT 2

II. THE SIXTH CIRCUIT'S DECISION IS IN TENSION WITH SEVERAL DECISIONS OF THIS COURT. 8

A. The Sixth Circuit's Decision Undermines Parental Efforts to Direct the Moral Upbringing of their Children. 8

B. The Sixth Circuit Misapplied This Court's Decisions Repeatedly Holding That The Independence of Parental Decisions Are A Vital Factor in Determining Whether a Program Constitutes Establishment of Religion. 9

C. The Circuit Court Misapplied This Court's Repeated Holding That Religious Neutrality Is A Vital Factor in Determining Whether A Government Program Establishes Religion. 11

D. The Circuit Court Misapplied This Court's "Effects" Test As Modified by *Agostini* 14

III. THE CIRCUIT COURT OPINION SETS CONFUSING AND CONTRADICTORY PRECEDENT ON A MATTER OF VITAL NATIONAL IMPORTANCE 15

IV. THE SIXTH CIRCUIT'S INTERPRETATION OF THE ESTABLISHMENT CLAUSE IS AT ODDS WITH THIS COURT'S RECENT FEDERALISM DECISIONS. 17

CONCLUSION 20

TABLE OF AUTHORITIES

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Bush v. *Holmes*, 767 So. 2d 668 (Fl. 2000) 15

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Committee for Public Ed. & Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973) 10, 14, 16

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Everson v. *Board of Ed.*, 330 U.S. 1 (1947) 18

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Meyer v. *Nebraska*, 262 U.S. 390 (1923) 8

Mitchell v. *Helms*, 530 U.S. 793 (2000) ..... passim

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Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 8, 9

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Mass. Const. of 1780, Pt. 1, Art. 3 ..... 3, 6

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the kind of moral virtue fostered by religions education was thought by our nation's founders to be a necessary pre-condition of republican government. The Institute pursues its mission through academic research, publications, and scholarly conferences. Of particular relevance here, the Institute and its affiliated scholars have published a number of books and articles on the role of religion in the American constitutional order, including Harry V. Jaffa, The American Founding as the Best Regime: The Bonding of Civil and Religious Liberty (1990); and Thomas G. West, "Religious Liberty: The View from the Founding," in Daniel C. Palm, ed., On Faith and Free Government (1997).

In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence, whose purpose is to further the mission of the Claremont Institute through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional signifycance. The Center has previously participated as *amicus curiae* in this Court in such important cases as *Dale* v. *Boy Scouts*, 530 U.S. 640 (2000), *United States* v. *Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of Northern Cook Cty.* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

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[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION THREATENS THE MORAL EDUCATION THAT OUR NATION'S FOUNDERS THOUGHT CRITICAL IN A REPUBLICAN FORM OF GOVERNMENT.

American public schools are facing a crisis. Children are threatened every day by violence, drug abuse, and sexual pressures; test scores are continually falling, and students are failing to graduate. Cleveland, Ohio's public schools have only a 38 percent graduation rate, and only 12 percent of sixth grade students passed the state's mathematics proficiency test in 1999. "Failing Cleveland's Students," Washington Times, 1999 WL 3092877 (Aug. 26, 1999). Fundamentally, this crisis appears to be rooted in the philosophy of moral relativism that has gained sway in our nation's top education establishments and become entrenched in our nation's public school curriculum.

Several states, including Ohio, have begun to address this education crisis by providing to parents—particularly to poor parents—who seek a more hopeful alternative some measure of the funding that the state would otherwise spend on the education of their children. As the dissent below noted, "[t]he *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority, public school children from the devastating consequences of requiring them to remain in the failed Cleveland schools, if they wish to escape." *Simmons-Harris v. Zelman*, 234 F.3d 945, 967 (6th Cir. 2000) (Ryan, J., dissenting in part) (emphasis in original). Despite the successes from parental school choice programs that are already being documented,[2] the Sixth

[2] *See, e.g.*, Thomas C. Dawson and Eric A. Helland, *Helping Hand: How Private Philanthropy and Catholic Schools Serve Low-Income Children in Los Angeles* (Pacific Research Foundation Study, 2001) (finding that Catholic schools in inner cities spend less than half the amount per student as public schools, yet achieve higher test scores); David Myers, et al., *School Choice in New York City after Two Years: An Evaluation of the School Choice Scholarships Program* (John F. Kennedy School of Government Study, 2000) (finding New York City's school choice plan resulted in safer campuses and increased test scores, especially among minority students); Paul Peterson et al., *An Evaluation of the Cleveland Voucher Program after Two Years* (John F. Kennedy School of Government Study, 1999) (finding that the Cleveland Scholarship Program involved in this case achieved greater parental satisfaction and an average test-score increase of about forty percent).

Circuit Court of Appeals has in this case erected an unwarranted constitutional barrier to Ohio's efforts.

The efforts undertaken by Ohio but thwarted by the Sixth Circuit would have been applauded by our nation's Founders, who believed, virtually without exception, that only a virtuous people was fully capable of self-government. This belief is evident in the constitutions they adopted, in their public writings, and in their private correspondence. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15. The Massachusetts Constitution of 1780 echoes the sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality ...." Mass. Const. of 1780, Pt. 1, Art. 3.

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers:

> Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be

> that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

The Federalist No. 55, at 346 (C. Rossiter and C. Kesler eds., 1999).

In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government. They were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. Many of the leading Founders, therefore, proposed systems of public education that would help foster the kind of moral virtue they thought necessary for self-government. Perhaps the best example, but by no means the only one, of this sentiment is expressed in the Northwest Ordinance, adopted by Congress in 1787 for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 51, 53 n. a (July 13, 1787, re-enacted Aug. 7, 1789); *see also*, *e.g.*, Mass. Const. of 1780, Ch. V, Sec. 2 ("wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties").

As the Northwest Ordinance makes clear, the fostering of moral excellence was, for the Founders, a task intimately tied to religion. President Washington, for example, noted in his Farewell Address that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, Farewell Address, *reprinted in* William B. Allen, ed., George Washington: A Collection 521 (1988). Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals."

Benjamin Rush, Speech in Pennsylvania Ratifying Convention (Dec. 12, 1787), *reprinted in* Merrill Jensen, ed., 2 *Documentary History of the Ratification of the Constitution* 595 (1976). Accordingly, he proposed a public school system whose curriculum included religious instruction, noting that such an education would "make dutiful children, teachable scholars, and afterwards, good apprentices, good husbands, good wives, honest mechanics, industrious farmers, peacable sailors, and, in everything that relates to this country, good citizens." Benjamin Rush, To The Citizens of Philadelphia: A Plan for Free Schools, *reprinted in* L.H. Butterfield, ed., 1 Letters of Benjamin Rush 412, 424 (1951) (1786). Even Thomas Jefferson, who coined the phrase, "a wall of separation between church and state,"[3] provided in his proposal for public education in Virginia that

> [t]he first elements of morality, too, may be instilled into [students'] minds, such as...may teach them how to work out their own greatest happiness, by showing them that it...is always the result of good conscience, good health, occupation, and freedom in just pursuits.

Thomas Jefferson, Notes on the State of Virginia, *reprinted in* M. Peterson, ed., Jefferson: Writings 125, 273 (1984).

In addition, several of the States explicitly provided for religious education in their State constitutions. The Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning...shall be encouraged and protected." Pa. Const. of 1776, § 45; *see also* Vt. Const. of 1777, Ch. II § XLI ("all religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of

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[3] Thomas Jefferson, "Letter to the Danbury Baptist Association" (Jan. 1, 1802), *reprinted in* Jefferson: Writings 510 (M. Peterson, ed., 1984).

religion and learning, shall be encouraged and protected"). The Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 went even further. The Massachusetts Constitution provides:

> The people of this Commonwealth have the right to invest their legislature with power to authorize and require...the several towns...or religious societies to make suitable provision at their own expense...for the support and maintenance of public protestant teachers of piety, religion and morality.

Mass. Const. of 1780, Pt. I § 3. And New Hampshire's Constitution authorized the legislature

> to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" because "morality and piety...will give the best and security to government ....

N.H. Const. of 1784, Pt. I § 5.

While no State has, since the 1830s, supported such a starkly sectarian establishment of religion as is evident in the Massachusetts and New Hampshire constitutions' references to "protestant teachers," several continue to recognize the importance of moral-religious instruction in fostering the kind of citizen virtue the Founders thought necessary to the continued security of the republic. *See, e.g.*, Nebr. Const. Art. 1, § 4 ("Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature ... to encourage schools and the means of instruction"); Vt. Const. ch. II, § 68; Ind. Const. Art. 8, § 1; Iowa Const., Art. IX, § 3; *see also* Mass. Ann. Laws ch. 71, § 30 (2001) (providing that it is the "duty" of Harvard professors and other teachers of youth "to impress on the minds of children and youth committed to their care and instruction the principles of *piety* and justice" (emphasis

added)). Particularly where, as here, individual parents remain free to direct the state's tuition support to schools of their own choosing, the incidental benefit to religion would have been viewed by the Founders as an added benefit, not a constitutional impediment. Benjamin Rush addressed this point directly in his proposal for a public education system: "The children of parents of the same religious denominations should be educated together," he wrote, "in order that they may be instructed with the more ease in the principles and forms of their respective churches." Benjamin Rush, "Plan for Free Schools," *supra*. "If each society in this manner takes care of its own youth, the whole republic must soon be well educated. It has been found by experience that harmony and Christian friendship between the different religious societies is best promoted by their educating their youth in separate schools." Benjamin Rush, "To The Citizens of Pennsylvania of German Birth and Extraction: Proposal of a German College," *reprinted in* Butterfield, *supra*, at 364.

Given the Founders' views on the subject, the Sixth Circuit's holding that the Constitution they drafted and ratified mandates the *exclusion* of religious schools from the general tuition support program at issue here is extraordinary. Indeed, from the Founders' vantage point, such a holding would have been viewed as dangerous, because it thwarts rather than supports the very kind of moral-religious education that the Founders thought so necessary to the preservation of free government. *Cf.* Martin Luther King, Jr., THE WORDS OF MARTIN LUTHER KING JR. 41 (Coretta Scott King, ed., 1993) ("education which stops with efficiency may prove the greatest menace to society. The most dangerous criminal may be the man gifted with reason but with no morals. We must remember that intelligence is not enough. Intelligence plus character—that is the goal of education"). Given the harm that is likely to flow from the Sixth Circuit's decision, not just to the particular children and schools who have petitioned for this

Court's review, but to the broader society, the decision cannot be allowed to stand without a much more clear basis in this Court's precedent than exists here. In fact, not only is the Sixth Circuit's decision not clearly mandated by this Court's Establishment Clause jurisprudence, it is fundamentally at odds with it.

II. THE SIXTH CIRCUIT'S DECISION IS IN TENSION WITH SEVERAL DECISIONS OF THIS COURT.

A. The Sixth Circuit's Decision Undermines Parental Efforts to Direct the Moral Upbringing of their Children.

In *Pierce* v. *Society of Sisters*, this Court acknowledged that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

268 U.S. 510, 535 (1925). Parents, this Court held, have the right "to choose schools where their children will receive appropriate mental and religious training." *Id.* at 532; *see also, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). This right is "established beyond debate as an enduring American tradition." *Yoder*, 406 U.S., at 232. In fact, this Court has characterized the right to direct the education of one's children as not only a right but a "high duty." *Meyer*, 268 U.S., at 535. "The *duty* to prepare the child for 'additional obligations,' ... must be read to *include the inculcation of moral standards, religious beliefs*, and elements of good

citizenship." *Yoder*, 406 U.S., at 233 (emphasis added) (quoting *Meyer*, 268 U.S., at 535).

Although government is not obligated to subsidize the exercise of this fundamental parental right, this case is not about compelling governmental aid, but rather about whether the Constitution prohibits government from removing a financial impediment to the exercise of the parental right. The Cleveland Scholarship program simply makes it easier for parents to choose alternatives to failing public schools when, in the parents' own view, such is in the best interest of their children.

Because the program is open on equal grounds to both religious and secular private schools, the program respects the rights of religious parents to have their children receive appropriate religious training as well, without being charged twice for the education (tuition plus taxation for educational services which the parent does not utilize). Ohio's laudable efforts to remove a financial impediment to the exercise of parents' fundamental right to direct the moral upbringing of their children no more constitutes an impermissible establishment of religion than any other governmental action that merely accommodates rather than supports religious practice and beliefs. *See Yoder*, 406 U.S., at 235 n.22; *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963).

B. The Sixth Circuit Misapplied This Court's Decisions Repeatedly Holding That The Independence of Parental Decisions Are A Vital Factor in Determining Whether a Program Constitutes Establishment of Religion.

This Court has repeatedly held that a government education program whose incidental benefits to a religious group are the result of purely private individual choices does not violate the Establishment Clause. *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993);

Witters v. *Washington Dept. of Svcs. for Blind*, 474 U.S. 481 (1986); *Mueller* v. *Allen*, 463 U.S. 388 (1983). Simply put, "government doesn't necessarily endorse private choices that people make with government funds, any more than it endorses cabbage by letting people use food stamps to buy the food of their choice, which may include cabbage." Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341, 357-358 (1999).

Mueller is particularly instructive. This Court upheld a Minnesota law that permitted parents to deduct from their state taxes the amount of money they spent in sending children to private schools, including religious ones, because

> under Minnesota's arrangement, public funds become available only as a result of numerous private choices of individual parents of school-age children. For these reasons, we recognized in [*Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973)] that the means by which state assistance flows to private schools is of some importance.... Where, as here, aid to parochial schools is available only as a result of decisions of individual parents, no "imprimatur of state approval," can be deemed to have been conferred on any particular religion, or on religion generally.

Mueller, 463 U.S., at 399.

Likewise, under the Cleveland Scholarship Program, "any money that ultimately [goes] to religious institutions d[oes] so 'only as a result of the genuinely independent and private choices of' individuals." *Agostini*, 521 U.S., at 226. The State of Ohio no more endorses a religious viewpoint—or sends a message of favoritism—than it endorses cabbage by providing poor people with food stamps.

The Circuit Court found this freedom of choice to be "illusory" because "82 percent of the participating schools

were sectarian," *Zelman*, 234 F.3d, at 959, but the fact that most schools participating in the program are religious does not turn this admittedly facially neutral program, *see id.* at 949, into an impermissible establishment of religion. This Court has emphatically rejected such reasoning: "*We would be loath* to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S., at 401 (emphasis added). This Court's precedent at least makes clear that in such a case the question must not be *how many recipients happen to be religious*, but instead *whether*, due to the program, *an endorsement of one faith can be reasonably attributed to the government's actions*.

Quite simply, the private choices of parents cannot be attributed to the government, and thus become an establishment of religion, merely because those choices are supported by (rather than induced by) state funding which would have gone to educate the child anyway. In short, as the Ohio Supreme Court held when rejecting the parallel state court challenge to the Cleveland Scholarship Program, "[t]o the extent that children are indoctrinated by sectarian schools receiving tuition dollars that flow from the School Voucher Program, it is not the result of direct government action." *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 7 (1999). The Sixth Circuit's holding to the contrary, that "*practically speaking*," parents had no real freedom of choice, because too many religious schools participated in the program, *id.* at 959, is based on precisely the nose-counting rationale that this Court was "loath to adopt" in *Mueller*.

C. The Circuit Court Misapplied This Court's Repeated Holding That Religious Neutrality Is A Vital Factor in Determining Whether A Government Program Establishes Religion.

The Court of Appeals also held that the Cleveland

Scholarship Program was not religiously neutral. As the dissent below noted, this conclusion lacked even "a scintilla of evidence." *Zelman*, 234 F.3d, at 970 (Ryan, J., dissenting in part). Indeed, the majority opinion acknowledged that "the voucher program does not restrict entry into the program to religious or sectarian schools." *Id.*, at 959. Yet it went on to find the program non-neutral because religious schools "often have low overhead costs, supplemental income from private donations, and consequently lower tuition needs." *Id.* (citing Martha Minow, "Reforming School Reform," 68 Fordham L. Rev. 257, 262 (1999)). In other words, because religious schools are cheaper, a program which grants benefits *equally* to religious and non-religious schools is made unequal precisely *because it does not discriminate*. The Sixth Circuit's definition of neutrality borders on the Orwellian, and it is contrary to this Court's repeated holding that religious organizations should not be treated less favorably than non-religious organizations in the provision of governmental aid. *See, e.g., Rosenberger* v. *Rector of the University of Virginia*, 515 U.S. 819 (1995).

Just this month, this Court reiterated the importance of considering the religious neutrality of a government program in evaluating its Establishment Clause effects. In *Good News Club* v. *Milford Central School*, No. 99-2036, 2001 WL 636202 (June 11, 2001), this Court noted that "[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality*, upholding aid that is offered to a broad range of groups or persons without regard to their religion." Slip Op. at 14 (*quoting Mitchell*, 530 U.S., at 838 (O'Connor, J., concurring in judgment)). The Good News Club sought "nothing more than to be treated neutrally and given access to speak [on the same terms] as are other groups." *Id.* In exactly the same way, religious schools which participate in the Cleveland Scholarship Program have received nothing more than

neutral treatment and an equal opportunity to participate in the program.

The Cleveland Scholarship Program is also religiously neutral because no reasonable bystander would perceive it a State endorsement of religious schools. On the contrary, the Sixth Circuit's decision *excluding* religious schools from the program amounts to a negative endorsement that the plurality opinion in *Good News Club* found constitutionally troubling. *See id.*, at 18 ("Any bystander could conceivably be aware of the school's use policy and its exclusion of the Good News Club, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement"). So, too, here: Any bystander could conceivably be aware of the Cleveland Scholarship Program's terms, and if those terms are read to specifically exclude religious schools, such an exclusion would "send[] a message to nonadherents that they are outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

The Sixth Circuit, relying on Justice O'Connor's opinion concurring in the judgment in *Mitchell*, correctly noted that neutrality is not the sole consideration in an Establishment Clause case, but it failed to give full regard to the entirety of Justice O'Connor's opinion. Primarily, the Sixth Circuit never came to grips with Justice O'Connor's explanation that a Program

> distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools...supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school [in which case] "no reasonable observer is likely to draw from the facts...an inference that the State itself is endorsing a religious practice or belief." Rather, endorsement of the religious message is reasonably

attributed to the individuals who select the path of the aid.

Mitchell, 530 U.S., at 842-843 (quoting *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in judgment)).

The Court of Appeals failed to apply the proper neutrality analysis, and has therefore misapplied this Court's binding precedent.

D. The Circuit Court Misapplied This Court's "Effects" Test As Modified by *Agostini*.

The Court below based its opinion largely on *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Yet this Court has acknowledged that "Establishment Clause jurisprudence has changed significantly" since the *Nyquist* case. *Agostini*, 521 U.S., at 236; *see also id.*, at 223 ("What has changed...is our understanding of the criteria used to assess whether aid to religion has an impermissible effect").

To determine whether a government program has an impermissible effect of favoring religion, this Court now asks whether it "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement." *Agostini*, 521 U.S., at 234. The Cleveland Scholarship Program does none of these things. The Program does not result in governmental indoctrination because no "religious indoctrination that occurs in these schools could reasonably be attributed to government action." *Mitchell*, 530 U.S., at 809 (Thomas, J:, plurality opinion). Indeed, the whole reason parents wish to send their children to private religious schools is because they are *dissatisfied* with government action to begin with; it is unlikely that they would get the impression that the religious school is acting as a government entity.

Nor does the Cleveland program define its recipients by reference to religion. As the Sixth Circuit itself conceded,

the program is facially neutral. *Zelman*, 234 F.3d, at 949. Finally, unlike the remedial program at issue in *Agostini*, there will be no government employees teaching on the premises of sectarian schools under the Cleveland program. Since the aid program in *Agostini* did not constitute an excessive entaglement of religion, the far less entangling program here clearly does not either.

III. THE CIRCUIT COURT OPINION SETS CONFUSING AND CONTRADICTORY PRECEDENT ON A MATTER OF VITAL NATIONAL IMPORTANCE.

The Sixth Circuit's ruling comes at a time when school choice programs across the nation are being tested for constitutionality. Yet while several other courts, including the Ohio Supreme Court addressing the very program at issue here, have upheld these programs against Establishment Clause challenges, the Sixth Circuit has, in stark contrast, held the Ohio program to be unconstitutional. In *Simmons-Harris* v. *Goff*, for example, the Supreme Court of Ohio held that the Cleveland Scholarship Program did not violate the Establishment Clause because "[w]hatever link between government and religion is created by the School Voucher Program is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government." 86 Ohio St. 3d 1, 7 (1999) (*quoting Witters*, 474 U.S., at 487). Similar programs have been upheld in Illinois, Florida, Wisconsin, and Arizona. *See Griffith* v. *Bower*, 2001 Ill. App. LEXIS 248 (Ill. App. Ct. 5th Dist. Apr. 3, 2001); *Bush* v. *Holmes*, 767 So. 2d 668 (Fl. 2000); *Jackson* v. *Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998); and *Kotterman* v. *Killian*, 193 Ariz. 273 (Ariz.), *cert. denied*, 528 U.S. 810 (1999). Demonstrating the depth of the split on this issue, however, parental choice programs have been struck down in Vermont and Maine. *See Chittenden Town Sch. Dist.* v. *Vermont Dep't of Educ.*, 169 Vt. 310 (Vt.), *cert. denied sub nom*

Andrews v. *Vermont Dep't of Educ.*, 528 U.S. 1066 (1999); *Bagley* v. *Raymond Sch. Dep't*, 728 A.2d 127 (Me.), *cert. denied* 528 U.S. 947 (1999).

The different holdings by the Sixth Circuit and the Ohio Supreme Court about the constitutionality of the Cleveland program presents the most direct conflict, of course. The Ohio Supreme Court held that the Cleveland Scholarship Program did not have an impermissible effect of advancing religion because "[t]he primary beneficiaries of the [Scholarship Program] are children, not sectarian schools." *Goff*, 86 Ohio St. 3d, at 9. The Sixth Circuit, on the other hand, held that the Program *does* have an impermissible effect of advancing religion because there are "no restrictions on the religious schools as to their use of the tuition funds—the funds may be used for religious instruction or materials as easily as for erasers and playground equipment." *Zelman*, 234 F.3d, at 959.

The conflict with other State courts is equally stark. The Wisconsin Supreme Court, for example, upheld a program that, like the Ohio program at issue here, gave "participating parents the choice to send their children to a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private sectarian school." *Jackson*, 218 Wis. 2d, at 869. "As a result," the Wisconsin Court continued, "the amended program is in no way 'skewed towards religion.'" *Id.* at 870 (*quoting Witters*, 474 U.S., at 488). The Sixth Circuit, on the other hand, refused to consider the entirety of the Cleveland program, instead focusing only on the portion of the program that was available to sectarian schools. *Zelman*, 234 F.3d, at 958.

Moreover, although the Sixth Circuit rendered its decisions months after this Court's holding in *Mitchell* v. *Helms* called into question the continued vitality of *Nyquist*, the Sixth Circuit held that *Agostini* required it to abide by the

Nyquist holding until this Court explicitly overrules the decision or holds a school choice program constitutional despite *Nyquist*. *See Zelman*, 234 F.3d, at 954-955. Because this Court has already denied certiorari in several cases involving similar school choice programs, parents in some parts of the country are able to receive tuition support for their private educational choices while parents in other parts of the country are not. Only a definitive ruling from this Court, therefore, can restore uniformity in this important area of the law.

IV. THE SIXTH CIRCUIT'S INTERPRETATION OF THE ESTABLISHMENT CLAUSE IS AT ODDS WITH THIS COURT'S RECENT FEDERALISM DECISIONS.

Perhaps most fundamentally, even were the Sixth Circuit's interpretation of the Establishment Clause a logically-compelled extension of this Court's Establishment Clause jurisprudence, the Sixth Circuit's interpretation is at odds with this Court's recent federalism decisions. Because the Ohio Supreme Court and the Sixth Circuit Court of Appeals reached opposite conclusions with respect to the very same program, this case brings the federalism question into sharp relief.

It has long been settled that the First Amendment (like the other provisions of the Bill of Rights) was intended to apply only to the federal government, not to the state governments. "*Congress* shall make no law ..." meant precisely that. U.S. Const. Amend. I (emphasis added); *see also Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (holding the Free Exercise clause inapplicable to the states). This is particularly true with respect to the Establishment Clause, whose language, "Congress shall pass no law *respecting* the establishment of religion," was designed with a two-fold purpose: to prevent the federal government from

establishing a national church; and to prevent the federal government from interfering with the state established churches and other state aid to religion that existed at the time. *See, e.g.,* W. Katz, Religion and American Constitutions 8-10 (1964); M. Howe, The Garden and the Wilderness 23 (1965) (both cited in G. Stone, et al., eds., Constitutional Law 1539 (3d ed. 1996); *see also* Neil Cogan, The Complete Bill of Rights 1-8, 53-62 (1997) (reprinting the debates in Congress leading to the proposal of the First Amendment's religion clauses).

Of course, the 14th Amendment affected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that would interfere with their fundamental rights. But the Establishment Clause is on its face different in kind than the other provisions of the Bill of Rights that had previously been incorporated and made applicable to the states via the 14th Amendment. The Free Speech and Free Exercise Clauses, for example, are much more readily described as protecting a "liberty" interest or a "privilege" of citizenship than is the Establishment Clause, yet when this Court in *Everson* v. *Board of Ed.*, 330 U.S. 1 (1947), held that the clause was incorporated and made applicable to the States via the Due Process clause of the 14th Amendment, it merely cited its prior cases incorporating those two clauses, without any analysis of the evident differences between them and the Establishment Clause. *See id.*, at 5 (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), a free exercise case); *id.*, at 15 (citing, e.g., *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), a free exercise case, which in turn relied upon *Schneider* v. *State*, 308 U.S. 147 (1939), a free speech case).

Moreover, the application of the Establishment Clause to the states has allowed the federal courts and, via section 5 of the 14th Amendment, the Congress, to do the very thing the clause was arguably designed to prevent, namely, federal interference with state support of religion. Indeed, the

constitutional prohibition on federal intrusion into this area of core state sovereignty is much more explicit than the prohibition on federal commandeering of state officials, *see New York* v. *United States*, 505 U.S. 144 (1992), the limits of federal power inherent in the doctrine of enumerated powers, *see United States* v. *Lopez*, 514 U.S. 549 (1995), or even the barrier to federal power erected by the doctrine of state sovereign immunity that this Court has held to be implicit in the 11th Amendment, *see Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996). Yet in each of these latter areas, this Court has in recent years given renewed attention to the limits of federal power.

This Court need not revisit the long-standing precedent incorporating the Establishment Clause, however, in order to give due consideration to that precedent's effect on federalism. All that is required is for this Court to recognize that the scope of activity prohibited by the Establishment Clause may well be narrower with respect to the States than with respect to the Federal government. Such a distinction is particularly important in light of the fact that the States rather than the federal government have historically been viewed as the respository of the police power—that power to regulate the health, safety, welfare, *and morals* of the people. *See, e.g., Barnes* v. *Glen Theatre, Inc.*; 501 U.S. 560, 569 (1991); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 304 (1932). Thus, even if the Sixth Circuit's "no aid to any or all religions, directly or indirectly," were an appropriate interpretation of the Establishment Clause vis-à-vis the federal government, certiorari is warranted here to consider whether such an expensive interpretation can properly be applied to the states without intruding into core areas of state sovereignty.

CONCLUSION

For all of the above reasons, the petitions for a writ of certiorari should be *granted.*

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IN THE

Supreme Court of the United States

SENEJ TAYLOR, JOHNNIETTA MCGRADY, CHRISTINE SUMA, ARKELE WINSTON, AND AMY HUDOCK,

&

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION,

&

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 6

I. THIS CASE PRESENTS THE BEST OPPORTUNITY SINCE *BOWEN V. KENDRICK* FOR THE COURT TO CLARIFY WHAT FACTS ARE RELEVANT TO THE PLEADING, PROOF, AND DEFENSE OF A CLAIM CHALLENGING STATE ACTION UNDER THE INCORPORATED ESTABLISHMENT CLAUSE. 12

II. THE COURT CAN AND SHOULD USE THIS CASE TO CLARIFY THE PURPOSES OF THE FACTUAL INQUIRIES MANDATED BY THE "THREE-PRONGED" TEST OF *LEMON V. KURTZMAN* AND ITS PROGENY. 19

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997)..... 13

Bagley v. Raymond School Dep't, 728 A.2d 127, 133-135, 144-145 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999)..... 2, 12

Board of Education of the Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994)..... 14

Campbell v. Manchester Bd. Of School Directors, 161 Vt. 441, 452-456, 641 A.2d 352, 359-361 (Vt. 1994)..... 2, 10

Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995)..... 13

Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)..... passim

DeRolfe v. State (*DeRolfe I*), 78 Ohio St.3d 193, 677 N.E.2d 733 (1997), *rehr'g. and clarification*, 78 Ohio St.3d 419, 678 N.E.2d 886 (1997), *clarification*, 83 Ohio St.3d 1212, 699 N.E.2d 518 (1998)..... 8

DeRolfe v. State (*DeRolfe II*), 89 Ohio St.3d 1, 728 N.E.2d 993 (2000)..... 8

Good News Club v. Milford Central School, -- U.S. --; 2001 WL 636202..... 13

Jackson v. Benson, 218 Wis.2d 835, 869-873, 578 N.W.2d 602, 617-619 (1998), *cert. denied*, 525 U.S. 997 (1998)..... 2, 10

Kotterman v. Killian, 193 Ariz. 273, 279-282, 972 P.2d 606, 612-615, *cert. denied*, 528 U.S. 921 (1999)..... 2, 10

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)..... 4, 12, 15, 17

Mitchell v. Helms, 530 U.S. 593 (2000)..... 13

Reed v. Rhodes, 179 F. 3d 453 (6th Cir. 1999)..... 3

Reed v. Rhodes, 422 F. Supp. 708, 797 (N.D. Ohio 1976), *remanded without opinion*, 559 F.2d 1220 (6th Cir. 1977), *on remand to* 455 F. Supp. 546 (N.D. Ohio), *on remand to* 455 F. Supp. 569 (N.D. Ohio 1978)(discussing the Liability Order) and *Reed v. Rhodes*, 455 F. Supp. 546, 568 (N.D. Ohio1977), *on remand to* 455 F. Supp. 569 (N.D. Ohio 1978)(discussing the Remedial Order)..... 6

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995)..... 13

Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999)..... 3, 12

Zobrest v. Catalina Hills School District, 509 U.S. 1 (1993)..... 14

CONSTITUTIONAL PROVISIONS

Ohio Const. Art. VI §2..... 10

OTHER AUTHORITIES

"Governor Announces Additional $1.6 Million in Alternative Education Grants," Press Release, Ohio Department of Education (June 26, 2000, available at http://www.ode.state.oh.us/comm/news/06-26-00.htm) 9

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Evelyn Theiss, "School Board Repeats Failed Reform Pattern," *The Cleveland Plain Dealer* (August 27, 1995) at 6B 6, 7

Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985). 13

Jeanne Allen, *The School Reform Handbook*, Ch. 7, p. 62 (Center for Education Reform (Washington, D.C., 1995) (available at http://www.edreform.com/handbook/srhch7.htm.)..... 7

Patrice Jones, "9th Graders Falter on Proficiency Tests," *Cleveland Plain Dealer* (March 20, 1994), at 1B. 7

Patrice Jones, "Schools Slide into Disrepair, District Has Enough to Fix Only the Worst," *Cleveland Plain Dealer* (September 11, 1994) at 1B. 7

Peggy Caldwell , "Ohio Panel Asks Change in Tenure Law, Teacher Certification Tests," *Education Week* (December 21, 1983)..... 6

Scott Stephens, "Parents Get Early Word on Schools," *Cleveland Plain Dealer* (May 19, 1998)..... 7, 8

Scott Stephens, "School Board Unveils Steps to Curb Violence," *Cleveland Plain Dealer* (October 29, 1994) at 1B..... 7

William Snider, "State Mandates, Equity Law: On a Collision Course," *Education Week* (February 10, 1988)..... 6

Nos. 00-1751, 00-1777, 00-1779

In the Supreme Court of the United States

Senel Taylor, Johnnietta McGrady, Christine Suma, Arkele Winston, and Amy Hudock

&

Susan Tave Zelman, Superintendent of Public Instruction,

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Doris Simmons-Harris, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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AMICUS CURIAE BRIEF FOR THE CENTER FOR EDUCATION REFORM[1]

INTEREST OF AMICUS CURIAE[2]

The Center for Education Reform ("CER") is a national, independent, non-profit advocacy organization founded in 1993. CER provides support and guidance to parents and teachers, community and civic groups, policymakers, grassroots leaders, and all other interested citizens who are working to bring fundamental reforms to

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[1] Pursuant to Supreme Court Rule 37.6, no person other than Counsel identified on the cover and the staff of The Center for Education Reform participated in authoring this brief. No entity other than The Center for Education Reform and its counsel provided financial support for this brief.

[2] The consent of the parties to the filing of this *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

their schools. It also supports the lawyers and litigants who strive to present an accurate picture of the social, cultural, educational, economic, and political facts supporting the constitutionality of these fundamental reforms.

In CER's experience, education reform is, at bottom, a restructuring of the goals and relationships that define the character of a school system or program. By definition, meaningful reform is rarely a discrete event. It is a difficult process that takes place over an extended period of time. *Successful* reforms require careful crafting. Those that succeed must address the social, economic, cultural, and educational needs and aspirations of the community.

Because each reform effort is unique, CER believes that the political and constitutional legitimacy of specific reforms should be considered only in the factual context that led to their implementation in the first instance. Lower courts, however, are deeply divided on the relevance and weight that should be allocated to the specific facts and factual contexts when education reform initiatives are tested under the Establishment Clause. Compare *Campbell v. Manchester Bd. Of School Directors*, 161 Vt. 441, 452-456, 641 A.2d 352, 359-361 (Vt. 1994) (detailing the facts relevant to the Establishment Clause inquiry); *Jackson v. Benson*, 218 Wis.2d 835, 869-873, 578 N.W.2d 602, 617-619 (1998), *cert. denied*, 525 U.S. 997 (1998) (detailed factual analysis of the Milwaukee School Choice Program); and *Kotterman v. Killian*, 193 Ariz. 273, 279-282, 972 P.2d 606, 612-615, *cert. denied*, 528 U.S. 921 (1999) (close analysis of factual background of state income tax credit for contributions to private scholarship programs) with *Bagley v. Raymond School Dep't*, 728 A.2d 127, 133-135, 144-145 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999) (acknowledging that the statute intentionally singled out religious schools for adverse treatment, but failing to examine the factual context); *Strout v. Albanese*, 178 F.3d

57 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999) (same, failing to analyze the possibility that the statue had the primary effect of "inhibiting" religion).

This Court should grant the writ and provide the state and federal courts with guidance concerning the quality and quantum of evidence needed to plead and prove a violation of the incorporated Establishment Clause.

SUMMARY OF ARGUMENT

The effort to desegregate and reform the Cleveland Public Schools began more than twenty-five years ago. This case is the latest to test the constitutionality of numerous remedial "plans," millions of dollars in spending, and thousands of student and teacher re-assignments. After decades of judicial oversight of the state and local political struggles necessitated by the remedial orders put in place by the District Court, there is widespread agreement that the task of reforming the Cleveland's education system is far from complete. The Cleveland Public Schools attained "partial unitary" status with respect to student assignments only in 1999. *See Reed v. Rhodes*, 179 F. 3d 453 (6th Cir. 1999).

The Cleveland Scholarship and Tutoring Grant Program at issue in this case is an important component of an ongoing desegregation and school reform effort that has lasted for more than a generation. When the District Court "suggested that parental and student choice become an important factor in student assignment," *Reed v. Rhodes*, 179 F. 3d at 458, it was inevitable that private schools would be included in the effort to provide real options for Cleveland's children.

Also inevitable was litigation under the Establishment Clause. At bottom, the Establishment Clause argument by opponents of school choice is a simple one: To the extent

that a desegregation remedy permits parents and students to choose from the full range of educational opportunities in their community, including private and religiously affiliated schools, the Establishment Clause is violated.

Amicus CER respectfully submits that an inclusive funded school choice plan does not violate the Establishment Clause simply because it permits the choice of a religiously affiliated school, or because the educational marketplace may not have had time to offer the range of options contemplated by that plan. CER submits that plaintiffs in an Establishment Clause challenge bear the burden of pleading and proving every element of their claim. Where, as here, the plaintiffs rely on the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), they must prove by a preponderance of the evidence:

1. That the choice plan – taken as a whole and viewed in context – either has no secular legislative purpose, or that the alleged purpose of the statute is a cover for an [otherwise unconstitutional] attempt to advance or inhibit religion; or

2. That "the principal or primary effect of the statute" – read in the education reform and remedial context in which it was adopted – *actually* "advances [or] inhibits religion"; or

3. That the choice plan embedded in Ohio law *actually* "foster[s] an excessive entanglement with religion."

See Lemon, 403 U.S. at 612-13.

In the case at bar, the courts below held that plaintiffs had established the relevant "constitutional fact" – that the principal or primary effect of the Cleveland Scholarship

and Tutoring Grant Program "advanced" religion – by proving only: 1) that more than 80% of the students utilized their scholarships at religiously affiliated schools; 2) that the mission statements of those schools attest that they approach the task of education from a religious perspective; and 3) that the payments under the Scholarship Program were unrestricted. Evidence that the Cleveland Scholarship and Tutoring Grant Program is materially different in its purpose, genesis, design, operation, fiscal impact on parents and schools, and overall effect from the program challenged in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) was flatly rejected as "irrelevant." *See Simmons-Harris v. Zelman*, 234 F. 3d 945, 958 (6th Cir. 2000), *aff'g* 72 F. Supp. 2d 834, 848 (N.D. Ohio 1999) ("At the outset, we note that Defendants' argument concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant.").

Amicus submits that where, as here, respondents assert that the challenged program "advances or inhibits religion," they must prove each of the elements of their Establishment Clause claim *as a matter of fact*, and that the District Court must give petitioners an opportunity to rebut. We agree with petitioners that this case presents "an important issue of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c).

INTRODUCTION

Serious efforts to reform public education in Cleveland began in 1973 with a federal desegregation lawsuit. In 1978, the District Court approved a 14-point desegregation plan that was designed to improve the quality of education for all students enrolled in the Cleveland Public Schools. Among other things, the plan opened up school assignments, implemented non-discriminatory testing and

tracking procedures, required significant efforts to improve reading scores, added magnet and vocational opportunities, upgraded and reorganized transportation, implemented stronger financial and management practices, and desegregated the teacher and professional staff assignments. *Reed v. Rhodes,* 422 F. Supp. 708, 797 (N.D. Ohio 1976), *remanded without opinion*, 559 F.2d 1220 (6th Cir. 1977), *on remand to* 455 F. Supp. 546 (N.D. Ohio), *on remand to* 455 F. Supp. 569 (N.D. Ohio 1978)(discussing the Liability Order) and *Reed v. Rhodes,* 455 F. Supp. 546, 568 (N.D. Ohio 1977), *on remand to* 455 F. Supp. 569 (N.D. Ohio 1978)(discussing the Remedial Order).

Political efforts for reform proceeded along a parallel track. In 1982, Cleveland voters elected reform-minded members to the School Board. That Board hired a new superintendent, Fred Holliday. Superintendent Holliday instituted a new automated attendance system, started a scheduling system and began making management changes. The Board also placed a tax levy on the ballot. It passed, giving the district its strongest financial position in years. Evelyn Theiss, "School Board Repeats Failed Reform Pattern," *The Cleveland Plain Dealer* (August 27, 1995) at 6B.

In 1983, an advisory panel recommended reform measures to the State Superintendent of Public Instruction. These included revisions to tenure laws, developing teacher competency tests, and raising teacher salaries. The panel also recommended school accreditation standards and graduation requirements, greater emphasis on math, science and technology, and an extension of the school year. Peggy Caldwell, "Ohio Panel Asks Change in Tenure Law, Teacher Certification Tests," *Education Week* (December 21, 1983).

In 1988, then-Superintendent of Cleveland Schools, Alfred D. Tutela, proposed expanding the district's reading

program, reducing the ratio of pupils to guidance counselors, converting high schools to theme or magnet schools, and implementing a "promotional gates" testing system as part of the desegregation plan. William Snider, "State Mandates, Equity Law: On a Collision Course," *Education Week* (February 10, 1988).

In 1991 and 1993, respectively, two slates of reform-minded candidates for the school board were elected with the backing of Mayor Michael R. White. Theiss, *supra.* Faced with numerous buildings in dangerous disrepair, the School Board implemented a comprehensive plan to address safety code violations on a priority basis. Funds from the desegregation lawsuit were funneled into the buildings with most pressing problems. Patrice Jones, "Schools Slide into Disrepair, District Has Enough to Fix Only the Worst," *Cleveland Plain Dealer* (September 11, 1994) at 1B.

The 1993 slate of candidates, known as the "Vision 21" team, called for the restructuring of grade levels in elementary and middle schools, Scott Stephens, "Parents Get Early Word on Schools," *Cleveland Plain Dealer* (May 19, 1998), but the Superintendent hired to implement the restructuring refused to make substantive educational and management changes despite demands from the Board to do so. Efforts also began in 1993 to reform the kindergarten through eighth grade curriculum with new math books, several classroom projects focusing on alternative teaching methods and efforts to retrain teachers in efforts to help students improve their achievement on the state-mandated proficiency tests. Patrice Jones, "9th Graders Falter on Proficiency Tests," *Cleveland Plain Dealer* (March 20, 1994), at 1B.

In 1994, the School Board took steps to curb rising violence in Cleveland schools. Scott Stephens, "School Board Unveils Steps to Curb Violence," *Cleveland Plain*

Dealer (October 29, 1994) at 1B. The State of Ohio also introduced minimum standards tests for graduating high school seniors set at a level of ninth grade proficiency. Jeanne Allen, *The School Reform Handbook*, Ch. 7, p. 62 (Center for Education Reform (Washington, D.C. 1995) (available at http://www.edreform.com/handbook/srhch7 .htm.).

Despite these reform efforts, the federal court monitoring the desegregation plan ordered the State of Ohio to take over the Cleveland school district in 1995. Theiss, *supra*. On June 29, 1995, then-Governor George Voinovich signed into law the Cleveland Scholarship and Tutoring Grant Program. It was designed to provide educational choice through vouchers for Cleveland's low-income families, and provided full eligibility for families with an income 200% below the poverty line. The adoption of this program was the culmination of legislative efforts dating back to the late 1970s.

As a result of the "Vision 21" program, the takeover of the district, and the creation of numerous magnet schools, thousands of students have been reshuffled. In response, reforms of the school assignment and transportation were undertaken. Until 1997, the district's desegregation plan imposed strict racial balance guidelines on student assignments. Today assignments are based on the programs the students choose and on the neighborhoods in which they live. Stephens, "Parents Get Early Word on Schools," *supra*.

Changes were occurring in school finance as well. In 1997, the Ohio Supreme Court held that certain portions of Ohio's school funding formula were unconstitutional. *DeRolfe v. State* (*DeRolfe I*), 78 Ohio St.3d 193, 677 N.E.2d 733 (1997), *rehr'g. and clarification*, 78 Ohio St.3d 419, 678 N.E.2d 886 (1997), *clarification*, 83 Ohio St.3d 1212, 699 N.E.2d 518 (1998). The ruling in *DeRolfe I* was

designed to force major changes in the school funding program, its emphasis on the property tax as a primary source of school funds, the school foundation program that provides monetary support to the districts, the emergency school loan assistance program that allowed the districts to borrow money from commercial lenders, the spending reserve borrowing program that allowed the districts to borrow against amounts anticipated to be collected from property taxes, and the classroom facilities program.

Since the ruling in *DeRolfe I*, the Ohio Legislature has adopted numerous laws in an attempt to address the issues identified by the Ohio Supreme Court. On February 26, 1999, the trial court held that these laws did not remedy the violations of the Ohio Constitution. On May 11, 2000 the Ohio Supreme Court affirmed the findings of the trial court, and ordered that the state address seven specific problem areas: reliance on property taxes, the revised funding formula, facilities funding, the school solvency fund, unfunded mandates, phantom revenue, and academic guidelines. *DeRolfe v. State* (*DeRolfe II*), 89 Ohio St.3d 1, 728 N.E.2d 993 (2000). The Ohio Supreme Court retained jurisdiction of the case, and it remains pending.

Structural reforms have been enacted as well. In 2000, Governor Taft announced $1.6 million in grants for alternative schools and programs targeted at disruptive and habitually truant youth. Cuyahoga County, which includes Cleveland, received $150,000. "Governor Announces Additional $1.6 Million in Alternative Education Grants," Press Release, Ohio Department of Education (June 26, 2000, available at http://www.ode.state.oh.us/ comm/news/06-26-00.htm). In December 2000, the State of Ohio adopted a teacher-testing program to begin in 2003. It will determine whether a beginning teacher can move from provisional status to professional status under the licensure provisions. "Ohio First in the Nation to Adopt New

Teacher Test," Press Release, Ohio Department of Education (December 14, 2000, available at http: //www.ode.state.oh.us/comm/news/dec_2000news/12-14-00a.htm). The State School Board also adopted new curriculum guidelines and new high school graduation requirements in 2000. "State Board Approves New School Operating Standards and Teacher Education Test," Press Release, Ohio Department of Education (December 12, 2000) (This press release is available at http://www.ode.state.oh.us/comm/news/dec_2000news/12-12-00.htm.)

ARGUMENT

I. THIS CASE PRESENTS THE BEST OPPORTUNITY SINCE *BOWEN V. KENDRICK* FOR THE COURT TO CLARIFY WHAT FACTS ARE RELEVANT TO THE PLEADING, PROOF, AND DEFENSE OF A CLAIM CHALLENGING STATE ACTION UNDER THE INCORPORATED ESTABLISHMENT CLAUSE.

Recent state and federal opinions dealing with Establishment Clause challenges to education reform programs reveal a stark contrast in the courts' approach to fact-based claims and defenses. In those cases where the courts are willing to examine the factual context and actual *operations* of education reform efforts that result in state payments to parents of children attending religiously affiliated schools, the programs have tended to survive scrutiny. *See Campbell v. Manchester Bd. Of School Directors*, 161 Vt. 441, 452-456, 641 A.2d 352, 359-361 (Vt. 1994); *Jackson v. Benson*, 218 Wis.2d 835, 869-873, 578 N.W.2d 602, 617-619 (1998), *cert. denied*, 525 U.S.

997 (1998); and *Kotterman v. Killian*, 193 Ariz. 273, 279-282, 972 P.2d 606, 612-615, *cert. denied*, 528 U.S. 921 (1999). In those instances where the analysis is largely doctrinal, evidence concerning the purpose, operation, context, or actual effects of the challenged program is either dismissed as "irrelevant" or ignored altogether. In this case, both the District Court and Sixth Circuit followed this pattern, treating the myriad factual and legal issues involved in this case as if the context in which they arose was largely irrelevant.

Education reform efforts have been going on in Cleveland, and in the State of Ohio generally, since the mid-1970s. These reforms – which include an ongoing desegregation case – were designed to provide the parents and children of Cleveland the "thorough and efficient system of common schools" promised in Article VI § 2 of the Ohio Constitution. Ohio Const. Art. VI §2. These efforts have been persistent and ongoing for at least 22 years, and now include limited funds to support parental and student choice of educational options outside of the troubled Cleveland Public Schools.

In the case at bar, the District Court held, correctly, that a showing that the Scholarship Program was serving an important secular goal "does not obviate this court's duty to further question whether the Program also has the direct and immediate effect of advancing religion." Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 848 (N.D. Ohio 1999), *aff'd* 234 F.3d 945 (6th Cir. 2000). From that point forward, however, it studiously ignored the constitutional significance of undisputed facts concerning the *actual* operations of the program, and concluded – on largely doctrinal grounds that did not permit rebuttal, that the relevant "constitutional fact" – that the Cleveland Scholarship Program "advanced religion" – had been proved.

The District Court did not, for example, question the fact that "educating [public school scholarship] students with such needs costs the [receiving] schools more than the payment they receive." 72 F. Supp. 2d at 849. Assuming, as we must under Rule 56 of the Federal Rules of Civil Procedure, that the court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir.1990), the "most favorable" conclusion that can be drawn from this undisputed fact is that when private schools accept scholarship students at rates below their normal cost of attendance, there is no subsidy to the school. The subsidy – in the form of a "tuition discount" below-cost – *runs in favor of the State*. The Cleveland Public Schools are subsidized as well, in that *all* costs associated with students in the Scholarship Program are borne by others.

Rule 56(c) states plainly that summary judgment is inappropriate unless there is "*no* genuine issue as to *any* material fact" (emphasis added). But there were many such disputes in the case at bar, including one implicit in the District Court's formulation of one of the key "constitutional fact issues" in this case: whether the Scholarship Program "benefits the participating schools *in such a way as to impermissibly foster* religion." 72 F. Supp. 2d at 849 (emphasis added) Given those disputes, it was incumbent on the *plaintiffs* – respondents in this Court – to prove, by a preponderance of the evidence, the *precise ways* in which the Scholarship Program "has the direct and immediate effect of advancing religion" 72 F. Supp. 2d at 848, citing *Nyquist*, 413 U.S. at 783 n. 39. The defendants were, in turn, entitled to rebut that evidence.

The panel opinion in the Sixth Circuit is even more blunt. No attention whatever is given to the ongoing struggle to desegregate Cleveland's schools, to State and local efforts to reform them in a manner that creates a unitary school system that meets the needs of the poor and underserved, or to the titanic political struggles over school finance that pit local school authorities against the State Legislature. For the Court of Appeals, the existence of "other options available to Cleveland parents such as the Community Schools is at best irrelevant." Simmons-Harris v. Zelman, 234 F.3d 945, 958 (2000). So too, apparently, is the *raison d'être* for the options made available to Cleveland parents and children: an *existing* constitutional mandate to reform a dual school system that isolates and victimizes the very children the Scholarship Program is designed to serve. *See generally Reed v. Rhodes*, 179 F.3d 453, 458 (6th Cir. 1999) *aff'g* 934 F.Supp. 1533 (N.D. Ohio 1996) [recounting at length the history of the Cleveland school desegregation litigation, and noting that the District Court had urged the parties "not to hesitate to think about innovative programs and undertakings 'that might ameliorate the situation in the school system.' *Reed v. Rhodes*, 1992 WL 80626, at *2 (N.D. Ohio Apr.2, 1992)."].

Other courts have taken an equally hostile attitude toward facts that this Court has held are clearly relevant in an Establishment Clause inquiry. In *Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999), for example, the First Circuit professed to be "at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery" in a case where the State Legislature changed a neutral rule of general applicability into one that discriminates on the basis of religion. Accord *Bagley v. Raymond School Dep't*, 728 A.2d 127, 133-135, 144-145 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999) (acknowledging that the statute singled out *only* religious schools for adverse treatment). Unless the

"negative prohibition" in the "second prong" of *Lemon* is meaningless, *de jure* religious discrimination by government is one of the clearest cases where the intended "primary effect" of a statute is to *inhibit* or stigmatize religious belief, practice or association. Compare U.S. Const. Art. VI cl. 3 (prohibiting religious tests). *See generally* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 Case W. Res. L. Rev. 674 (1987) (arguing that the No Religious Test Clause was the Constitution's first explicit prohibition of religious discrimination in federal employment – a practice that would have enabled the creation and maintenance of a political establishment selected by reference to religious belief or practice).

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), this Court held that an Establishment Clause challenge is no different in kind from any other claim arising under the incorporated First Amendment. The duty of the District Court is to

> consider[] ... the evidence presented by [the parties] insofar as it sheds light on the manner in which the statute is presently being administered. It is the latter inquiry to which the court must direct itself on remand. ... As our previous discussion has indicated, and as *Tilton, Hunt,* and *Roemer* make clear, it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is "religiously inspired."

487 U.S. at 621. *See e.g., United States v. Playboy Entertainment, Inc.*, 120 S. Ct. 1878, 1891 (2000) (noting that the government had failed to make its case on the facts); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995) (appellate review of facts to decide whether petitioner's activity was

protected speech); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (holding that plaintiffs in both public- and private-figure cases concerning matters of public concern bear the burden of proof on the issue of falsity); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984) (requiring "independent appellate review" of factual determinations that a libel defendant acted with actual malice). *See generally* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).

Since *Kendrick*, this Court has consistently affirmed the importance of constitutional fact-finding in Establishment Clause litigation. *Good News Club v. Milford Central School*, -- U.S. -- (June 11, 2001), 2001 WL 636202; *Mitchell v. Helms*, 530 U.S. 593 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995); *Board of Education of the Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994); *Zobrest v. Catalina Hills School District*, 509 U.S. 1 (1993).

The decisions below emphatically endorse a narrow and constitutionally erroneous approach to fact-finding in education reform cases having Establishment Clause elements. This Court should grant the writ, and take the opportunity to clarify what facts are relevant to the pleading, proof, and defense of a claim arising under the incorporated Establishment Clause. We agree with petitioners that this case presents "an important issue of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c).

II. THE COURT CAN AND SHOULD USE THIS CASE TO CLARIFY THE PURPOSES OF THE FACTUAL INQUIRIES MANDATED BY THE "THREE-PRONGED" TEST OF *LEMON V. KURTZMAN* AND ITS PROGENY.

Over the years since the Court synthesized its approach to Establishment Clause adjudication in *Lemon v. Kurtzman*'s "three-pronged" test[3], there has been a good deal of confusion concerning the relationship between and among the fact-based inquiries it requires.

In the decision below, the District Court conceded that the plaintiffs (respondents in this Court) did not challenge the "secular purpose" of the Cleveland Scholarship Program, but the clear implication of its analysis is that Ohio's *purpose* in enacting the Cleveland Scholarship Program was to benefit schools affiliated with religious groups.

Relying on a narrow reading of *Nyquist*, the District Court found that the primary *effect* of the Cleveland

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[3] The pedigree of the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), can be summarized as follows:

> " 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive governmental entanglement with religion." Walz [v. Tax Comm'n, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970)].' " Lemon v. Kurtzman, 403 U.S., at 612-613, 91 S.Ct., at 2111-2112, quoted in Larson v. Valente, 456 U.S., at 252, 102 S.Ct., at 1687.

Scholarship Program was to provide substantial benefits for religiously affiliated schools, notwithstanding undisputed evidence that many of the schools lose money by accepting scholarship students. In the view of the District Court, this purported effect was so substantial that it supported a finding that the "function" of the Scholarship Program – i.e. its *purpose* – was "to provide assistance to private schools, the great majority of which are sectarian."

> Indeed, the Court's ultimate analysis of the *Nyquist* program under the "effects" test can be applied in this case by merely substituting "Ohio" for "New York": "[I]t is precisely the function of [Ohio's] law to provide assistance to private schools, the great majority of which are sectarian .... [T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."

Amicus respectfully submits that there is a good deal of confusion in the courts below about the relationship between the "purpose" and "effect" inquiries under the Establishment Clause, and concerning the types and quantum of evidence necessary to prove, or rebut, such a claim.

The Cleveland Scholarship Program is part of an evolving 25-year program designed to bring the Cleveland Public Schools into compliance with a desegregation decree, and yet the Court of Appeals held that consideration of the complete education reform package is "irrelevant" to its inquiry under the Establishment Clause.

> Should we consider the Community Schools program in our analysis of the constitutionality of the school voucher program, we would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship

> programs available to children who qualify for the school voucher program: we would be considering and comparing every available option for Cleveland children.

Simons-Harris v. Zelman, 234 F. 3d 945, 958 (6th Cir. 2000).

Amicus respectfully submits that to the extent that education reforms are a "necessary and proper" means of compliance with the Equal Protection Clause in a school desegregation context, they cannot, by definition, be "irrelevant" in a challenge to those reforms under the Establishment Clause. To the contrary, the options made available by the State of Ohio for Cleveland's children are directly relevant to the question of whether the Scholarship Program has a "primary effect" that advances religion.

Cleveland's public school children would not have these options *but for* the remedial orders and legislation that were a direct result of the desegregation case. The Scholarship Program is only one of those options, and should not be reviewed out of context, or in a manner that assumes the existence of facts that are not in the record. *See Simons-Harris v. Zelman*, 234 F. 3d 945, 959 (6th Cir. 2000) (citing a law review article "finding that voucher funding levels typically 'approximate[ ] the tuition level set by parochial schools [which] reflects subsidies from other sources'').

This Court should grant the writ, and hold that where, as here, plaintiffs rely on the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), or one of its variants, they must prove by a preponderance of the evidence:

1. That the statute – taken as a whole and viewed in context – either has no secular legislative purpose,

> or that the alleged purpose of the statutory scheme at issue is a cover for an otherwise unconstitutional attempt to advance or inhibit religion; or

2. That "the principal or primary effect of the statute" – read in the education reform and remedial context in which it was adopted – "advances [or] inhibits religion" in a tangible or demonstrable way; or

3. That the *nature and degree* of any "entanglement with religion" under the statute is "excessive" given the nature and purpose of the programs involved.

In the case at bar, the District Court and Court of Appeals treated an essentially fact-based inquiry under the Establishment Clause as one of doctrine. All we know is that the majority of children enrolled in the Scholarship Program attend religiously affiliated schools, that some of the schools have mission statements that attest to their religious character, that there are other school choice options, and that the suburban school districts have not yet opted into the Scholarship Program. We do not know, on this record, *how* either an individual scholarship or the Scholarship Program as a whole *actually* (as opposed to theoretically) has the effect of "advancing religion," whether *parents and children* view their choices as "illusory," or whether the effects of the program as it exists today are the "primary effect" *of the statute* or simply a result of current, but changeable, education market conditions. Nor do we know – largely because the District Court did not appear to entertain the possibility of any outcome but a declaration of unconstitutionality under *Nyquist* – whether the defendants could produce evidence that would rebut its conclusions. They were not given the chance to do so. Nor were they permitted to demonstrate

that the exclusion of religiously affiliated schools might be problematic under either the Free Speech, Free Exercise, or Equal Protection Clauses. *Cf.* U.S. Const. Art. VI (No Religious Test Clause, as forbidding religious discrimination as a qualification for a public trust, such as the expenditure of scholarship money earmarked for secular education programs only).

Accordingly, *Amicus* submits that this Court should grant the writ. The factual context of this case presents the Court with an opportunity to examine an increasingly important question in the field of education reform. Education reform advocates, including the parties in this case, need to know how specific factual inquiries mandated by the Establishment, Free Exercise, Speech and Press, and Equal Protection Clauses support or undermine the constitutionality of a student assignment plan designed to remedy a violation of the Equal Protection Clause.

CONCLUSION

As this case provides an opportunity for the Court to clarify what facts are relevant to the pleading, proof, and defense of a claim arising under the incorporated Establishment Clause, as well as to clarify the relationships between and among the factual inquiries required in litigation under the Establishment, Free Exercise, Speech and Press, No Religious Test, and Equal Protection Clauses, *amicus curiae*, The Center for Education Reform, supports granting a writ of *certiorari*.

Respectfully submitted,

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Supreme Court of the United States

October Term, 2000

ZELMAN, Petitioners,
v.
SIMMONS-HARRIS, Respondents

HANNA PERKINS SCHOOL, Petitioners
v.
SIMMONS-HARRIS, Respondents

TAYLOR, Petitioners,
v.
SIMMONS-HARRIS, Respondents

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, CALIFORNIA SCHOOL BOARDS ASSOCIATION, COLORADO ASSOCIATION OF SCHOOL BOARDS, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, OHIO SCHOOL BOARDS ASSOCIATION AND WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION IN SUPPORT OF RESPONDENTS

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20 PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 2

ARGUMENT 4

I. The Sixth Circuit Court was correct in holding that this voucher program violates the Establishment Clause. 4

II. State legislatures and voters have rejected vouchers. Since the idea is waning there is no need for U.S. Supreme Court attention. 7

A. Vouchers are consistently being rejected by the voters and state legislatures. 7

B. Voters and state legislatures recognize that vouchers are bad public policy. 9

1. Vouchers weaken public schools. 9

2. Vouchers drain needed funds from public schools. 9

3. Public schools realize no gains from students leaving the system under vouchers. 10

4. Voucher programs leave the public schools with high need students and declining resources. 11

5. Vouchers provide no accountability for the use of public funds. 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Agostini v. Felton,
521 U.S. 203 (1997) 4

Committee for Public Education v. Nyquist,
413 U.S. 756 (1973) ..... *passim*

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530 U.S. 793 (2000) 5

Mueller v. Allen,
463 U.S. 388 (1983) 5

Simmons-Harris v. Goff,
711 N.E. 2d 103 (Ohio 1999) 3

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54 F.Supp.2d 725 (N.D. Ohio 1999) ..... *passim*

Simmons-Harris v. Zelman
234 F.3d 945 (2000) ..... *passim*

Witters v. Washington Dept. of Servs. For Blind,
474 U.S. 481 (1986) 4

STATUTES AND REGULATIONS

Ohio Rev. Code Ann. §3313.975(A) (West 2000) 2
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INTEREST OF AMICI

The interest of the *amici curiae*[1] is as follows.

Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U. S. Virgin Islands. NSBA represents the nation's 95,000 school board members. These board members govern 14,772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation.

The school boards associations in California, Colorado, Michigan, Ohio, and Washington represent all or most of the public school boards in their respective states. The goal and mission of each association is to support the work of local school boards as a means of improving local public education and student achievement. As a group, they provide training, information, and materials on a range of management, policy, and legal issues that are of importance to education leaders. Each of these states has experienced either a voucher program or proposal. With the exception of Ohio, voters in each state have soundly rejected these measures. In addition, all *amici* have had a longstanding interest in the effective development and implementation of local school board policies, including those assuring compliance with the Establishment Clause.

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Sup. Ct. Rule 37.3. The undersigned counsel has authored this brief, and no person or entity other than *amici* has made a monetary contribution to its preparation or submission. Sup. Ct. Rule 37.6.

STATEMENT OF THE CASE

In 1995, the Ohio General Assembly enacted the Ohio Pilot Project Scholarship Program, a voucher program in the Cleveland School District. Ohio Rev. Code Ann. § 3313.975(A) (West 2000). Ohio's General Assembly enacted the voucher program after a United States District Court placed the Cleveland School District under the direct management and supervision of the State Superintendent of Public Instruction because of financial mismanagement at the local level. The voucher program gives tuition money to families with children in kindergarten through the eighth grade. Preference is given to students from families with income that is less than 200 percent of the poverty level. Students who are not from low-income families become eligible after all students from low-income families have been considered for placement. Ohio Rev. Code Ann. 3313.978(A) (West 2000). Students do not have to be public school students to be eligible; those already enrolled in a private school are also eligible. Scholarship checks, although made payable to the parent, are mailed directly to the child's school. The parent is then required to endorse the check over to the private school. *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000). The voucher program requires participating schools to cap tuition at $2,500 per student per year, and for low-income families, the State pays 90 percent of the tuition the school actually charges. Ohio Rev. Code Ann. 3313.976(A)(8), 3313.978(A) (West 2000). For other families, the State pays 75 percent of a school's tuition, up to a maximum of $1,875. *Id.* In the 1999-2000 school year, 3,761 students enrolled in the program, and 60 percent of the enrollees were from families at or below the poverty level. Of these students, 3,632 (96 percent) were enrolled in sectarian schools. *Simmons-Harris v. Zelman*, 234 F.3d at 949.

In 1999, the Ohio Supreme Court held that the program violated the state constitution. *Simmons-Harris v. Goff*, 711 N.E.2d 103, 216 (Ohio 1999). Later that year, the Ohio General Assembly re-enacted the program in a way to withstand a challenge based on the state constitution. However, all other relevant features of the program remained the same. The program was then challenged again in federal district court for violating the Establishment Clause. The U.S. District Court for the Northern District of Ohio found the voucher program unconstitutional because it provided unrestricted grants to parents, in the form of scholarships, to send their children to private schools – 82 percent of the eligible schools were religious. The court determined that "the Cleveland Program has the primary effect of advancing religion." *Simmons-Harris v. Zelman*, 54 F.Supp.2d 725, 741-42 (N.D. Ohio 1999).

The State appealed that decision; however, the United States Court of Appeals for the Sixth Circuit also held that the voucher program violated the First Amendment's Establishment Clause. The court concluded that the Cleveland voucher program directly funnels monetary subsidies to religious institutions. *Id.* at 960. As such, the program has the primary effect of advancing religion and constitutes an endorsement of religion and sectarian education. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000). The Sixth Circuit reached its conclusions based on the parallels between the Cleveland program and the New York tuition reimbursement scheme invalidated in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). *Simmons-Harris*, 234 F.3d at 958.

On December 22, 2000, the State filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. The Court of Appeals denied the petition on February 28, 2001. On March 8, 2001, the court issued a stay of its mandate pending the filing of petitions for *certiorari*.

ARGUMENT

I. THE SIXTH CIRCUIT COURT WAS CORRECT IN HOLDING THAT THIS VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE.

The Sixth Circuit Court of Appeals was correct in concluding that the Cleveland voucher program violates the First Amendment Establishment Clause. The program's core function – to divert public taxpayer money to support private, religious schools – is a transgression of both historic and contemporary legal standards. There is no reason for this Court to disturb that finding.

The Sixth Circuit's reliance in part on *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), is well placed. That case's analytical framework remains relevant today. In *Nyquist*, this Court held that there was no way to ensure that funds received by religious schools under a tuition reimbursement program, would be restricted to secular purposes.

Some argue that it is acceptable to have "grants disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice," *Agostini v. Felton*, 521 U.S. 203, 226 (1997). Writing in *Agostini*, the majority opinion emphasized that a key component was "... the genuinely independent and private choices of individuals," quoting *Witters v. Washington Dept. of Servs. For Blind*, 474 U.S. 481, 487 (1986). But, this is a different circumstance for three reasons: first, because the method of disbursement is effectively a direct grant to the private school; second, the funds seek only to benefit private school parents; and third the private schools benefited are overwhelmingly religious schools.

In *Mueller v. Allen*, 463 U.S. 388 (1983) this Court upheld an education tuition tax deduction under the thinking that it was a neutral benefit to all parents. The program included deductions for a variety of educational expenses, *Id.* at 391, for all parents. *Id.* at 397. Further, it operated to the benefit of religious schools only as a function of individual parents' choice. *Id.* at 401. This is not the case here. The Cleveland voucher program does not support broad educational expenses, only private school tuition. This program supports only those "choices" of private school parents. Interestingly, in the first year of the program, 25 percent of the vouchers went to parents whose children were already enrolled in private school. *The Cleveland Voucher Program*, AFT on Vouchers, (1997), *at* http://www.aft.org/research/ reports/clev/contents.htm. In the current year 37 percent of new vouchers went to students who were continuing in private schools.

Additionally, in this program the state functionally writes a check to the private school. Parents never see the funds individually. "Disbursement of scholarship money to a private school is accomplished by the State sending a check to the chosen school made payable to the parents of the recipient; thereafter, the parents must endorse the check to the school." *Simmons–Harris*, 72 F.Supp. 2d at 836.

Like in *Nyquist*, the Cleveland program is overwhelmingly populated with religious schools. This Court said in *Mitchell v. Helms*, 530 U.S. 793 (2000), that it is exactly that kind of profile which has led the Court to strike down direct payments to private schools in the past. That opinion cited the "serious concerns about whether the payments were truly neutral," and notes in a parenthetical about *Nyquist* that "... payments were allocated per-pupil but were only available to private, nonprofit schools in low-income areas, 'all or practically all' of which were Catholic." 530 U.S. at 820, *quoting Nyquist, 413* at 768.

While proponents may seek to describe this voucher program as an escape hatch for low-income children in

troubled schools, the truth of the matter is that little "choice" actually exists. The market beyond public schools is dominated by religious institutions. Here, 82 percent of the schools eligible to participate in this program were religious in nature. *Simmons- Harris v. Zelman*, 54 F.Supp.2d 725, 741 – 42 (N.D. Ohio 1999). The structure of the tuition cap works to attract religious schools and religious school students. As a result, in the 1999 – 2000 school year 96percent of the students participating in the program were religious school students. *Simmons- Harris v. Zelman*, 234 F.3d at 949. The disparity essentially means this: vouchers are a *sine qua non* to attending a religious school. Despite attempts to wrap that reality in a seemingly neutral veneer, the reality exists.

The fact that the program is targeted to a specific population (poor children) does not alter the Establishment Clause analysis. Evidence from the Cleveland program calls into question the argument that the program's purpose is to enable low-income students to enter a private school of their choice. In fact, while *preference* is given to low-income students – those whose families' income is less than 200 percent of the federal poverty level – the program places *no* income cap on voucher applicants. A January 1999 state audit revealed that students whose families' annual income ranged from $50,781 to $90,000 received vouchers. Jim Petro, *Cleveland Scholarship and Tutoring Program Special Audit Report*, Auditor of the State of Ohio, January 5, 1999. In the most recent school year, 22 percent of the participating families had incomes higher than 200 percent of the federal poverty level.

This Court should refuse this case because the Sixth Circuit faithfully followed *Nyquist* and other Supreme Court precedent and came to the correct finding that the *effect* of the Cleveland voucher program is to promote religion. Other lower courts should similarly see the issue clearly, negating a need for this Court's involvement.

II. STATE LEGISLATURES AND VOTERS HAVE REJECTED VOUCHERS. SINCE THE IDEA IS WANING THERE IS NO NEED FOR U.S. SUPREME COURT ATTENTION.

Petitioners argue the voucher debate needs this Court's involvement; however, we respectfully disagree. The facts belie the contention that states have been unable or unwilling to deliberate over vouchers without a definitive ruling from the Court. Voters and lawmakers across the nation have examined and rejected vouchers for public policy reasons – not constitutional reasons. They have considered whether vouchers are a solution for improving the education of all students and have concluded that they are not.

A. Vouchers are consistently being rejected by the voters and state legislatures.

The public and lawmakers have come to the conclusion that vouchers are bad public policy. During the 2000 state legislative sessions, only one state, Florida, has actually approved a voucher program. Voters have been particularly emphatic and have soundly rejected school voucher ballot initiatives.

Voucher proposals were rejected in 1996 by 65 percent of voters in Washington state; in 1993 by 70 percent of voters in California; in 1992 by 67 percent of voters in Colorado; in 1978 by 74 percent of voters in Michigan; and in 1972 by 55 percent of voters in Maryland. Michael A. Resnick, *Why Vouchers Won't Work*, National School Boards Association, 1998, at 47.

In November 2000, 71 percent of the voters in California rejected a proposal to give every student in the state a $4,000-a-year tuition voucher. Associated Press, *No Voter Support for Vouchers*, Milwaukee Journal Sentinel Online, November 9, 2000, at http://www.jsonline.com/

election2000/ap-eln-failing-vou110900.asp. The California votes were consistent across racial, economic and political lines. Seventy seven percent of Latinos, 70 percent of whites, and 68 percent of African-Americans voted against the plan. In addition, a majority of Democrats, Republicans, and Independents – regardless of income, education level, age, or gender – rejected the proposal. *Exit Polls for California*, CNN.com Election 2000, at http://www.cnn.com/ELECTION/2000/epolls.

The story was the same in Michigan, when on the same day 69 percent of the voters rejected a proposal to give students in seven school districts a voucher worth about $3,300. Associated Press, *No Voter Support for Vouchers*, Milwaukee Journal Sentinel Online, November 9, 2000, at http://www.jsonline.com/election2000/ap-eln-failing-vou110900.asp. Again the votes were consistent across various demographic lines. Seventy-seven percent of African-Americans and 69 percent of whites voted against the proposal, as did a majority of Republicans, Democrats, and Independents. *No Voter Support for Vouchers*, Milwaukee Journal Sentinel Online, November 9, 2000, at http://www.jsonline.com/election2000/ap-eln-failing-vou110900.asp. Among voters in Detroit's county, a district in which many students would have been eligible for vouchers, 72 percent of the voters rejected the plan. http://www.sos.state.mi.us/election/results.

For almost 30 years, voucher proponents have tried unsuccessfully to garner public support for their position. However, voters have left absolutely no doubt about their staunch opposition to vouchers.

B. Voters and state legislatures recognize that vouchers are bad public policy.

1. Vouchers weaken public schools.

Private school tuition vouchers will significantly damage this nation's system of free public education for all. In May 2001, during a failed attempt to pass a school voucher amendment in Congress, Representative Richard Armey (R-TX) offered this reasoning in support of vouchers: "We walk away from these kids in every regard. We *never* fix these schools. Where is the heart?" (emphasis added) Juliet Eilperin, *House Advances Education Overhaul*, Washington Post, May 24, 2001, at A1.

In many ways, this is precisely why vouchers are so wrong. We ought not to continue to walk away from *any* of these children. We ought not to allow another day to pass without fixing *every* school that needs fixing. Yet, vouchers are akin to waving the white flag. As Louis V. Gerstner, Chairman and Chief Executive Officer of IBM, put it, this issue boils down to commitment: will this nation show a commitment to *all* students, or will we embrace a system that benefit a chosen few at the expense of many others?

2. Vouchers drain needed funds from public schools.

Voucher programs create a direct drain on public school budgets. Milwaukee's voucher program, which serves just under 10,000 students, cost taxpayers $49 million this school year. State aid, half of which is diverted from the Milwaukee Public Schools and half of which is diverted from all other Wisconsin public school districts, covers this cost. As a result, 238 public school districts across the state (including Milwaukee) are *losing* taxpayer dollars to private schools in Milwaukee and increasing local property taxes to make up for the missing funds. *Funding for the Milwaukee*

Parental Choice Program, Wisconsin Legislative Fiscal Bureau, May 8, 2001, at 5.

At the same time that millions of dollars are flowing to private schools, the Milwaukee Public Schools, which serve 10 times as many students as the voucher program, are forced to cut programs because of a budget shortfall of up to $19.6 million. Sam Schulhofer-Wohl, *Protesters Slash at MPS Budget Plans*, Milwaukee Journal Sentinel, March 28, 2001, at 1B. Last year, the public system faced $32 million in budget cuts. Robert C. Johnston, *Union-Backed Candidates Win Milwaukee Board Seats*, 20 Education Week , 3 (2001).

The smaller voucher program in Cleveland cost taxpayers $13.9 million this fiscal year. Funding for this program has also come from state aid that would otherwise have gone to disadvantaged public schools students in the city.

3. Public schools realize no gains from students leaving the system under vouchers.

Vouchers drain dollars from the public's schools without eliminating or even addressing those schools' many needs. Selectively removing children from the public school system does not reduce the current infrastructure needs. This drain of badly needed money diminishes efforts to continue or institute critical reforms, and undermines attempts to improve education for all students.

When students leave the public schools pursuant to a voucher program, they do not do so in sufficient numbers or within any pattern that would allow the school district to redirect or reduce the need for resources. In Cleveland, the loss of 3,761 students to private schools through vouchers has not reduced the capital or human resource needs of the district's schools, which serve 77,000 students. Because the voucher students are scattered throughout the system school officials cannot eliminate a class, layoff a teacher, or

close a school; the program merely creates a few vacancies in ongoing public school programs.

4. Voucher programs leave the public schools with high need students and declining resources.

Not only do vouchers leave behind many students in public schools with fewer resources, but also they leave behind the neediest students. Schools participating in voucher programs do not admit our public schools' most challenging and expensive-to-educate students. For example, in a memo to the Ohio Governor's office, David Brennan, a leading voucher proponent and one-time operator of voucher schools, noted: "Numerous scholarship (voucher) recipients were discouraged from taking their scholarships to private schools with the full knowledge that none of the existing private schools will be able to handle a seriously handicapped child." Dennis J. Willard and Doug Oplinger, *Voucher Plan Leaves Long List of Broken Vows*, Akron Beacon Journal, Dec. 14, 1999, at http://www.ohio.com/bj/ projects/whose_choice/docs/029046.htm. A researcher at the Ohio Department of Education confirmed these exclusionary practices. The researcher informed agency staff that, at Brennan's voucher schools, "students with learning disabilities or other special needs were actively counseled out of the program." *"Directory of Documents for 'Whose Choice?'"* Akron Beacon Journal Online, January 18 2000, 97-1000-1 Rogers p. 1, at http://www.ohio.com/ bj/projects/whose_choice/.

Further examples from Milwaukee illustrate the problem. The Milwaukee voucher schools include the Agape Center for Academic Excellence. This school has indicated that it cannot serve "severely physically disabled students who need on-site medical supervision or unusual classroom accommodations (space is limited)." In addition, it cannot serve students who are "hearing disabled unless they can read lips." *Agape Center for Academic Excellence*,

Empowering Parents for Informed Choices in Education, http://epic.cuir.uwm.edu/EPIC/English/data/agape/html. Similarly, the Blessed Sacrament School has indicated that "students who are 2-3 years below grade level cannot be realistically brought up to grade level because we do not have a tutorial/learning center to accommodate their needs." *Blessed Sacrament School*, Empowering Parents for Informed Choices in Education, http://epic.cuir.uwm.edu/EPIC/English/data/blesse/html. Our Lady Queen of Peace School has stated, "we have no programming for emotionally disturbed or educationally mentally retarded youngsters. We can educate children with physical disabilities, but we have no easy access to the school building." *Our Lady Queen of Peace*, Empowering Parents for Informed Choices in Education, http:// epic.cuir.uwm.edu/EPIC/English/data/queeno/html.

When selected students are siphoned into private schools, the percentage of students with high needs who remain in the public schools increases. When funds are reduced to public schools in favor of private schools, it is more difficult for districts to pay for the rising costs of high needs and special education programs. Districts already face a monumental challenge in this regard. Today, 26 years after Congress made a promise to fully fund the Individuals with Disabilities Education Act (IDEA) by paying 40 percent of the associated costs, they continue to fund no more than 15 percent.

5. Vouchers provide no accountability for the use of public funds.

Vouchers make a mockery of the notion that any program funded by the taxpayers ought to be accountable to those taxpayers. Vouchers channel tax dollars into private schools that need not comply with open meetings and records laws, adhere to state academic standards, or report on students' academic achievement. Thus, although the

public has an interest in what students are taught, how well they are taught, and under what circumstances, taxpayers' oversight of the expenditure of these public funds is eliminated.

Moreover, public funds should ensure public protections. Currently, taxpayer funds used for public education are sent to school districts with the condition that certain rules and regulations must be followed. These "strings" ensure that health and safety standards are being met and that anti-discrimination laws are being followed. Schools at which vouchers are used do not have to adhere to the same rules that public schools must adhere to in order to receive state and federal funding.

Loose regulations and the lack of public oversight inherent in voucher programs have contributed to several alarming incidents. For example, two Milwaukee voucher schools overcharged taxpayers $390,000 by falsely inflating their student enrollment numbers. Clarence Page, *Reality Check on School Vouchers*, The Dayton Daily News, March 18, 1996, at 6A. Similarly, taxpayers in Cleveland paid nearly $3.5 million for taxicabs to transport students to voucher schools, including $419,000 in erroneous overpayments that were made for students who were absent or not even enrolled in the voucher school. *Cleveland Scholarship and Tutoring Program Special Audit Report, July 1, 1995 through June 30, 1998*, State of Ohio, 1998, at 7.

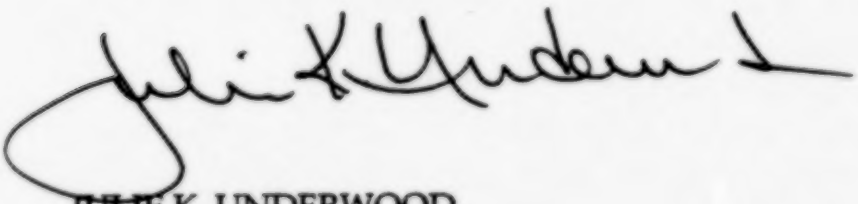
Another Cleveland voucher school, the Islamic Academy School of Arts and Sciences, enrolled as many as 100 students and claimed as much as $268,000 in taxpayer money for two years before journalists revealed that the 110-year old school building had no fire alarm, no sprinkler system, broken windows, lead paint flaking off the walls at dangerous levels, and little, if any, heat in the winter. Furthermore, two-thirds of the school's teachers were unlicensed, including one who had been convicted of first-degree murder for a bar room shooting. Scott Stephens and

Mark Vosburgh, *Murderer on Staff of State-Funded Private School*, The Plain Dealer, July 1, 1999, at 1A.

CONCLUSION

For the above reasons, we ask this Court to deny *certiorari* and to permit the Sixth Circuit's well-crafted decision in this case to stand.

Respectfully submitted,



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UNSCANNED

In the Supreme Court of the United States

No. 00-1751
SUSAN TAVE ZELMAN, *et al.*,
Petitioners
v.
DORIS SIMMONS-HARRIS, *et al.*,
Respondents

Nos. 00-1777 and 00-1779 are
shown on inside of cover

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

~~Motion of~~ Hugh Calkins ~~for Leave to file~~ Brief as *Amicus Curiae*, ~~and Brief~~, in Support of Petitioners

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No. 00-1777

HANNA PERKINS SCHOOL, *et al.*,

Petitioners

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents

No. 00-1779

SENEL TAYLOR, *et al.*,

Petitioners

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents

Motion for Leave to File Brief *Amicus Curiae* In Support of Petitioners

Hugh Calkins hereby moves, pursuant to Supreme Court Rule 37.2, for leave to file a brief in support of Petitioners as *amicus curiae*. He requested consent from counsel for all parties by mail and fax on October 16, 2001. Consents have been received and forwarded to the Clerk from counsel for the State Petitioner, from Petitioners Senel Taylor *et al.*, and from Respondents. Despite repeated follow-up inquiries, no word has been received from David J. Young, Esq., counsel for Petitioners Hanna Perkins School *et al.* This motion is therefore necessary.

STATEMENT OF *AMICUS* INTEREST

Hugh Calkins, the *amicus*, was a law clerk to Mr. Justice Frankfurter in the 1950-51 term of this Court. Since 1975 he has been a member of the Council of the American Law Institute. He was an elected member of the Cleveland Board of Education from 1965 to 1969. In 1969 he was appointed by President Johnson Chair of the National Advisory Committee on Vocational Education. Upon retirement from the practice of law in 1990, Calkins obtained a teaching certificate and taught in Cleveland elementary schools, and a middle school,

for four years. Following that experience, Calkins has devoted his energies to improving education in Cleveland in four principal ways. He has stimulated and helped finance improvement projects in Cleveland schools. He has encouraged improved pre-school and child care/education for children 1 to 5. He has researched and advanced proposals for improved school finance. He assisted in the formation of a charter school in inner-city Cleveland, and served as Chair of its Board of Trustees for three years.

The interest of the *amicus* in this case is three-fold. (1) The *amicus* believes that the decision of the Court of Appeals for the Sixth Circuit was erroneous, and that the Cleveland voucher plan is a valid and valuable component of an array of programs designed to improve educational opportunity in Cleveland. He further believes that similar programs in other cities with high rates of educational failure would be valid and helpful in overcoming America's critical big city educational problem. (2) The *amicus* believes that the private choice argument relied on by Petitioner raises issues which are not presented by the facts of this case, and should not be adopted by

this Court as the ground for its decision in this case. (3) The *amicus* believes it may be useful to this Court for the *amicus* to apply the "endorsement" approach of Justice O'Connor, which now represents the holding of this Court on this issue, to this case, and to point out weaknesses and dangers inherent in making "private choice" by itself a decisive criterion.

Respectfully submitted,

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November 2, 2001

In the Supreme Court of the United States

No. 00-1751
SUSAN TAVE ZELMAN, *et al.*,
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On Writ of Certiorari
to the
United States Court of Appeals
for the Sixth Circuit

Brief of Hugh Calkins as *Amicus Curiae*,
in Support of Petitioners

Hugh Calkins
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QUESTION PRESENTED

Should the validity under the Establishment Clause of a voucher plan which attempts to provide improved education to low-income students in a school district characterized by high rates of educational failure be determined:

(a) by using a "private choice" standard, which would validate state-wide plans as well, or

(b) by using the endorsement standard advanced by Justice O'Connor, which could limit the decision to low-income students or school districts providing unsatisfactory education?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT ON CONSENTS, AUTHORSHIP AND MONETARY CONTRIBUTION 1

INTEREST OF *AMICUS CURIAE* (See motion to which this brief is appended.)

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. Under The Endorsement Guideline Of Justice O'Connor, The Cleveland Voucher Plan Is Valid, Since The Plan's Limitation To A School District Which Is Not Educating Acceptably The Majority Of Its Students Itself Establishes That The Plan Does Not Constitute An Endorsement Of Religion. For The Plan To Constitute An Endorsement Of Religion, The Plan Would Have Had To Apply Throughout The State Of Ohio 4

II. Parent Choice Is An Unsatisfactory Criterion For Judging Cases Under The Establishment Clause For Three Reasons Which Confirm The Usefulness of the Endorsement Guideline Of Justice O'Connor 6

A, A single test is inherently unsatisfactory 7

B. Absence of Free Choice 7

C. The Difficulty Of Allowing Government Support For All Religious Sects, Or For Some But Not All Sects 9

III. While No Single Rubric Resolves The Application Of The Establishment Clause To Government Support Of Sectarian Schools, A Serviceable Guideline Is Found In The "Endorsement or Discouragement" Guideline Advanced By Justice O'Connor 10

A. Justice O'Connor's Statement of the Guideline ..10

B. Justice O'Connor's Guideline Represents The Holding Of This Court In *Mitchell v. Helms* 10

IV. Under Established Supreme Court Jurisprudence, This Court Will Not Formulate A Rule Of Constitutional Law Broader Than Is Required By The Precise Facts To Which It Is To Be Applied 12

Conclusion 14

Appendix 15

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U.S. 203 (1997) 11

Ashwander v. Valley Authority, 297 U.S. 288 (1936) 2, 12, 14

Board of Ed. Of Kiryas Joel Schl. Dist.v. Grumet, 512 U.S. 687 (1994) 7

Good News Club v. Milford Central School, 121 S. Ct. 2093 (2001) 12

Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'r 12

Lynch v. Donnelly, 465 U.S. 668 (1984) 10

Marks v. United States, 430 U.S. 188 (1977) 3, 11

Mitchell v. Helms, 530 U.S.___, 120 S.Ct. 2530 (2000) 3, 10, 11

Santa Fe Ind. Schl. Dist. v. Doe, 530 U.S. 290 (2000) 12

Wallace v. Jaffree, 472 U.S. 38, 69 10

Constitution of United States of America

Amendments, Article I, Establishment Clause . . *passim*

Statute

Ohio Revised Code Section 3313.975 5

Miscellaneous

Excerpt from *New York Times* article dated October 20, 2001 .....9, 15

STATEMENT ON CONSENTS, AUTHORSHIP AND MONETARY CONTRIBUTION

This brief *amicus curiae* is submitted in support of Petitioners in accordance with Rule 37.2(a) of the Rules of this Court. All parties have consented to the submission of this brief, through communications filed with the Clerk of the Court, except one. A motion for leave to file is therefore attached. Hugh Calkins authored this brief in its entirety, and no other person has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF *AMICUS* INTEREST

The Statement appears in the motion to which this brief is appended, and is not repeated here.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to establish that in support-to-sectarian-school cases, the only satisfactory guideline will be one which permits some balancing of factors. The simplistic, absolute rule proffered by Petitioners delegates to parents the resolution of important Constitutional issues. The "endorsement/discouragement" guideline advanced by Justice O'Connor requires the Court to reach an informed judgment based on the facts of the particular case.

In this case there are two salient facts. One is the unsatisfactory educational performance of Cleveland public schools. The other is that the program designed by Ohio as a partial response to that performance is limited to Cleveland, although it might permissibly be extended to other districts in Ohio and elsewhere which are failing to educate large numbers of their young people.

The ground advanced by Petitioners, however, would validate support to sectarian schools even where the public schools were providing very satisfactory education. A state program to provide funds to sectarian schools under such circumstances presents a very different issue which this Court should not resolve in this case. A fundamental principle of this Court's jurisprudence is that it will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ashwander v. Valley Authority, 297 U.S. 288, 347(1936)* (Justice Brandeis, concurring).

Petitioners are asking this Court in this case to do just that. The ground on which Petitioners are seeking reversal of the judgment below is that the Cleveland voucher plan is a "true private choice program," and

"True private choice programs, *by their very nature, cannot* have the forbidden 'primary effect' of the government 'advancing religion.' That is because, when students or parents decide where aid will be applied, any religious 'advancement' that occurs is attributable to private choices, not governmental action....Accordingly, this Court's decisions hold, contrary to the Sixth Circuit, that when individuals determine whether and how much money flows to religious institutions, it is no more troubling than when a government employee donates her paycheck (all derived from public funds) to a church." (citations omitted and emphasis supplied) Petition for Writ of Certiorari filed by attorneys for the State of Ohio p. 21

The fact that Petitioners cannot see a difference between this case and a church contribution from a government paycheck dramatizes how little judicial discretion is allowed in the private choice ground on which they rest their case.

The first difficulty with the position the Petitioners are urging on the Court is that it is incorrect to assert that the private choice standard is already established by the decisions of this Court. It is not. In *Mitchell v. Helms,* 530 U.S. ___, 120 S.Ct. 2530 (2000) Justice O'Connor agreed that private choice, which she subsumed under the term "neutrality," was a significant factor. She protested, however, that the rule advanced in the plurality opinion was a rule of "unprecedented breadth" which she did not accept as a "single and sufficient test" for establishing Constitutionality of school aid. *Mitchell v. Helms, supra,* at 2556 and 2557. See also the discussion at page 15 of *Marks v United States*, 430 U.S. 188 (1977), in which this Court adopted a principle under which the Justice O'Connor endorsement test, and not the new Justice Thomas formulation, represents the current judgment of this Court.

The second difficulty is that. in the real world of parent choice, a parent's decision on what school to select is powerfully influenced by a rational parental desire to find a classroom dominated by middle class, and not low-income, students. Middle class students are often found in tuition-charging schools. A government program which subsidizes attendance at tuition-charging schools, especially if the schools are permitted to select students by admissions tests and charge tuition in excess of the subsidy, is likely to enhance the segregation by family income level which already exists among schoolchildren in this country as a result of neighborhood segregation. Such a program, which would be valid under a "private choice" rationale, is therefore hard to justify as sound educational policy, and its enactment is likely to be considered an endorsement of religion.

The final difficulty, and a highly topical one, is that, if parent choice validates all government aid to schools, it will be difficult to find a principled ground consistent with entanglement and free exercise concerns to exclude from a government tuition subsidy program those schools, possibly financed by oil-rich countries abroad, which teach their students doctrines quite antithetical to American values – for instance, that close association with persons outside of the sect is immoral. The reality of this concern is confirmed by the material in the Appendix.

The bottom line is that there is no simple talisman, which will resolve Establishment Clause cases. It is wise jurisprudence to decide each case on a ground tied to the facts of the case, which is as narrow as the circumstances permit.

In this case the crucial facts are the extent of educational failure in the Cleveland Municipal School District, and the fact that by its terms the plan is limited to that district.[1] Those facts demonstrate that the plan responds to an educational crisis and does not constitute an endorsement of religion. Therefore, the plan is valid under the Establishment Clause.

ARGUMENT

I. Under the Endorsement Guideline of Justice O'Connor, The Cleveland Voucher Plan Is Valid, Since The Plan's Limitation. To A School District That Is Not Educating Acceptably The Majority Of Its Students Itself Establishes That The Plan Does Not Constitute An Endorsement Of Religion. For The Plan To Constitute Such An Endorsement, It Would Have Had to Apply Throughout The State Of Ohio.

[1] Cleveland is the only Ohio District as to which a District Court has ordered a transfer of control to the State Superintendent. In view of the loss of interest nationwide in pursuing racial desegregation in the courts, it is unlikely that another such district will emerge.

Without doubt, the Cleveland voucher plan has important educational characteristics. It provides Cleveland youngsters and their parents with an important alternative to attending Cleveland Municipal School District schools. Most participating children enroll in parochial and other church-related schools. Other students in those schools, who do not participate in the voucher plan, are paying significant tuition and typically are of middle class, rather than low-income, backgrounds. It was reasonable for the Ohio Legislature to conclude that low-income students, enrolling in the more diversified student bodies of such parochial and church related schools, and exposed to a traditional sectarian curriculum, would receive a better education than had they remained in the Cleveland neighborhood schools.

Religious characteristics of the Cleveland voucher plan are also clear. The size of the subsidy is more than enough to cover the variable costs of adding students to existing classrooms with existing teachers, especially if the schools have the low cost structure of most church-related schools. The fact that a high proportion of the voucher students are enrolled in preexisting, church related schools, and not in newly created schools (Brief of State Appellants in Court of Appeals p. 8), and the further fact that non-church-related voucher schools have converted to charter status once that status was made available (Brief of State Appellants in Court of Appeals p. 11) are evidence that the voucher is attractive to supplement the income of the existing schools, but inadequate to sustain new private schools. Religious characteristics of the plan are that it provides financial support to parents who could not otherwise send their children to fill otherwise empty seats in church-related schools. See Ohio Rev. Code Section 3313.975.

The issue before this Court, therefore, is: which of the characteristics of the program establish its real character? Does the plan communicate a response to an educational need, or an endorsement of religion?

On this question, there is no better indicator than the terms of the plan itself. The Ohio Legislature chose to limit the plan to the Cleveland Municipal School District. Educational conditions in that district were so deplorable that a District Judge had directed the takeover of the District by the State Superintendent of Public Instruction. The District failed to meet any of the State's 18 minimum performance standards. (Brief of United States in Support of Petition for Certiorari p. 4) If the purpose of the plan had been to encourage church- related education, it would have made no sense to have limited the plan to Cleveland. To the contrary, the limitation demonstrates the genuineness of the legislative purpose to relieve what is probably the most critical educational problem in the State.

What is true of purpose is also true of endorsement. Providing some financial support to some church-related schools in Cleveland is not the message communicated by the plan. That it attempts to provide a better education where educational improvement is critically needed is the character it conveys. No one would confuse this effort to provide better education where it was so badly needed with an endorsement of religion.

The Cleveland voucher plan is therefore valid under the Establishment Clause.

II. PARENT CHOICE IS AN UNSATISFACTORY CRITERION FOR JUDGING FINANCIAL SUPPORT FOR SECTARIAN SCHOOL CASES UNDER THE ESTABLISHMENT CLAUSE FOR THREE REASONS. THEY CONFIRM THE USEFULNESS OF THE ENDORSEMENT GUIDELINE OF JUSTICE O'CONNOR.

A. A single test is inherently unsatisfactory

"Experience proves," Justice O'Connor wrote in her concurring opinion in *Board of Ed. Of Kiryas Joel Village Schl. Dist. V. Grumet*, 512 U.S. 687, 720 (1994), "that the Establishment Clause, like the Free Speech Clause, cannot be easily reduced to a single test." There are different categories of cases involving government support to sectarian schools, which may call for different approaches.

The private choice standard advocated by Petitioners is a one-rule-fits-all kind of standard. It leaves no room for different approaches in all cases in which pure parent choice exists.

B. Absence of free choice

Proponents of the "private choice" criterion for resolving government aid to sectarian school cases contend that the aid which is allotted by parent choice is not government aid to the school because the parent makes an independent, unpressured decision where her child will go to school. The situation is said to be similar to a parent receiving a tax refund or a government salary, and choosing to spend it on sectarian school tuition.

The contention has a logical basis. "Private choice" is clearly a relevant factor in determining whether an Establishment Clause violation has occurred. It is when it is considered to be, by itself, the controlling factor, that trouble arises.

To rebut a possible argument that education in Cleveland Metropolitan School District schools is so unsatisfactory as to limit free choice, Petitioner State of Ohio argues in its reply brief in support of its petition for a writ that Cleveland parents can choose a Cleveland magnet or community school, as well as a voucher sectarian school. Their choice is therefore said to be "free." This rebuttal overlooks a major qualification on freedom of choice.

There has for years existed in this country, and there exists today, a powerful and rational pressure from parents to seek for their children a school in which classmates will be predominantly middle class. The desire to escape from schools in which children are mostly of low-income backgrounds explains much of the flight to the suburbs which has been in progress for decades, and much of the widespread anger over the efforts of courts in the past two decades to replace the neighborhood school pattern with a busing pattern designed to achieve racial and economic integration.

The attitude of parents is rational. Every athlete knows that to improve his skill he should play with those who are a little better than he. It is often stated that students learn more from other students than from anyone else. The persistence of the idea that truly able students should be in separate classrooms for advanced students is confirmation that parents act sensibly when they seek high-performing ability groups for their children. Modern academicians, seeking to help low income students through association with higher income students, often claim that the higher income students learn as much in a classroom with low income students as they would in a class restricted to the able. What is important for present purposes is that the academicians are not believed by parents. Nearly all parents seek the best for their children, and the best education, they are convinced, is in classrooms with slightly more advanced classmates.

Because success in school is closely related to the educational level of the parents, and their educational level is closely associated with family income, schools which charge tuition are more likely than no-tuition schools to attract students from the middle class, and to repel students from low income families. It follows that, if the present tuition barrier to enrollment in tuition-charging schools were to be significantly reduced but not eliminated by a vouchers- for-all plan, many middle class families, but few low income families, would enroll their children in the tuition-charging schools.

The effect of the vouchers-for-all plan would therefore be to encourage a segment of American society – families with sufficient income to pay the difference between the school's tuition and the amount of the voucher – to enroll their children in tuition-charging schools, many of which would be religiously affiliated. The loss to the public schools of these more successful students would diminish the quality of education in the public schools. The inequality in educational opportunity thus created might support a challenge to the plan on Equal Protection grounds. It would certainly invite challenge under the Establishment Clause, on the ground that the educational merit in the plan, while arguable, was not strong enough to overcome the conclusion that the program constituted an endorsement of religion.

C. The difficulty of allowing government support for all religious sects, or for some but not all sects.

The third reason why parent choice is an unsatisfactory criterion for applying the Establishment Clause to government support for schools today is illustrated by a recent news story in the *New York Times*. Excerpts are included as the Appendix to this brief. The *Times* reported on October 20, 2001 that a fundamentalist group in Saudi Arabia which practiced an "austere" form of Islam known as "Wahhabism" was attempting to recruit U.S. Moslems to their group. According to the *Times*, Wahhabism teachings have inspired the violent extremism of Osama bin Laden and the Talaban government that harbors him in Afghanistan. Interacting very closely with non-Muslim society is among the acts forbidden by Wahhabism.

The *Times* reported that this group spent $10,000,000 in two years in the 1980's building mosques in the United States in an effort to recruit U.S. Muslims to its views. The *Times* attributed declining mosque construction activity in recent years to declining oil revenues in Saudi Arabia.

A plausible scenario relevant to this case is the possibility that the Wahhabis conclude that a better way to recruit American Moslems to their cause is to put their money into the construction of schools with gymnasiums, swimming pools, laboratories and an auditorium, and to urge Moslem families to enroll their children. The financial burden on the Wahhabis and the parents would be reduced by a vouchers-for-all plan. Those who advocate private choice as the controlling Establishment Clause criterion would have difficulty finding any ground on which payment of the vouchers to the Wahhabi schools could be denied without raising acute issues of entanglement and free exercise.

Fortunately, a majority of this Court remains committed to the salutary principle that the Establishment Clause forbids government support to religion, which constitutes an endorsement of religion.

III. While No Single Rubric Resolves The Application Of The Establishment Clause To Government Support Of Sectarian Schools, A Serviceable Guideline Is Found In The "Endorsement or Discouragement" Guideline Advanced By Justice O'Connor.

A. Justice O'Connor's Statement of the Guideline

In her concurring opinion in *Lynch V. Donnelly*, 465 U.S. 668, 690 (1984), and again in *Wallace v. Jaffree*, 473 U.S. 38, 69 (1985), Justice O'Connor advanced concepts of endorsement and neutrality as guidelines for applying the Establishment Clause in school support cases. If the government action constitutes an endorsement, or a discouragement, of religion, the action is invalid.

B. Justice O'Connor's Guideline Represents The Holding Of This Court In *Mitchell v. Helms*

The endorsement concept was tested most recently in *Mitchell v. Helms*, 530 U.S. ___, 120 S.Ct. 2530 (2000). This case concerned the validity of a portion of the Elementary and Secondary Education Act under which a public authority may loan educational equipment to church-related schools for use in implementing secular programs. Writing for a plurality of four, Justice Thomas propounded revised criteria to govern school financial support Establishment Clause cases. Under these criteria, a government program would be valid if it "does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Mitchell v. Helms, supra,* at 2540.

Justice Thomas argued that his formulation was derived from the Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997). Justice O'Connor, however, was the author of the *Agostini* opinion, and concurred in *Mitchell*. She stated in her concurring opinion in *Mitchell* that the Thomas formulation was a "rule of unprecedented breadth." *Id.*, at 2556. She asserted that neutrality, which became a paramount criterion in the Thomas formulation, was only one of several factors leading to the *Agostini* conclusion. Id. at 2557. The *Agostini* and the *Mitchell* programs were valid, because there was no evidence, and no presumption, that the remedial teachers or the borrowed equipment would be used to indoctrinate children in religion. Id. at 2568.

It therefore appears that Justice Thomas' view, as expressed in *Mitchell v. Helms,* does not represent any holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977), holds that, when no opinion is joined by a majority of the Court, the narrowest ground supported by at least five justices represents the holding of the Court. Justice O'Connor's endorsement guideline therefore now represents the holding of the Court on these issues.

IV. UNDER ESTABLISHED SUPREME COURT JURISPRUDENCE, THIS COURT WILL NOT FORMULATE A RULE OF CONSTITUTIONAL LAW BROADER THAN IS REQUIRED BY THE PRECISE FACTS TO WHICH IT IS TO BE APPLIED.

Especially when it is interpreting the Constitution, this Court decides only the case before it, and does not lay down rules which would decide, not only that case, but others in which the facts are not yet clearly understood and the issues have not been fully explored in briefs and argument and in the decisions below. As Mr. Justice Brandeis stated, concurring in *Ashwander v. Valley Authority,* 297 U.S. 288, 347 (1936), "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N.Y. & P.S.S. Co. v Emigration Commissioner,* [113 U.S. 33 (1885)]."

Justice Brandeis' limiting principle has been followed by members of the Court in recent cases. See *Good News Club v. Milford Central School,* 121 S. Ct. 2093, 2115 (2001), in which Justice Stevens, dissenting, stated that he would not "reach out" to decide an Establishment Clause question which had not been considered by the courts below; cf *Santa Fe Independent School District v. Doe,* 530 U.S. 290, 321 (2000), in which Chief Justice Rehnquist criticized the majority for deciding an issue before the relevant outcome of an election on use of school facilities was known.

The case at bar involves a voucher plan limited to a school district in which it is conceded by all that substantial educational improvement is needed. The facts relevant to determining the validity of the Cleveland plan are well known, and the issues relating to its validity have been extensively briefed.

If this plan is upheld on the ground advanced by Petitioners, however, it is likely that this Court's decision will

be relied on by states to create voucher plans applicable to all districts, including many which are providing acceptable education.

This Court should avoid deciding this case on grounds that would be so broad as to apply to a voucher plan extending to educationally successful districts. The effect that such a plan would have on the religious preferences of U. S. citizens is unknown. No one has approximated the number of parents who would take advantage of such a plan, or the number of denominations and ethnic groups which would create schools for their own children in response to such legislation.

No one has resolved whether such voucher schools could exclude students on the basis of ethnicity or religion — after all, they would be private, often sectarian schools, and to avoid the "entanglement" issue the authorizing legislation would impose a minimum of regulation on schools admitting voucher students. The size of the voucher, and the right of the school to charge tuition in excess of the voucher or employ admission tests, are important unknowns. The effect of a possible statewide voucher plan on public schools is speculative. This Court should not decide in this proceeding the validity of a statewide plan about which so little is known.[1]

CONCLUSION

For these reasons, this Court should reverse the Court of Appeals, and hold that the Cleveland voucher plan is valid because its limitation to a district desperately needing educational improvement causes it to pass the "endorsement" test. The Court should not approve the "parent choice solves the problem" approach taken by the Petitioners. In the words of Justice Brandeis, concurring, this Court should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ashwander v. Valley Authority, supra.*

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November 2, 2001

[1] It is noteworthy that references to "failing schools," "underperforming schools," unacceptable school performance,low-income families," "disadvantaged children," and "districts subject to federal court orders" appear no less than 15 times in the brief *amicus curiae* filed by the United States in support of the granting of certiorari. The guidance the United States seeks from this Court relates to programs "enacted in response to specific educational crises in failing public schools." Brief for the United States in Support of Petition for Certiorari p. 18. Clearly, the United States is not thinking of a statewide plan.

Appendix

Extract from Article by Blaine Harden published on p. 1 of *New York Times* on October 20, 2001under headline: "Saudis Seek U.S. Muslims for their Sect."

In a costly and quietly insistent campaign to spread its state religion, Saudi Arabia has been trying for decades to induce American Muslims to become followers of the puritanical Islamic sect that sustains the power of the Saudi royal family.

By building mosques across the country, sending Americans to the Middle East to be trained as imams and promoting pilgrimages to Mecca, the Saudis have spent hundreds of millions of dollars in an effort to stamp their austere version of Islam on the lives of Muslims in the United States.

That version is called Wahhabism, although the Saudis are loath to use the term in referring to their proselytizing in this country. As practiced in Saudi Arabia, Wahhabism denies equal rights to women, and its teachings have inspired the violent extremism of Osama bin Laden and the Taliban government that harbors him in Afghanistan.

"In America, the Saudis don't call it Wahhabism because they don't want to have all the albatrosses associated with the sect," said Earle H. Waugh, a professor of religion atthe University of Alberta, who is the author of several books about Muslims in North America. "But they have a strong mission tradition, and they have used their money to export their ideology to America. Wahhabism says that Islam is the superior religion and must always be so."

Despite all their efforts, the Saudis' approach to Islam appears not to have found widespread acceptance in the United States and in fact seems to have faded in popularity

here in recent years, perhaps because it is too rigid for a multiethnic society like America's. Experts estimate that of the two million American Muslims who attend mosques regularly, no more than 25 percent, and perhaps many fewer, adhere to the strictures of Wahhabism.

As the Saudis themselves explain, their beliefs reject aspects of Western culture that they see as deviating from fundamental teachings of the Koran. Mingling of the sexes, living in a community where alcohol is consumed, eating pork and interacting very closely with non-Muslim society are forbidden.

"A knowledgeable Muslim will find it hard to integrate into a non-Islamic society of the United States," explained Muhammad al-Alahmari, a Saudi who is chairman of the Islamic Assembly of North America, an organization based in Ann Arbor, Mich., that sends copies of the Koran to prisons and libraries.

About half the group's money, Mr. Alahmari said, comes from the Saudi government, with the rest coming from private donors, most of them Saudi.

A number of prominent religious scholars describe Wahhabism as a particularly rigid minority Islamic sect that is intolerant of other forms of Islam, unwilling to accommodate other religions and likely to create a narrow view of the world among its followers.

In the 1970's and 80's, when Saudi Arabia was flush with oil money, the United States experienced a boom in the founding of mosques. About 57 percent of the country's 1,200 mosques were built in those years, academics estimate.

Records of the Saudi-controlled Muslim World League

show that during a two-year span in the 1980's, the organization spent about $10 million in the United States on mosque construction, said Yvonne Y. Haddad, a professor of the history of Islam at the Georgetown center.

Mr. Alahmari, the Saudi charity official based in Ann Arbor, estimates that half the mosques and Islamic schools in the United States have been built with the help of money from Saudi Arabia. The Saudi royal family has directly contributed to the construction of a dozen mosques, including the $8.1 million King Fahd Mosque in Culver City, Calif.

Although the Saudi Embassy official maintained that "there are absolutely no strings attached" to Saudi spending, several scholars and American Muslims said the money had often involved a quid pro quo.

"At several mosques around Los Angeles, they would dole out money month by month until something happened that they didn't like, such as boys and girls mixing together in religious classes," said Mr. Akbarut, a member of the Islamic Center of Southern California. He said the Pasadena mosque where he prays had refused money from the Saudis.

The training of Americans, especially African-Americans, as imams in Saudi Arabia has also had a clear ideological purpose, said Faheem Shuaibe, imam at a large, predominantly black mosque in Oakland, Calif. More than 200 African-American imams have been trained in Saudi Arabia, he said.

"There was a very deliberate recruitment process by the Saudis, trying to find black Muslims who had a real potential for Islamic learning and also for submission to their agenda," said Mr. Shuaibe, who has frequently traveled to Saudi Arabia. "They taught Islam with the intent to expand their influence. A principal target was to stop the indigenous

Muslim leadership in America from tinkering with the religion."

Estimates of the percentage of American Muslims who worship in mosques that adhere to Wahhabism vary widely. Just as Saudis do not describe their faith as Wahhabism, conservative imams in America reject that label for their mosques. Several scholars said they did not know of a single mosque in this country that identified itself with the Saudi sect.

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IN THE

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Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

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HANNA PERKINS SCHOOL, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

SENEL TAYLOR, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a program designed to rescue economically disadvantaged children from a failing public school system by providing scholarships that they may use in private, religious, or suburban public schools that choose to participate in the program—and which operates in the context of a broad array of public school choices—violate the First Amendment because in the early stages of the program most of the schools that have agreed to take on scholarship students are religiously affiliated?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICUS*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. OHIO PUBLIC SCHOOL CHARACTER EDUCATION AND SERVICE LEARNING PROGRAMS INDOCTRINATE CHILDREN IN RELIGIOUS CONCEPTS, MOTIVES, AND THEMES THAT ARE NO DIFFERENT IN KIND THAN THOSE TAUGHT IN PRIVATE RELIGIOUS SCHOOLS	5
A. Ohio Public Schools Teach Religious Concepts, Motives, and Themes That Are No Different in Kind Than Those Used as a Foundation for Moral Education in Private Religious Schools	5
B. The Religious Concepts, Motives, and Themes Taught in Ohio Public Schools Are Similar to Those Promoted in Nineteenth-Century France in an Attempt to Eliminate the Role of the Catholic Church in Providing for the Moral Education of Children	14
C. The State of Ohio is Indoctrinating Children in a Secular Morality Rather Than Promoting a Sacred Pluralism That Protects the Fundamental Right of Parents to Educate Their Children in the Religious Concepts, Motives, and Themes of Their Choice	17

TABLE OF CONTENTS—Continued

	Page
II. THE STATE OF OHIO ENGAGES IN VIEWPOINT DISCRIMINATION THAT COMPELS CHILDREN TO SUBSCRIBE TO AND PARTICIPATE IN RELIGIOUS CONCEPTS, MOTIVES, AND THEMES IN A MANNER THAT ESTABLISHES A CIVIC RELIGION	20
A. The State of Ohio Has Created a Limited Public Forum for the Expression of Religious Concepts, Motives, and Themes Relating to the Moral Education of Children	22
B. By Funding Only Religious Concepts, Motives, and Themes Taught in Public Schools, the State of Ohio Engages in Viewpoint Discrimination	25
C. By Engaging in Impermissible Viewpoint Discrimination, the State of Ohio Compels Children to Subscribe to and Participate in Religious Concepts, Motives, and Themes in a Manner That Establishes a Civic Religion	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
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TABLE OF AUTHORITIES—Continued

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Page

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Page

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Nos. 00-1751, 1777, 1779

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

HANNA PERKINS SCHOOL, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

SENEL TAYLOR, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS* *

Solidarity Center for Law and Justice, P.C. is a professional corporation organized under the laws of the State of

* Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

Georgia for the promotion of social welfare by defending human and civil rights secured by law, to wit: those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U. S. Constitution or by a special statutory provision coming directly within the scope of the 13th or 14th Amendment, some other comparable constitutional provision, or that otherwise fall within the protection of the Constitution by reason of their long established recognition at the common law as rights that are essential to the orderly pursuit of happiness by free men and women. When permitted by court rules and practice, Solidarity Center for Law and Justice, P.C. files briefs as *amicus curiae* in litigation of importance to the protection of human and civil rights, particularly when the primary right of parents to direct the upbringing of their children in accordance with the dictates of their consciences is at issue.

In examining the constitutionality of the Ohio Pilot Project Scholarship Program, Ohio Rev. Code §§ 3313.974-3313.983 (the "Program"), the United States Court of Appeals for the Sixth Circuit determined that private religious schools receiving scholarship aid under the Program "incorporate religious concepts, motives, and themes into all facets of their educational planning." *Simmons-Harris v. Zelman*, 234 F.3d 945, 960-961 (6th Cir. 2000). In addition to reversing the Sixth Circuit's decision that the Program is unconstitutional, this Court should remand this case to the applicable federal trial court for a determination as to whether, through the teaching of comprehensive character education and service learning programs, Ohio *public* schools are incorporating religious concepts, motives, and themes into all facets of *their* educational planning. If so, the lower trial court then should be required to determine whether the eligibility for and amount of the scholarship aid offered under the Program should be expanded in order to avoid the establishment of a civic religion in Ohio public schools.

Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

SUMMARY OF ARGUMENT

In examining the constitutionality of the Program, the Sixth Circuit determined that private religious schools receiving scholarship aid under the Program "incorporate religious concepts, motives, and themes into all facets of their educational planning." *Id.* In point of fact, through comprehensive character education and service learning programs, Ohio *public* schools incorporate religious concepts, motives, and themes into all facets of *their* educational planning.

This Court has determined that for purposes of the Free Speech Clause there is "no logical difference in kind between the invocation of Christianity" by an after-school youth club "and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Good News Club v. Milford Central School*, 533 U.S. ___, 121 S.Ct. 2093, 2102 (2001). The character virtues pervasively taught in Ohio public schools, including truthfulness, trustworthiness, respect, responsibility, fairness, caring, and citizenship, are more "quintessentially religious" in nature than are the virtues of teamwork, loyalty, or patriotism.

Facing a crisis of character among youth that is attributable in significant part to a decades-long absence of effective character formation within their schools, Ohio public school officials have embraced character education and service learning models similar to those for which private religious schools are renowned. Yet, Ohio parents who choose to educate their children at such private religious schools are denied equal access to public education funding due to the very existence of such moral education models.

By funding public school character education and service learning programs, the State of Ohio has created a limited

public forum for the expression of parent, student, and community viewpoints regarding the moral and social character of the ideal American citizen and worker. By failing to examine the religious nature of this limited public forum, the Sixth Circuit has implicitly endorsed a form of viewpoint discrimination in the funding of Ohio public education. Such discrimination results in the establishment of a state-sponsored civic religion by compelling children to subscribe to and participate in public school religious concepts, motives, and themes that conflict with the private and peaceful religious viewpoints of their parents.

The government may not establish "an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). Far from offering low-income families an "illusory" educational choice, the Program constitutes an important first step at creating a public school funding paradigm that will prevent Ohio school officials from coercing parents into having their children indoctrinated in a civic religion rather than the tenets of their chosen religious faiths.

This Court should uphold the constitutionality of the Program as an acceptable example of "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion." *Witters v. Washington Dep't. of Services for the Blind*, 474 U.S. 481, 490-91 (1986) (Powell, J., concurring). This case should be remanded to the applicable federal trial court for a determination as to whether the State of Ohio has created a public forum for the teaching of religious concepts, motives, and themes relating to the moral education of children. If so, the lower trial court then should determine whether the eligibility for and amount of the scholarships offered under the Program should be expanded in order to prevent impermissible viewpoint discrimination and the establishment of a civic religion in Ohio public schools.

ARGUMENT

I. OHIO PUBLIC SCHOOL CHARACTER EDUCATION AND SERVICE LEARNING PROGRAMS INDOCTRINATE CHILDREN IN RELIGIOUS CONCEPTS, MOTIVES, AND THEMES THAT ARE NO DIFFERENT IN KIND THAN THOSE TAUGHT IN PRIVATE RELIGIOUS SCHOOLS.

The Sixth Circuit determined that private religious schools receiving scholarship aid under the Program "incorporate religious concepts, motives, and themes into all facets of their educational planning." *Simmons-Harris*, 234 F.3d at 960-961. In making this determination upon which its entire decision rests, the Sixth Circuit emphasized sectarian school i) religious guidelines requiring that "all learning take place in an atmosphere of religious ideals;" ii) handbooks and mission statements reflecting "that most believe in interweaving religious beliefs with secular subjects;" and iii) educational scholarship designed to make "religious truths and values permeate the whole atmosphere of the school." *Id.* at 949.

In point of fact, the religious concepts, motives, and themes taught in Ohio's *public* school character education and service learning programs are no different in kind than those taught in private religious schools. Yet, the Sixth Circuit restricted its Establishment Clause analysis to the religious nature of the moral education provided in private schools, especially Christian ones.

A. Ohio Public Schools Teach Religious Concepts, Motives, and Themes That Are No Different in Kind Than Those Used as a Foundation for Moral Education in Private Religious Schools.

The Ohio Department of Education has developed and subscribes to the following definition of character education:

> Character education involves specific, targeted efforts to communicate and integrate into the lives of children and youth widely shared core character qualities (e.g., caring, citizenship, fairness, respect, responsibility, trustworthiness). A school and larger education community committed to character education explicitly names and publicly stands for specific core character qualities like these, shares the qualities among members of the school and community, defines them in terms of behaviors that can be observed, practices them, studies and discusses them, and honors them by holding all representatives of the school and community accountable to standards of conduct consistent with the qualities.

Ohio Partners in Character Education, *Character Education Resources*, http://www.charactereducationohio.org/resources.htm (2001).

Ohio Partners in Character Education ("OPCE") is a public-nonprofit-private initiative that pursues "a respectful and productive learning environment for Ohio students." OPCE creates, supports, and evaluates character education policies and practices in schools and communities; provides technical assistance to local agencies in the development and implementation of curriculum materials, teacher training, and other activities relating to character education; and encourages local school communities to integrate character education into their programming and curricula. Ohio Partners in Character Education, *About OPCE*, http://www.charactereducationohio.org/about.htm (2001).

OPCE is comprised of three types of partners: the Ohio Department of Education is the lead partner, the Council for Ethics in Economics is a community partner, and there are fifteen local partners who receive grant money to develop and implement different styles and formats of character education initiatives across Ohio. In July of 1999, state funding was obtained to fund 58 character education programs over a two-year period. Grants from corporations fund additional project

activities including dialogue between employers and educators about character needs in the workplace.

OPCE Management Advisory Groups have been established to identify specific character needs for employment success in the employment sectors relating to construction and development, distribution and warehousing, finance, financial integrity for clients (insurance, banking, brokerage), health and residential care, manufacturing and processing, public sector employment, retailing/real estate and sales, utilities, youth/social and community service organizations, and call centers. Detailed Management Advisory Group Reports have been generated for six of the employment sectors and include specific character education examples designed to be helpful to educators and counselors in developing the business ethical character of targeted public school students.

On September 25 and 26, 2001, OPCE presented the 3rd Annual Governor's Summit on Character Education in Columbus, Ohio. In a pre-conference workshop, participant educators were taught strategies "that help young people develop into caring, respectful, responsible individuals who make positive choices based on ethical reasoning and a well-developed sense of service, civic involvement, and philanthropy." Ohio Partners in Character Education, *The Governor's Summit on Character Education*, http://www.charactereducationohio.org/summit.htm (2001). During the actual conference, participants could choose from among breakout sessions including "Creating a Caring School Culture through Weaving Moral and Emotional Literacy into the Fabric of the School Community," "Building Character School-wide: Creating a Caring Community in Your School," and "Navigating the Heart through Character Education."

John Marshall High School, an OPCE Partner located in Cleveland, Ohio, subscribes to the following character education mission:

> The mission of the character/ethics committee of the John Marshall High School is to plan and implement ideas and activities to reinforce positive character traits in the JMHS community in order that these characteristics are understood, internalized and acted upon by all.
>
> When we at John Marshall identify persons as having "good character" we are saying that they adhere to *a set of behaviors and beliefs* which our culture commonly holds as desirable. Our goal is to produce citizens who are equipped with all the skills needed to thrive in the 21st Century. We believe this includes *knowing that which is right and good, desiring those attributes, and acting upon them.*

Ohio Partners in Character Education, *OPCE Partners*, http://www.charactereducationohio.org/partners/marshall.htm (2001) (emphasis added).

The John Marshall High School character/ethics committee works with its feeder elementary and middle schools in Cleveland to get them involved in a strong character education program. It is also working with the Rotary Club and Eveready Battery Co. to develop a character education program in every K-12 public school in the Cleveland region. *Id.* Rotary International encourages character education in public schools through the indoctrination of children in the principles of truth, justice, friendliness, and helpfulness that serve as the foundation for the Rotary 4-Way Test.[1]

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[1] The Rotary 4-Way Test challenges students to consider the following questions:

"Of the things we think say or do:

1. Is it the TRUTH?
2. Is it FAIR to all concerned?
3. Will it build GOODWILL and BETTER FRIENDSHIPS?
4. Will it be BENEFICIAL to all concerned?"

In Akron, Ohio, public school teachers indoctrinate their students in the Six Pillars of Character as developed and promoted by the Character Counts! Coalition, a project of the Josephson Institute of Ethics in Marina del Rey, California. The Six Pillars of Character include trustworthiness, respect, responsibility, fairness, caring, and citizenship.[2]

Rotary International, *The Rotary 4-Way Test*, http://www.rotary.org/aboutrotary/4way.html (2001). The presence of Rotary Club members as character educators in Ohio public schools raises the question of whether, in the absence of publicly-funded school choice, the State of Ohio must grant equal public school access to members of the Knights of Columbus for the teaching of character through the use of the Catechism of the Catholic Church.

[2] The Character Counts! Coalition attaches the following meaning to the Six Pillars of Character:

1. Trustworthiness—Be honest. Don't deceive, cheat or steal. Be reliable—do what you say you'll do. Have the courage to do the right thing. Build a good reputation. Be loyal—stand by your family, friends and country.
2. Respect—Treat others with respect; follow the Golden Rule. Be tolerant of differences. Use good manners, not bad language. Be considerate of the feelings of others. Don't threaten, hit or hurt anyone. Deal peacefully with anger, insults and disagreements.
3. Responsibility—Do what you are supposed to do. Persevere: keep on trying! Always do your best. Use self-control. Be self-disciplined. Think before you act—consider the consequences. Be accountable for your choices.
4. Fairness—Play by the rules. Take turns and share. Be open-minded; listen to others. Don't take advantage of others. Don't blame others carelessly.
5. Caring—Be kind. Be compassionate and show you care. Express gratitude. Forgive others. Help people in need.
6. Citizenship. Do your share to make your school and community better. Cooperate. Stay informed; vote. Be a good neighbor. Obey laws and rules. Respect authority. Protect the environment.

Ohio public schools in Toledo, Brook Park, Girard, Lima, Painesville, Perrysburg, Sandusky, and Stow also are members of the Character Counts! Coalition and teach the Six Pillars of Character. In some instances, the Ohio National Guard, through its Higher Ground program, assists Ohio public schools in teaching the Six Pillars of Character. Eileen Dempsey, "Building Character: Ohio National Guard instructors take message of respect to schools," *The Columbus Dispatch* (May 2, 2001).

In addition to the Council for Ethics in Economics, the Character Counts! Coalition, and Rotary Clubs, other outside organizations are granted access to Ohio public schools for the expression of their viewpoints regarding the religious concepts, motives and themes that serve as the foundation for Ohio's character education program. These private speakers include The Communitarian Network, The Character Education Partnership, and Make-A-Wish Foundation of Northeast, Central, and Southern Ohio in partnership with Partnerships Make a Difference.

Most of the outside organizations that are expressing their religious character education viewpoints in Ohio's public schools are involved in the broader character education movement that has flourished in the United States during the past ten years. Through national and regional conferences, the leaders of these organizations train educators in character education principles and practices.[3] The leaders of the Ohio

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Character Counts! Coalition, *The Six Pillars of Character*, http://www.charactercounts.org/defsix.htm (2001).

[3] The Washington, D.C.-based Character Education Partnership promotes the following Elever Principles of Effective Character Education:

1. Character education promotes core ethical values as the basis of good character.
2. "Character" must be comprehensively defined to include thinking, feeling, and behavior.

and national character education movements recognize that "Education in its fullest sense is inescapably a moral enterprise—a continuous and conscious effort to guide students to know and pursue what is good and what is worthwhile." Center for the Advancement of Ethics and Character, *Character Education Manifesto* (1996).

After being indoctrinated in state-approved character traits through classroom instruction and role-playing, Ohio public school students are required to participate in service projects in their local communities. These service projects are designed to "provide structured time for students to reflect on their experiences" and to "help foster the development of a

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3. Effective character education requires an intentional, proactive, and comprehensive approach that promotes the core values in all phases of school life.
4. The school must be a caring community.
5. To develop character, students need opportunities for moral action.
6. Effective character education includes a meaningful and challenging academic curriculum that respects all learners and helps them succeed.
7. Character education should strive to develop students' intrinsic motivation.
8. The school staff must become a learning and moral community in which all share responsibility for character education and attempt to adhere to the same core values that guide the education of students.
9. Character education requires moral leadership from both staff and students.
10. The school must recruit parents and community members as full partners in the character-building effort.
11. Evaluation of character education should assess the character of the school, the school staff's functioning as character educators, and the extent to which students manifest good character.

Character Education Partnership, *Eleven Principles of Effective Character Education*, http://web541ba.ntx.net/principles/index.cgi (2001).

sense of caring for others." Ohio Department of Education, *About Learn & Serve Ohio*, http://www.ohiok-16service.org/odeabout.htm (2001). The Ohio Department of Education awards Learn and Serve America (Ohio) grants on a competitive basis to local public school districts that provide service-learning opportunities to K-12 students.

Ohio law permits any public school district board of education to include community service education in the educational program of the district by adopting a resolution to that effect. Participating public school districts establish community service advisory committees the members of which may include representatives of parents, teachers, administrators, other educational institutions, business, government, nonprofit organizations, veterans organizations, social service organizations, religious organizations, and philanthropies. The participating school districts and their community service advisory committees develop and implement a community service plan for students. The community service plan educates students in the value of community service, identifies opportunities for students to provide community service, encourages students to provide community service, and integrates community service opportunities into the curriculum. Ohio Rev. Code § 3313.60.5(B).

In April of 1996, leaders of the national character education and service learning movements participated in a conference at Racine, Wisconsin "to identify the key elements and most effective models of both movements and to develop new collaborations between the two movements to enhance the work of both." Institute for Global Ethics, *Report from Wingspread*, 2 (1996). The resulting conference report explained that there was a sense of urgency "to ameliorate the rapidly deteriorating situation in many of America's schools and communities." *Id.* at 3. It was the view of these character education and service learning

professionals "that today the real and lasting questions are about survival." *Id.*

To "ameliorate the rapidly deteriorating situation," Ohio education officials have decided to embrace character education and service learning models that have long been an integral part of the curriculum in private religious schools, especially those operated by the Catholic Church. Ohio public schools have been transformed into publicly-funded replicas of the very parochial school communities that continue to be denied equal access to public education funds because their approach is too religious for education officials and, apparently, the Sixth Circuit.

This Court disagrees with those who would maintain "that something that is 'quintessentially religious' or 'decidedly religious' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." *Good News Club*, 533 U.S. at ___, 121 S.Ct. at 2102. In fact, the character education virtues taught in Ohio's public schools (i.e., truthfulness, trustworthiness, respect, responsibility, fairness, caring, and citizenship) are more "quintessentially religious" in nature than the character traits of teamwork, loyalty, or patriotism which this Court has equated in kind to Christian moral and character education traits. *Id.* The habits of the heart taught in Ohio's public schools involve issues of self-examination, self-regulation, self-sacrifice, and love of neighbor that go to the very core of what it means to be a Christian.

The scholarships offered to low-income parents under the Program, far from creating "illusory" choices regarding the education of their children, provide the only means available to these families for escaping from the coercive effect of a monopolistic public education funding policy that establishes a civic religion in Ohio's public schools.

B. The Religious Concepts, Motives, and Themes Taught in Ohio Public Schools Are Similar to Those Promoted in Nineteenth-Century France in an Attempt to Eliminate the Role of the Catholic Church in Providing for the Moral Education of Children.

The rejection of Catholic educational authority that accompanied the French Revolution opened the door for a strictly scientific educational philosophy that rejected the notion of an ideal moral code that could serve as the basis for social organization. By the end of the first quarter of the nineteenth century, unstable social conditions in France caused many leaders to realize that a strictly scientific education could not build the social solidarity that was necessary to support a liberal republican political system.

One of the world's first social scientists, Henri de Saint-Simon (1760-1825), recognized late in his career the threat that a purely scientific education posed to social solidarity. Yet, Saint-Simon was convinced that historic Christianity had run its course and would be unable to adapt itself to the needs of the new, technologically advanced society. During the last two years of his life, up until his final hours, Saint-Simon developed and espoused a New Christianity that could be used to establish social order and fraternity.

In Saint-Simon's view, all that is divine in Christianity could be reduced to the single principle that men "should organize their community in a way which will be most advantageous to the greatest number; they should make it their aim in all their undertakings and actions to promote as quickly and completely as possible the moral and physical welfare of the most numerous class." Henri de Saint-Simon, "New Christianity" (1825), in Felix Markham (ed.), *Social Organization, the Science of Man and Other Writings*, 83 (1964).

Orestes Brownson, a nineteenth-century Catholic political philosopher, gave an early warning about social scientists like Saint-Simon who, in Brownson's opinion, believed that:

> The Christian symbol needs a new and more Catholic interpretation, adapted to our stage in universal progress. Where the old interpretation uses the words God, Church, and Heaven, you must understand Humanity, Society, and Earth; you will then have the true Christian idea, and bring the Gospel down to the order of nature and within the scope of human reason.

Orestes Brownson, "Socialism and the Church" (1849), in Orestes Brownson, *Essays and Reviews*, 479 (1852).

In the view of the so-called Saint-Simonian cult members that survived Saint-Simon, the faculty of feeling should be developed in equal proportion to the rational faculty. In their opinion, "those sympathies that unite man with his fellowmen and that make him suffer their sorrows, enjoy their joys, and live their lives" prevent societies from becoming "aggregations of individuals without bonds, having no motive for their actions but the impulses of egoism." Georg Iggers (trans.), *The Doctrine of Saint-Simon: An Exposition, First Year, 1828-1829*, 154 (1958). For this reason, moral education was to "be the object of a social plan and of a political function." *Id.* at 149.

Auguste Comte (1798-1857), a former secretary to Saint-Simon, created a new "religion of humanity." Comte was, at first, a "positivist" whose initial goal was to establish a philosophy of science that would provide the basis for a scientific reordering of society. Late in his life, Comte's positivist theory evolved into a positivist religion. In the future, Comte affirmed, "science, poetry and morality will be consecrated to the study, praise and love of humanity and our life will thus become a continuous act of worship." D. G. Charlton, *France*, 264 (1972).

Comte believed his religious ethic based on the love of mankind would cure the self-centeredness of men in his era. This would occur "with the help of a didactic art and literature, the beneficent moral influence of women, a political reorganization in which duties will take the place of rights, and above all the impact of a newly organized Church of Humanity." *Id.* Comte proposed replacing the Christian calendar with months and saints' days named after great men like Aristotle and Archimedes and starting from 1789, the date of the French Revolution. See Auguste Comte, *The Catechism of Positive Religion*, Table "D" (1858).

Later in the nineteenth century, Jules Ferry, a French republican politician and positivist, proposed legislation that would make primary education obligatory and would replace the mandatory "religious and moral" instruction for primary school children with a requirement that students should learn "moral and civic" duties. Conservatives in the French Senate who were concerned about a state-sponsored "atheistic Christianity" asked Jules Ferry to amend his legislative proposal by specifying in the law that schoolchildren be taught a "religious morality." Ferry refused. Jules Simon, the moderate republican author of *La Religion Naturelle*, advocated an amendment that would require teachers to at least teach children their "duties toward God and country." On March 28, 1882, the French Senate passed the Obligatory Primary Education law, without Jules Simon's amendment. Philip Bertocci, *Jules Simon*, 204-205 (1978).

The Obligatory Primary Education law paved the way for the introduction of secular morality, called *morale laïque*, in France's national schools. In July of 1899, a *Société de l'éducation sociale* was formed in France to conduct "research into the proper means to produce, not only the virtuous person, the good citizen, but the veritable social being." Phyllis Stock-Morton, *Moral Education for a Secular Society*, 117 (1988). The virtue of "solidarity" was viewed as

the new moral attitude that offered a middle way between classical individualism and collective socialism. "There is between each individual and all others a necessary bond of solidarity; only the exact study of the causes, conditions, and limits of that solidarity would produce a standard of the rights and duties of each to all and all to each, and would insure scientific and moral conclusions to the social problem." Léon Bourgeois, *Solidarité*, 15 (1912).

The role of public education is to facilitate the building of *authentic* solidarity through voluntary education associations, not to impose an *artificial* solidarity through compulsory public school character education and service learning programs.

C. The State of Ohio is Indoctrinating Children in a Secular Morality Rather Than Promoting a Sacred Pluralism That Protects the Fundamental Right of Parents to Educate Their Children in the Religious Concepts, Motives, and Themes of Their Choice.

America, with its due regard for life, liberty, and the pursuit of happiness, shares the historic French concern for social solidarity through liberty, equality, and fraternity. This Court has acknowledged that "if common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced." *Lee*, 505 U.S. at 589-590. Nevertheless, this Court has rejected "the suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Id.* at 590.

An examination of social trends in France and the United States over the past 200 years reveals Six Phases of Demo-

cratic Evolution.[4] Each of these two nations has experienced the first three phases of democratic evolution: a *skeptical phase* where the institutional authority of organized religions is questioned and rejected; a *social scientific* phase where spontaneous, voluntary associations are rejected in favor of social planning by social scientists and government officials; and a *social degenerative* phase where moral norms and social responsibility are rejected by an increasingly isolated citizenry that is unable to understand or cope with the social and economic impact of rapid technological and material advances. It is in response to the social degenerative phase that democracies must choose between socialism and solidarity.

France addressed its social degeneration by entering into a state-imposed *secular moralistic* phase. In this phase, the government attempts to create artificial social solidarity by indoctrinating citizens in core civic virtues. France then entered into a *social submissive* phase where citizens who have been indoctrinated in the civic religion cede effective control over their lives and destinies to the civil service agencies of the State. France has come to rest in its present *socialistic* phase where the State machinery reigns supreme.

Jacques Maritain, a French-Catholic philosopher and first-hand witness to the secular moralistic and social submissive phases in France, maintained that "both the essence and freedom of education would be ruined" where the state annexes the education task "in order to compensate for all the

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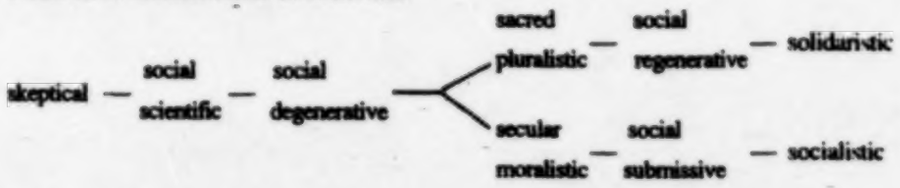
[4] The following diagram sets forth the two possible paths of the Six Phases of Democratic Evolution:



James Kelly, *Six Phases of Democratic Evolution* (2001).

deficiencies in civil society, to turn out in a hurry the type fitted to the immediate needs of the political power." Jacques Maritain, *Education at the Crossroads*, 100 (1943).

Through the national character education and service learning movements, the United States is following France's path into the *secular moralistic* phase. Ohio public school educators, in cooperation with economic forecasters, business leaders, and politicians, have constructed and implemented a social plan that indoctrinates children in state-endorsed opinions regarding how children should relate to and care for their fellow students, teachers, eventual employers and co-workers, and members of society-at-large. Such indoctrination runs contrary to this Court's holding that "in our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969).

There is a better way. To address social degeneration, the United States should re-affirm its belief in a *sacred pluralistic* phase that rejects a state-sponsored secular morality in favor of government respect for and promotion of the independent, private decisions of parents regarding the moral education of their children. This would lead to the *social regenerative* phase during which society would be strengthened through the myriad of meaningful voluntary associations that lead to the *solidaristic* phase.

"If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads." Alexis de Tocqueville, *Democracy in America*, vol. 2, part 2, chap. 5, p. 517 (1968 ed.). Tocqueville believed that equality of conditions (eg., employment, healthcare, food, housing) produces isolated individuals who have been relieved of the need for communal undertakings. The resulting social apathy and

class-consciousness create a compulsive drive for a state-enforced unity. On the other hand, associations draw citizens together and counter the logic of a top-down unity that sacrifices individual freedom. See Joshua Mitchell, *The Fragility of Freedom*, 229 (1995).

As did France at the end of the nineteenth century, the State of Ohio has entered the *secular moralistic* phase of democratic evolution and is moving toward the *socialistic* phase. Whether they are called New Christianity, Religion of Humanity, *Morale Laïque*, the Six Pillars of Character, or the 4-Way Test, the religious concepts, motives, and themes taught in Ohio public schools are no different in kind than those taught in Catholic or other private religious schools that participate in the Program. To avoid impermissible view-point discrimination and the establishment of a civic religion, the State of Ohio must shift course and enter the *sacred pluralistic* phase to facilitate a move toward authentic solidarity.

II. THE STATE OF OHIO ENGAGES IN VIEW-POINT DISCRIMINATION THAT COMPELS CHILDREN TO SUBSCRIBE TO AND PARTICIPATE IN RELIGIOUS CONCEPTS, MOTIVES, AND THEMES IN A MANNER THAT ESTABLISHES A CIVIC RELIGION.

As the primary educators of their children, parents are responsible for making sure that their children have the knowledge and moral fiber to become law-abiding, self-sustaining citizens. However, parents have the additional obligation to educate their children to think critically about social and political matters and, when appropriate, to challenge the status quo. "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and to prepare him for additional obligations." *Pierce v. Society of the Sisters*, 268 U.S 510, 535 (1925).

The Ohio Constitution directs the Ohio General Assembly to encourage schools and the means of instruction as a way of helping parents fulfill their role as the primary religious, moral, and academic educators of their children:

> Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Ohio Constitution, § 1.07, *Rights of conscience; education; the necessity of religion and knowledge* (1851).

The State of Ohio compels parents having children between the ages of six and eighteen years of age to send them to a public school or to cause them to be instructed in a school which conforms to the minimum standards prescribed by the state board of education. Ohio Rev. Code § 3321.03.

Ohio law requires each board of education within a public school district to implement a competency-based education program for citizenship in grades one through twelve. Ohio Rev. Code § 3301.07.15. This citizenship education program involves teaching in the areas of *civic knowledge* (i.e., political parties and candidates, separation of powers, economic systems, and the legislative process) and *civic skills* (i.e., civic involvement, evaluating officials and issues, and issue advocacy). Through character education and service learning, the State of Ohio has expanded the citizenship education program to include the teaching of *civic virtues* (i.e., truthfulness, trustworthiness, respect, responsibility, fairness, caring, and citizenship).

The desire of a state legislature "to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate." *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). However, the

means adopted may not "exceed the limitations upon the power of the state." *Id.*

A. The State of Ohio Has Created a Limited Public Forum for the Expression of Religious Concepts, Motives, and Themes Relating to the Moral Education of Children.

By mandating, funding, and implementing the teaching of civic virtues in its public schools, the State of Ohio has created a limited public forum for the expression of religious concepts, motives, and themes relating to the moral education of children. The public school classroom or building is not the forum; the forum is the marketplace of educational discourse that is created when the State of Ohio mandates and funds the pursuit by parents of a minimum level of moral education for their children.

This public education forum created by the State of Ohio is "a forum more in a metaphysical than a spatial or geographic sense, but the same principles are applicable." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995). In *Rosenberger*, a limited public forum was created by the University of Virginia's establishment and governance of a student activity fund to support a broad range of extracurricular activities that were related to the educational purpose of the University. The student activity funds were expended "to encourage a diversity of views from private speakers." *Id.* at 834. Similarly, the State of Ohio expends funds to encourage a diversity of views from private speakers, including students, parents, teachers, and community leaders, on the subject matter of the moral education of children for democratic participation.

Even if the purpose of the public education forum funded by the State of Ohio is not to encourage a diversity of views, the salient point is that, like the program in *Rosenberger*, the Ohio public education forum "is designed to facilitate private

speech, not to promote a governmental message." *Legal Services Corporation v. Velazquez*, 531 U.S. ___, 121 S.Ct. 1043, 1049 (2001). Ohio public school teachers speak to students on behalf of their parents and the broader community about religious concepts, motives, and themes relating to the moral education of children. This is comparable to the role of a government-subsidized attorney who "speaks on behalf of the client in a claim against the government for welfare benefits." *Id.*

The Ohio public education forum is a public forum, not a nonpublic forum for government speech. By funding public education, the State of Ohio itself is not the speaker, see *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235 (2000), nor is the State of Ohio using private speakers to transmit information pertaining to its own program, see *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Rosenberger*, 515 U.S. at 833.

Even if the State of Ohio is transmitting a government message regarding the moral education of children, it may not do so in a manner that imposes "a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). Such a disproportionate burden occurs when the government uses its control over a specific message i) to undermine "traditional political controls to ensure responsible government action," *Board of Regents of Univ. of Wis. System*, 529 U.S. at 229 or ii) to suppress "ideas thought inimical to the Government's own interest," *Legal Services Corp.*, 531 U.S. at ___, 121 S.Ct. at 1052 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983); *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

In the present case, if the State of Ohio is speaking, the very purpose of its message is to indoctrinate children in civic

virtues that serve as the foundation for the democratic deliberation skills used to consider the merit of policies or ideas advanced by state and local elected officials. By coercing families to send their children to tuition-free public schools, the State of Ohio increases the chances that the political views of its future citizens will be rooted in the State's moral education orthodoxy. Such coercion makes it less likely that Ohio officials will be "accountable to the electorate and the political process for its advocacy" of policies or ideas that, in previous generations, may have conflicted with the peaceful religious convictions of many citizens. *Board of Regents of Univ. of Wis. System*, 529 U.S. at 235.

Secondly, the State of Ohio may not use its subjective criteria to deny public education funds to parents on the grounds that their Christian viewpoints constitute "dangerous" ideas deserving of suppression. See *Speiser*, 357 U.S. at 519. To the contrary, recent data indicates that private schools are at least as capable as public schools of producing good citizens and that the provision of public funds to parents for the education of children at private schools may strengthen democratic values. Jay Greene, "Civic Values in Public and Private Schools," *Learning From School Choice*, Paul Peterson and Bryan Hassel (eds.), 83-84 (1998).

Ultimately, the compulsory nature of the Ohio public education forum dictates its classification as a public, not a nonpublic, forum. Parents have a natural duty to speak privately to their children about religious concepts, motives, and themes relating to moral behavior. By compelling school attendance between the ages of six and eighteen and exclusively funding public schools, the State of Ohio should not be permitted to convert private speech between parents and their children into government speech.

B. By Funding Only Religious Concepts, Motives, and Themes Taught in Public Schools, the State of Ohio Engages in Viewpoint Discrimination.

Although the character education and service learning programs taught at private religious schools fall within the limits of the public forum created for the moral education of children, the State of Ohio refuses to provide public funds for the viewpoints (i.e., religious concepts, motives, and themes) taught pursuant to such programs. This Court recently rejected this form of viewpoint discrimination. "What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the [after-school youth] Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Good News Club*, 533 U.S. at ___, 121 S.Ct. at 2102.

This Court has rejected the reasoning that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. It likewise has rejected the conclusion that relying on Christian principles "taints moral and character instruction in a way that other foundations for thought or viewpoints do not." *Id.*

Ohio parents who desire to secure a moral education for their children in accordance with the religious concepts, motives, and themes taught at private religious schools must pay private school tuition. This Court has determined "that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828 (citing *Simon & Schuster, Inc.*, 502 U.S. at 115). The financial burden of having to pay private school tuition for the privilege of opting-out of the moral education viewpoints funded by the State of Ohio coerces many parents into enrolling their children in public schools. This is especially

the case with respect to low-income families who do not have the financial means to make such tuition payments.

C. By Engaging in Impermissible Viewpoint Discrimination, the State of Ohio Compels Children to Subscribe to and Participate in Religious Concepts, Motives, and Themes in a Manner That Establishes a Civic Religion.

Unlike the voluntary nature of the educational decision confronting parents in the *Good News Club* case whether to enroll their children in after-school youth programs, Ohio parents are required by law to secure an adequate education, including a moral education, for their children. If this Court requires public school officials to provide equal access to prevent viewpoint discrimination as to *voluntary* decisions regarding after-school moral education, then Ohio public education funding must be structured in a way that does not discriminate against moral education decisions that parents are *compelled* to make under state law.

The Ohio General Assembly has a duty to encourage schools and the means of instruction in order to promote the religion, morality, and knowledge that is essential to good government. "However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

Thus, in *Wooley*, this Court determined that it was unconstitutional for the state of New Hampshire to require objecting citizens to participate in the dissemination of the ideological message "Live Free or Die" contained on non-commercial vehicle license plates. This Court refused to uphold "a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view that he finds unacceptable." *Id.* at 715.

Impressionable public schoolchildren are at great risk of being coerced into becoming a courier for a State ideology. "Perhaps no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943).

Thus, in *Barnette*, this Court ruled that it was unconstitutional for the State of West Virginia to require Jehovah Witnesses schoolchildren to participate in a brief ceremony at the start of each school day during which they pledged allegiance to the American flag. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

In several ways, the Ohio character education program is a step beyond *Wooley* and *Barnette* in its potential for compelling adherence by schoolchildren to a State ideology that is contrary to their religious viewpoints and right to self-determination.

First, unlike the passive participation by drivers in the ideological message in *Wooley* or the momentary pledge of allegiance by students in *Barnette*, students in Ohio public schools are required to actively participate throughout the school day in an ideologically-driven moral code. All notions of liberty and justice for all would be offended by an interpretation of our Constitution that would make it constitutional to indoctrinate students throughout a school day in the democratic values embodied by the very American flag to which school officials cannot force students to momentarily pledge allegiance.

Second, the religious concepts, motives, and themes contained in the Ohio character education program have been developed by curricular specialists, guidance counselors, and business leaders to maintain social control and to shape the attitudes of the next generation of workers. "But Man is not an insect. Nothing is more pathetic than the total and blind devotion of an ant to its ant-hill; and to us nothing could be more deplorable." Pierre Teilhard de Chardin, "The Grand Option" (1939) in Norman Denny (Trans.), *The Future of Man*, 40 (1964).

Lastly, the State of Ohio compels students and their families who cannot afford tuition at the private religious schools of their choice to participate in public school religious instruction, community service projects, and school-wide celebrations that resemble the activities of a full-fledged parish community or civic organization.

The Ohio public school monopoly over the moral education of children fulfills the prediction of Catholic philosopher Christopher Dawson:

> The new State will be universal and omnicompetent. It will mold the mind and guide the life of its citizens from the cradle to the grave. It will not tolerate any interference with its educational functions by any sectarian organization, even though the latter is based on religious convictions. And this is the more serious, since the introduction of psychology into education has made the schoolmaster a spiritual guide as well as a trainer of the mind. In fact it seems as though the school of the future must increasingly usurp the functions that the Church exercised in the past, and that the teaching profession will take the place of the clergy as the spiritual power of the future.

Christopher Dawson, *Religion and the Modern State*, 55 (1935).

By using taxpayer funds in support of religious character education in its public schools, the State of Ohio has right-

fully embraced its constitutional duty to encourage schools and means of instruction that will promote religion, morality, and knowledge. However, the unconstitutional establishment of a civic religion in Ohio cannot stand. "A claim that the coercive use of force in matters of opinion can be justified seems not only dangerous in itself, but a complete contradiction to the implications of the idea of the human person." Gabriel Marcel, *Men Against Humanity*, 181 (1952).

Every human person is faced with the original and eternal choice of whether to follow or reject God. The defining role of a democratic government is to protect and promote the right of its citizens to make that choice. A democratic government should not force children to choose God; nor should it force children to ignore God by compelling their education in values-free public schools; nor should it force children to replace God by compelling them to participate in a secular civic religion in public schools. "In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience." Vatican Council II, *Dignitatis Humanae*, (Declaration on Religious Freedom) § 3 (1965).

The State of Ohio must fund public education in a manner that equally respects all peaceful religious concepts, motives, and themes relating to the moral education of children, whether they are taught in public or private schools. "We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839 (citing *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 704 (1994) (SOUTER, J.); *Witters*, 474 U.S. at 487-488; *Mueller v. Allen*, 463 U.S. 388, 398-399 (1983); *Widmar v. Vincent*, 454 U.S. 263, 274-275 (1981)).

A neutral public education funding policy that extends benefits to parents regardless of whether they secure a moral education for their children in public or private schools will require a fundamental shift in the present allocation of public funds. Nevertheless, the State of Ohio "cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Rosenberger*, 515 U.S. at 835. It is incumbent on the State of Ohio "to ration or allocate the scarce resources on some acceptable neutral principle." *Id.*

The Program's voucher system is a constitutional means of allocating public education resources in a way that avoids penalizing private school parents for subscribing to moral education viewpoints that are no different in kind than those which comprise the civic religion taught in Ohio's public schools.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be reversed. This case should be remanded to the applicable federal trial court for a determination as to whether the State of Ohio has created a public forum for the teaching of religious concepts, motives, and themes relating to the moral education of children. If so, the lower trial court then should determine whether the eligibility for and amount of the scholarships offered under the Program should be expanded in order to prevent impermissible viewpoint discrimination and the establishment of a civic religion in Ohio public schools.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE STATE OF WISCONSIN IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. TRUE PRIVATE CHOICE PROGRAMS SUSTAIN PARENTAL CHOICE IN MATTERS OF EDUCATION AND DEMONSTRATE THE ROLE OF THE STATES AS LABORATORIES OF DEMOCRACY	3
II. MILWAUKEE'S EXPERIENCE DEMONSTRATES THE DANGER OF EVALUATING THE CONSTITUTIONALITY OF A PRIVATE EDUCATIONAL CHOICE PROGRAM BASED ON A STATISTICAL "SNAPSHOT"	5
A. Wisconsin Enacted The MPCP To Create Educational Opportunities For Low-Income Families—Not To Advance Religion	6
B. The MPCP Continues To Grow And Offer Real Educational Choices	10
C. The MPCP Is Only One Of A Broad Range Of Educational Opportunities Available To Low-Income Families In Milwaukee	13
D. The MPCP Benefits Participating Families And May Improve The Public Schools	14

TABLE OF CONTENTS—Continued

	Page
III. *SIMMONS-HARRIS* REPRESENTS A DEPARTURE FROM ESTABLISHMENT CLAUSE JURISPRUDENCE	18
A. Wholly-Neutral, Indirect-Aid Programs Do Not Violate The Establishment Clause	19
B. The Sixth Circuit Erred By Going Beyond The Plain Words Of The Ohio Statute	20
1. The Ohio Program is facially neutral and there is no evidence of a hidden intent to advance religion	22
2. It is of no constitutional significance that 96% of the students in the Cleveland Program attend religious schools	25
3. The Establishment Clause does not mandate any particular "decision matrix"	27
IV. THE EXCLUSION OF RELIGIOUS SCHOOLS WOULD RAISE SERIOUS QUESTIONS UNDER THE FREE EXERCISE CLAUSE	29
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page
Agostini v. Felton, 521 U.S. 203 (1997)	*passim*
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)	*passim*
Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	2, 18, 19
Davis v. Grover, 166 Wis. 2d 501, 480 N.W.2d 460 (1992)	7, 9, 11
Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990)	22
Fletcher v. Peck, 6 Cranch 87 (1810)	23
Good News Club v. Milford Central School Dist., __U.S.__, 121 S.Ct. 2093 (2001)	19, 30
Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602 (1998)	*passim*
Lemon v. Kurtzman, 403 U.S. 602 (1971)	19, 28
Meyer v. Nebraska, 262 U.S. 390 (1923)	*passim*
Mitchell v. Helms, 530 U.S. 793 (2000)	*passim*
Mueller v. Allen, 463 U.S. 388 (1983)	*passim*
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)	2, 4
Pierce v. The Society of The Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925)	1, 2, 3, 4
Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000)	*passim*
United States v. O'Brien, 391 U.S. 367 (1968)	23
Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986)	*passim*
Younger v. Harris, 401 U.S. 37 (1971)	4, 5
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993)	18, 29

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

	Page
Wis. Stat. §§118.165(1)	9
Wis. Stat. §118.167	9
Wis. Stat. §119.23	5
Wis. Stat. §119.23(2)(a)1-2	7
Wis. Stat. §119.23(2)(a)4	9
Wis. Stat. §119.23(2)(a)5	9
Wis. Stat. §119.23(2)(b)1	7
Wis. Stat. §119.23(4)	7
Wis. Stat. §119.23(7)(am)	9
Wis. Stat. §119.23(7)(b)	9
1975 Wis. Laws ch. 220	14
1989 Wis. Act 336	6
1989 Wis. Act 336 §228	9
1993 Wis. Act 16 §2296	13
1995 Wis. Act 27, §§4002-4009	7, 8, 9

OTHER AUTHORITIES

	Page
Alan J. Borsuk, *Choice Program Tops 10,000*, Milwaukee Journal-Sentinel (October 24, 2001)	14
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TABLE OF AUTHORITIES—Continued

	Page
Institute for the Transformation of Learning, *The Milwaukee Parental Choice Program: Non-Religious and Religious School Participation* (October 2001) *http://www.schoolchoiceinfo.org/servlets/SendArticle/144/mpcpschtypes.pdf*	12, 13
Daniel McGroarty, "School Choice Slandered," *Public Interest* (Fall 1994)	15
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Cecilia Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Quarterly Journal of Economics 553 (1998)	16
Wisconsin Department of Public Instruction, *Charter Schools in Wisconsin http://www.dpi.wi.us/dpi/dfm/sms/csindex.html*	13, 14
Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program Facts and Figures for 2001-2002 http://dpi.state.wi.us/dpi/dfm/sms/mpcfnf01.html*	10, 11

TABLE OF AUTHORITIES—Continued

	Page
Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program FAQ http://dpi.state.wi.us/dpi/dfm/sms/mpscfaq.html*	10
John F. Witte, "Achievement Effects of the Milwaukee Voucher Program," Paper presented at American Economics Association Annual Meeting (New Orleans, Jan. 1997)	16
John F. Witte, "Who Benefits from the Milwaukee Choice Program?" Fuller *et al.*, eds., *Who Chooses? Who Loses? Culture, Institutions and the Unequal Effects of School Choice* (New York: Teachers College Press 1996)	15

INTEREST OF AMICUS CURIAE [1]

Amicus State of Wisconsin implemented the Nation's first true private educational choice program in 1990 and then, in 1995, amended the program to include both religious and non-religious schools. Although *de jure* and *de facto* differences exist between the Milwaukee Parental Choice Program and the Ohio Pilot Project Scholarship Program, the constitutionality of such programs generally has been called into doubt by the Sixth Circuit's decision in *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000). Therefore, *Amicus* State of Wisconsin joins Petitioners in urging this Court to reverse the Sixth Circuit's decision in *Simmons-Harris*.

SUMMARY OF ARGUMENT

This Court long ago recognized both that education is a matter of "supreme importance" and that the child is not "the mere creature" of the State. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. The Society of The Sisters of The Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). In both *Meyer* and *Pierce*, this Court turned back State laws that, in purpose and effect, sought to restrict parental authority in matters of education. Now, more than 75 years later, Petitioner State of Ohio and *Amicus* State of Wisconsin are called upon to defend modest educational reforms which have, as their purpose and effect, the goal of providing low-income, predominately minority parents with educational choices. What this Court recognized as hostility to parental choice in education more than 75 years ago appears today not in the laws of Ohio and Wisconsin, but in the Sixth Circuit's decision in *Simmons-Harris v. Zelman*.

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[1] Pursuant to Supreme Court Rule 37.6, no person other than Counsel identified on the cover participated in authoring this brief. No entity other than the State of Wisconsin provided financial support for this brief. Further, the consent of the parties to the filing of this *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

It is one of the "happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting). The citizens of Ohio and Wisconsin have courageously chosen to experiment with educational reforms, of which private parental choice is one aspect, to bring hope and opportunity to millions of families. These reforms are not an expression of a state preference for religious instruction over non-religious instruction. Rather, consistent with the principles discussed in *Meyer* and *Pierce*, they seek to give parents the ability to decide what educational program works best—public, religious, non-religious, charter, etc.—for their children. Federalism requires that these modest educational experiments be given the chance to grow and develop.

Wisconsin's private choice program, the Milwaukee Parental Choice Program, although itself relatively new, provides a broader view of how a true private choice program works in reality, over time. That reality bears little resemblance to the assumptions found in *Simmons-Harris*. The Wisconsin experience is that private choice programs attract both religious and non-religious school participation, increase parental satisfaction, improve the educational performance of participating students, and may even spur educational reforms in the public schools. There is simply no empirical evidence from Wisconsin to support the Sixth Circuit's assumption that, in practice, private choice programs have the effect of endorsing religion or, more precisely, promoting religious education over non-religious education.

In addition to its unsupported factual assumptions, the Sixth Circuit's decision in *Simmons-Harris* cannot be squared with this Court's Establishment Clause jurisprudence. Relying solely on *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Sixth Circuit

ignored nearly all subsequent decisions of this Court which, if they can be summarized, teach that wholly neutral state programs that offer educational assistance to a class defined without reference to religion do not violate the Establishment Clause. *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 490-491 (1986)(Powell, J., concurring).

Finally, the proposed rule of constitutionality in *Simmons-Harris* raises serious concerns under the Free Exercise Clause. Under the Sixth Circuit's reasoning, if a facially-neutral program, for whatever reason, does not include some (unknown) percentage of non-religious participants, religious participants must be excluded. This converts the constitutional analysis from an inquiry into whether the *State* is favoring religion into a factual inquiry regarding the differing and ever-changing motivations of participating and non-participating *private* actors. Such a rule of constitutional law is fundamentally misdirected and would put courts in the impossible position—regardless of a statute's neutrality—of deciding which private actors to favor or disfavor.

ARGUMENT

I. TRUE PRIVATE CHOICE PROGRAMS SUSTAIN PARENTAL CHOICE IN MATTERS OF EDUCATION AND DEMONSTRATE THE ROLE OF THE STATES AS LABORATORIES OF DEMOCRACY.

This Court long ago recognized that the "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Two years later, in *Pierce v. The Society of The Sisters of The Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), this Court affirmed the "liberty of parents and

guardians to direct the upbringing and education of children under their control." 268 U.S. at 535-536. As stated therein:

> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations.

Id. at 536. These principles—the supreme importance of education and the centrality of parental authority—animate private educational choice programs. Private choice programs are not, as opponents claim, "attacks" on the public school system or "schemes" to funnel money to religious institutions. They are, rather, a re-affirmation of *Pierce*: parents are trusted to know what is best for their children.

Both *Meyer* and *Pierce* struck down State laws which, in their purpose and intent, imposed restrictions on parental choice in matters of education. Here, by contrast, Ohio wishes to expand parental educational choice for low-income families. Our federalist system encourages such experimentation. As Justice Brandeis wrote:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Of course, as Justice Black explained in *Younger v. Harris*, 401 U.S. 37 (1971), the ideal of federalism "does not mean blind deference" to the States. Rather, it means a "sensitivity to the legitimate interests of both State and National Governments." 401 U.S. at 44. And while the national government may be "anxious . . . to vindicate and protect federal rights and federal interests," it must do so in a way that "will not unduly interfere with the legitimate activities of

the States." *Id.* The creation of an educational program that provides low-income parents with the resources to carry out the "high duty" recognized in *Meyer* is a legitimate State activity.

Wisconsin, in keeping with its proud progressive tradition, established the Nation's first private educational choice program in 1990, and then expanded the program in 1995 to give low-income parents residing in the City of Milwaukee the option of sending their children to religious schools. Wisconsin's educational experiment, the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, was upheld by the Wisconsin Supreme Court in *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998), *cert. denied*, 525 U.S. 997 (1998). Ohio has now joined Wisconsin at the forefront of the Nation's efforts to resolve the educational crisis confronting millions of low-income and predominately minority children. These limited, modest and experimental programs, in keeping with the principles of our federalist system, must be given time to mature. To demonstrate the point, Wisconsin invites this Court to review the Wisconsin experiment as recounted below. The experience here in Wisconsin is that a maturing private educational choice program, within a larger context of educational reform, differs markedly from the "snapshot" assumptions about such programs made by the Sixth Circuit in *Simmons-Harris*.

II. MILWAUKEE'S EXPERIENCE DEMONSTRATES THE DANGER OF EVALUATING THE CONSTITUTIONALITY OF A PRIVATE EDUCATIONAL CHOICE PROGRAM BASED ON A STATISTICAL "SNAPSHOT."

Although it is itself relatively young, the Milwaukee Parental Choice Program ("MPCP") is the Nation's longest-running private educational choice program. Thus, much can be learned about how private choice programs operate, over time, by considering Milwaukee's experience.

Like the Cleveland program, the MPCP gives low-income parents in the City of Milwaukee access to a modest percentage of State education funds to give them the financial ability to enroll their children in whatever school, religious or non-religious, will best meet their needs. The development of the MPCP over the eleven years since it was first implemented shows how a private choice program can evolve and change over time. It further shows that, even when operating under the cloud of litigation, private choice programs can spur the development of educational reform and increase the number of options, including religious and non-religious schools, available to low-income families.

A. Wisconsin Enacted The MPCP To Create Educational Opportunities For Low-Income Families—Not To Advance Religion.

The Wisconsin Legislature enacted the original MPCP in 1989. *See* 1989 Wis. Act 336. The Legislature was responding to the dismal state of Milwaukee's public school system which, as in Cleveland, was plagued with problems. For example, in 1990, only 48% of the students who entered 9th grade at Milwaukee's public schools managed to graduate on time. (Appendix LL, Declaration of Dr. Howard Fuller [2] (hereinafter Fuller Decl.), ¶ 10, reproduced in the Joint Appendix ("JA") from 228a-236a.)

The MPCP was first implemented in the 1990-91 school year. As amended in 1993, the original MPCP permitted up to 1.5% of the student membership of the Milwaukee Public Schools ("MPS") to attend at no cost any private, non-religious school located in the City of Milwaukee, subject to

[2] Dr. Fuller served as the superintendent of Milwaukee Public Schools from June 1991 to June 1995. He is currently a Distinguished Professor of Education and the founder and Director of the Institute for the Transformation of Learning at Marquette University. (*See* Fuller Decl., ¶¶ 3 & 5, JA at 229a-230a.)

certain eligibility requirements. Wis. Stat. § 119.23(2)(b)1 (1993-94). Among the eligibility requirements were that the child be a student in kindergarten through twelfth grade and that the income of his or her family be less than 175% of the federal poverty level. *See id.* § 119.23(2)(a)1-2.

Under the original MPCP, the State provided funds directly to participating private schools. For each student attending a private school under the program, the State paid to each participating private school an amount equal to the state aid per student to which MPS would have been entitled under State aid distribution formulas. *See id.* at § 119.23(4).

The original MPCP was the subject of litigation, which included challenges under Wisconsin's Constitution, brought in June 1990 by opponents of the program. In *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992), however, the Wisconsin Supreme Court confirmed its legality, and participation in the program grew. *See* Table 1 at p.11, *infra*.

After seeing the benefits of five years of educational experimentation, the Wisconsin Legislature amended the original MPCP in several important ways. *See* 1995 Wis. Act 27, § 4002-4009.

First, the Legislature removed the limitation that participating private schools be "nonsectarian," thereby allowing religious schools to participate. *See* 1995 Wis. Act 27, § 4002. Second, the Legislature added a religious "opt-out" provision, which prohibits a religious school from requiring "a student attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the teacher or the private school's principal a written request that the pupil be exempt from such activities." *Id.* at § 4008e.

Third, the Legislature further expanded the program by increasing the percentage of MPS membership allowed to participate in the program to 15%, and repealing the

limitation in the original MPCP that no more than 65% of a private school's enrollment consist of program participants. *See id.* at § 4003.

Fourth, the Legislature amended the MPCP so that, rather than paying the aid directly to participating schools, the State paid each participating student's parent or guardian. *See id.* at § 4006m. Under the amended MPCP, the State "send[s] the check to the private school" chosen by the parent or guardian, and the parent or guardian then "restrictively endorse[s] the check for the use of the private school." *Id.*

Fifth, the amended MPCP placed an additional limitation on the amount the State would pay to each parent or guardian. Under the amended MPCP, the State pays the lesser of the MPS per student aid amount calculated under the state aid distribution formula, or the private school's "operating and debt service cost per pupil that is related to educational programming" as determined by the State. *See id.*

Finally, the 1995 amendments addressed the issue of government oversight of the program, scaling back the authority of the State Superintendent of Public Instruction. The Legislature deleted the requirement of the original MPCP that the State Superintendent conduct annual, detailed performance evaluations of each participating school and report the findings to the Legislature, and it eliminated the Superintendent's authority to conduct multiple financial and performance evaluation audits of the program. *See id.* at §§ 4007m & 4008m. Indeed, as noted by the Wisconsin Supreme Court, because the amendments reduced the State Superintendent's oversight authority, the amended MPCP withstood an excessive entanglement challenge: "The program does not involve the State in any way with the schools' governance, curriculum, or day-to-day affairs. The State's regulation of participating private schools, while designed to ensure that the program's educational purposes

are fulfilled, does not approach the level of constitutionally impermissible involvement." *Jackson*, 218 Wis. 2d at 875, 578 N.W.2d at 620, ¶ 51.

Nonetheless, under the amended MPCP, participating schools were required to follow State accounting standards and file an independent audit. *See* 1995 Wis. Act 27 § 4007r (current version at Wis. Stats. § 119.23(7)(am) (2001)). Further, the State Superintendent retained the authority to exclude from the program in the next school year any school that failed to meet standards regarding at least one of the four following performance measurements—pupil grade advancement, average attendance, academic progress, or parental involvement.[3] *See* 1989 Wis. Act 336 § 228 (codified as amended at Wis. Stat. § 119.23(7)(b) (2001)). Finally, private schools that participate must comply with the laws that apply to all Wisconsin private schools (including regulations regarding instruction, curriculum and attendance, *see* Wis. Stat. §§ 118.165(1) & 118.167 (2001)), with health and safety codes, *see id.* § 119.23(2)(a)5, and with federal civil rights laws barring discrimination based on race, color, or religion, *see id.* § 119.23(2)(a)4.

The Legislature intended its expansion of the program to take effect in the 1995-96 school year. *See Jackson*, 218 Wis. 2d at 849 n.3, 578 N.W.2d at 609 n.3, ¶ 11. However, in August 1995, lawsuits were filed by the Milwaukee Teachers' Education Association and others challenging the amended MPCP under the State and Federal Constitutions. *See id.* at 850, 578 N.W.2d at 609, ¶ 12. A state court enjoined implementation of the amended MPCP before the start of the

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[3] As the *Jackson* Court observed, another important source of accountability remained: "'Control is also fashioned with the [plan] in the form of parental choice . . . . If the private school does not meet the parents' expectations, the parents may remove the child from the school and go elsewhere.'" *Id.* at 899, 578 N.W.2d at 630, ¶ 100 (quoting *Davis*, 166 Wis. 2d at 544, 480 N.W.2d 460).

1995-96 school year. *See id.* at 849 n.3, 578 N.W.2d at 609 n.3, ¶ 11. After three years of litigation, the Wisconsin Supreme Court rejected both the State and Federal Constitutional challenges in *Jackson*, *supra*, and religious schools began participating in the MPCP in the 1998-99 school year.

Since the amendments in 1995, there have been few substantive changes to the MPCP. It remains targeted at children from low-income families: the limitation is still 175% of the federal poverty level, which, for the 2001-02 school year, represented $30,913 for a family of four. *See* Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program FAQ, at* http://dpi.state.wi.us/dpi/dfm/sms/mpscfaq.html. For the 2001-2002 school year, the value of an MPCP voucher was the lesser of $5,553 per pupil, or the school's audited per-pupil cost of education. *See* Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program Facts and Figures for 2001-2001, at* http://dpi.state.wi.us/dpi/dfm/sms/mpcfnf01.html. A maximum of roughly 15,500 students are allowed to participate in the MPCP. *See* Press Release, Wisconsin Department of Public Instruction, *113 Schools Register to Participate in Milwaukee Parental Choice Program for 2001-02* (June 11, 2001), *available at* http://www.dpi.state.wi.us/dpi/dfm/sms/pdf/mpc01pr.pdf. Parents of students participating in the MPCP retain the ability to have their children "opt out" of religious activities. Finally, schools remain accountable to the State through audits and performance evaluations, and they must comply with other state and federal laws.

B. The MPCP Continues To Grow And Offer Real Educational Choices.

As demonstrated by Table 1 below, since its inception in 1990, the MPCP has grown considerably, both in the number of participating schools and in the number of participating students.

Table 1.

MPCP Participation

	NUMBER OF PARTICIPATING SCHOOLS	NUMBER OF PARTICIPATING STUDENTS
1990-'91	7	341
1991-'92	6	521
1992-'93	11	608
1993-'94	12	733
1994-'95	12	802
1995-'96	17	1,454
1996-'97	20	1,657
1997-'98	23	1,545
1998-'99	86	6,088
1999-2000	93	8,049
2000-2001	103	9,638
2001-2002	113	10,739

Id.; see also Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program Facts and Figures for 2001-2002*, *supra*. This growth reflects not only the Legislature's expansion of the program and the program's increasing popularity among Milwaukee's parents and schoolchildren, but also the response of parents and schools to Wisconsin Supreme Court decisions in *Davis* (1992) and *Jackson* (1998). In the first school year after *Davis*, the number of pupils participating in the MPCP increased by 17% and the number of schools increased by 83%. Even more dramatically, from the 1997-98 school year to the 1998-99 school, the numbers of both students and schools in the MPCP quadrupled.

Furthermore (and to the extent the Sixth Circuit's concern in *Simmons-Harris* has any constitutional validity), over time there has been vigorous participation in the MPCP by non-religious schools. For example, in the 2001-02 school year, 34 non-religious schools participated in the MPCP, which was nearly five times the number that had participated in the first year. *See* Institute for the Transformation of Learning, *The Milwaukee Parental Choice Program: Non-Religious and Religious School Participation* (October 2001), *available at* http://www.schoolchoiceinfo.org/servlets/SendArticle/144/MPCPschtypes.pdf.[4] Of course, until the constitution-ality of the expanded MPCP was upheld in 1998 in *Jackson*, only non-religious schools could participate. Nonetheless, participation in the MPCP by non-religious schools has not decreased since religious schools were allowed to participate. As shown in Table 2 below, the mix of religious versus non-religious schools has remained stable:

Table 2.

Percentage of Schools Each Year

School Year	Non-religious	Religious
1998-99	32%	68%
1999-00	32%	68%
2000-2001	33%	67%
2001-2002	32%	68%

Id. Similarly, even after the inclusion of religious schools, substantial growth has continued in the number of students enrolled in non-religious schools: from 2,048 in 1998-99, to 2,618 in the 1999-2000 school year, to 3,219 in the 2000-01

[4] The few, slight discrepancies between the numbers reported by the State Superintendent and by the Institute for the Transformation of Learning ("ITL") are explained at the ITL's website. *See* Institute for the Transformation of Learning, *The Milwaukee Parental Choice Program: Non-Religious and Religious School Participation, supra.*

school year, to 3,582 in the current school year. *Id.* Today, approximately one-third of the students participating in the MPCP attend non-religious schools. *Id.*

As discussed below in Section III(B)(2), *Amicus* State of Wisconsin does not believe the relative percentages of non-religious/religious school participation is relevant to the constitutional question. However, assuming *arguendo,* that relative percentages are of relevance, the current Milwaukee breakdown (32% non-religious, 68% religious) would seem to foreclose the argument that the State of Wisconsin is endorsing religion. Moreover, it is inappropriate to consider private choice programs in isolation. Private choice programs are merely one of numerous educational experiments, and must be viewed in relation to the other choices available to low-income families.

C. The MPCP Is Only One Of A Broad Range Of Educational Opportunities Available To Low-Income Families In Milwaukee.

As in Cleveland, the range of non-religious schools choices includes not only the public schools and those non-religious schools that participate in the private choice program, but also "Charter Schools." Wisconsin's Charter Schools are similar to Cleveland's "Community Schools." Charter Schools are public, non-religious schools created by charters between a school's operator and the sponsoring school board or other chartering authority. *See* Wisconsin Department of Public Instruction, *Charter Schools in Wisconsin, available at* http://www.dpi.wi.us/dpi/dfm/sms/csindex.html. Wisconsin charter school law gives Charter Schools freedom from most State rules and regulations in exchange for greater accountability for results. The Wisconsin Legislature first authorized the establishment of Charter Schools in Wisconsin in 1993. *See* 1993 Wis. Act 16 § 2296. In Milwaukee, there are approximately 12 Charter Schools with approximately 3,300 students enrolled in them for the 2001-02 school

year. *See* Alan J. Borsuk, *Choice Program Tops 10,000*, Milwaukee Journal-Sentinel, October 24, 2001, at B1; *see also* Wisconsin Department of Public Instruction, *Charter Schools in Wisconsin*, *supra*.

In addition to Charter Schools, Milwaukee schoolchildren have options available to them under Wisconsin's "Chapter 220" program. In an effort to foster greater racial integration in Milwaukee-area public schools, in 1976, the Legislature provided that Milwaukee's minority children could attend public schools located in the suburban communities surrounding Milwaukee. 1975 Wis. Laws ch. 220. In the 1999-2000 school year, approximately 5,500 students from Milwaukee attended public schools in the 23 suburbs surrounding the city. *See* Public Policy Forum, *Interdistrict Chapter 220: Changing Goals and Perspectives* (February 2000), *available at* http://www.publicpolicyforum.org/josh/interdistrict220.pdf. This voluntary program provides another source of public school alternatives for parents and students.

In addition to the public schools, MPCP schools, Charter Schools, and the Chapter 220 program, further educational options available to Milwaukee parents and their children include specialty (or "magnet") schools and, for students who are considered to be at-risk, alternative schools (including private schools under contract with MPS). (Fuller Decl., ¶ 20, JA at 235a-236a.)

In light of such alternative schooling options, it would be inappropriate to draw conclusions about the "decision matrix" (*Simmons-Harris*, 234 F.3d at 960) available to Milwaukee parents without giving consideration to the larger context of educational reform. The same is true for Cleveland parents.

D. The MPCP Benefits Participating Families And May Improve The Public Schools.

Because it is the Nation's oldest private educational choice program, numerous studies have examined the MPCP, its participants, and its effect on Milwaukee public schools.

Although there is some disagreement among scholars as to specifics, there is a growing consensus that the MPCP works.

For example, studies have uniformly concluded that parents of MPCP students are much more satisfied with the education that their children are receiving than the parents of students at MPS schools. (Appendix P, Affidavit of Paul E. Peterson,[5] JA at 117a (hereinafter Peterson Affidavit) (citing John F. Witte, "Who Benefits from the Milwaukee Choice Program?," in Fuller, *et al.* eds., *Who Chooses? Who Loses? Culture, Institutions and the Unequal Effects of School Choice*, at *132* (New York: Teachers College Press, 1996), *see also* Fuller Decl., ¶ 9, JA at 231a.) A three-year evaluation of the MPCP's effects found that "'choice parents were more satisfied with choice schools than they had been with their prior public schools and more satisfied than [MPS] parents with their schools . . . . Attitudes were more positive on every item, with "discipline in the school" showing the greatest increase in satisfaction.'" (*Id.*)

Similarly, research by Partners Advancing Values in Education, a privately-funded scholarship program in Milwaukee, indicates that school choice substantially reduces student mobility, which measures the number of students who move from one school to another: in MPS, student mobility is about 30%, while only about 6% of MPCP parents move their children from one school to another. (Fuller Decl., ¶ 9, JA at 231a; *see also* Peterson Affidavit, JA at 113a (citing Daniel McGroarty, "School Choice Slandered," *Public Interest*, at 94-111 (Fall 1994)).) Research also shows that

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[5] Paul E. Peterson is the Henry Lee Shattuck Professor of Government and the Director of the Program on Education Policy and Governance at Harvard University. He is a former Director of the Governmental Studies program at the Brookings Institution, and the author or editor of several books and numerous articles about education reform, including school choice. *See* Peterson Affidavit, JA at 74a.

parents who exercise choice are not only more satisfied than public school parents, but they also become more involved in their children's education. (Fuller Decl., ¶ 9, JA at 231a.)

Furthermore, in a study responding to predictions of negative effects caused by the MPCP's expansion, one study showed that since the addition of religious schools, there has been greater racial integration in MPCP schools than in MPS. *See* Howard L. Fuller & George A. Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools*, at 1 (Institute for the Transformation of Learning, Current Education Issues No. 2000-02) (June 2000). This conclusion is consistent with the results of other studies that reinforced the basic thesis that "choice programs targeted at low-income families likely will increase integration." *Id.* at 8.

With regard to academic achievement, three separate studies have examined the impact of the MPCP on student learning. (Peterson Affidavit, JA at 107a.) One concluded that, after participating for three and four years in the MPCP, students achieved higher scores in both mathematics and reading than students who remained in public schools. (*Id.* (citing Greene, *et al.*, "School Choice in Milwaukee: A Randomized Experiment," *Learning From School Choice* (Brookings Institution Press, 1998)).) Another study found no differences in the reading or math scores of MPCP students and public school students. (Peterson Affidavit, JA at 107a (citing John F. Witte, "Achievement Effects of the Milwaukee Voucher Program," Paper presented at American Economics Association Annual Meeting (New Orleans, Jan. 1997), *remaining citations omitted*).) The third study found higher mathematics scores, but not in reading. (Peterson Affidavit, JA at 107a (citing Cecilia Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Quarterly Journal of Economics, 553-602 (1998)).) In sum, all studies have concluded that students in MPCP schools perform at least as well as those in public schools, and two of the three found

that the comprehension of mathematics by MPCP students was greater than that of MPS students. (Peterson Affidavit, JA at 108a.)

Finally, data from Milwaukee suggests that benefits from the MPCP inure to the children whose parents choose to continue their education in the public schools. For example, per pupil spending for students in Milwaukee's public schools has actually increased because students who left to participate in the MPCP took with them less than total per-pupil funding. (Fuller Decl., ¶ 16, JA at 233a-234a.) Similarly, in 1999, MPS took the following steps: 1) it sought to encourage parents of young children to attend public schools by promising in radio advertisements that MPS would hire private tutors if students were not able to read at grade level by third grade; and 2) it responded to long-standing requests for more new schools specializing in popular programs, such as Montessori. (Fuller Decl., ¶ 17, JA at 234a.) Moreover, a recent study of the effects of competition on public schools found that

> [o]verall, an evaluation of Milwaukee suggests that public schools have a strong, positive productivity response to competition from vouchers. The schools that faced the most potential competition from vouchers had the best productivity response. In fact, the schools that were most treated to competition had dramatic productivity improvements.

Caroline M. Hoxby, *School Choice and School Productivity*, at 40, Paper presented at National Bureau of Economic Research Conference on The Economics of School Choice (Feb. 23-24, 2001). Thus, there is strong reason to conclude that MPS schools may also improve because of the MPCP.

The growth and expansion of the Milwaukee private choice program shows a positive trend on many levels. In short, at this early stage of the educational experiment, a body of evidence has developed that tends to prove the theory behind parental choice in education. At the very least, there is

nothing in the Milwaukee experience to suggest that Milwaukee families have been presented with a "decision matrix [which] yields a limited and restricted palette" from which to choose. *See Simmons-Harris*, 234 F.3d at 960. Therefore, while Wisconsin rejects the Sixth Circuit's interpretation and application of Establishment Clause precedent—i.e., that a facially neutral statute can be rendered unconstitutional by the choices of non-governmental third parties—the Milwaukee experience is that private choice programs provide real choice and, therefore, real hope to low-income parents.

Amicus State of Wisconsin respectfully asserts that the foregoing discussion of the Milwaukee experience underscores two fundamental errors in *Simmons-Harris*. First, private choice programs cannot be judged apart from the larger context of other educational reforms. And second, it is inappropriate to decide the constitutionality of a private choice program by a statistical "snapshot" taken while the program is young and is operating under the cloud of litigation.

III. *SIMMONS-HARRIS* REPRESENTS A DEPARTURE FROM ESTABLISHMENT CLAUSE JURISPRUDENCE.

This case presents a First Amendment Establishment Clause question, reserved by this Court in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782-783, n.38 (1973), but directly answered in *Mueller v. Allen*, 463 U.S. 388 (1983), and seemingly re-answered by *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Mitchell v. Helms*, 530 U.S. 793 (2000). The issue here is whether the Ohio Pilot Project Scholarship Program is a "true private-choice program" and, therefore, permissible under this Court's Establishment Clause jurisprudence. *Mitchell*,

530 U.S. at 842 (O'Connor, J., concurring). Or whether, on the *sole* factual basis that 96% of the participating students *currently* attend religious schools, the "religious indoctrination that occurs in these schools could reasonably be attributed to" the State of Ohio. *Mitchell*, 530 U.S. at 809 (citing *Agostini*, 521 U.S. at 226).

Amicus State of Wisconsin respectfully asserts that the Ohio Pilot Project Scholarship Program—regardless of where parents have chosen (or will choose) to send their children—is a "true private-choice program" and, therefore, the Sixth Circuit's decision must be reversed.

A. Wholly-Neutral, Indirect-Aid Programs Do Not Violate The Establishment Clause.

What was reserved in *Nyquist* was "made clear" in *Mueller*:

> State programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries. *Mueller*, 463 U.S., at 398-399, 103 S.Ct., at 3068-69.

Witters, 474 U.S. at 490-491 (Powell, J., concurring).

The parties can be expected to thoroughly brief the development of this Court's Establishment Clause jurisprudence from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) through *Good News Club v. Milford Central School Dist.*, __U.S.__, 121 S.Ct. 2093 (2001). Therefore, *Amicus* State of Wisconsin will not present another discussion of *Agostini*'s refinement of the three-part test adopted in *Lemon*. *Agostini*, 521 U.S. at 232-234; *Mitchell*, 530 U.S. at 807-808. Nor is it necessary to examine the disagreement between the plurality and concurring opinions in *Mitchell*, *supra*. That disagreement, which relates to the relative value to be assigned to the "neutrality" factor in direct aid cases, need not be resolved in

this *indirect* aid case. Indirect aid programs, as Justice O'Connor explained in *Mitchell*, negate the inference that the State is advancing religion.

> [W]hen the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision.

530 U.S. at 842 (O'Connor, J., concurring)(emphasis in original). In short, the issue is whether a "reasonable observer" could infer "that the State itself is endorsing a religious practice or belief." 530 U.S. at 843 (O'Connor, J., concurring) (quoting *Witters*, 474 U.S. at 493). This view commands a clear majority of this Court. As the *Mitchell* plurality explained:

> the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.

530 U.S. at 809 (internal citations omitted). For this reason, whatever disagreements exist between the plurality and the concurring Justices in *Mitchell*, there is agreement on the principle that governs this case: wholly neutral, indirect aid programs do not violate the Establishment Clause.

B. The Sixth Circuit Erred By Going Beyond The Plain Words Of The Ohio Statute.

Turning then to *Simmons-Harris*, the Sixth Circuit's decision fails the "reasonable observer" test, both as to the law and the factual record before it.[6] With respect to the law,

[6] *Amicus* State of Wisconsin does not use the phrase "reasonable observer test" in any formal sense. Rather, the phrase captures what seems to be the touchstone of the inquiry in these cases.

Simmons-Harris suggests—although it stops short of actually saying it—that the Ohio Legislature had some hidden *intent* to create a private choice program in which only religious schools could (or would) participate. The Sixth Circuit's point of departure—to go beyond the words of the facially-neutral Ohio statute—is this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Another legal error, related to the first, was the Sixth Circuit's examination of and reliance upon the relative percentages of religious school participation (82%) and student matriculation at religious schools (96%). In doing so, the Sixth Circuit gave dispositive weight to an argument that was unambiguously rejected in *Mueller*, 463 U.S. at 401, *Witters*, 474 U.S. at 491 (Powell, J., concurring) and *Agostini*, 521 U.S. at 229-230.

Finally, as the basis for its holding that the Ohio voucher program "has the primary effect of advancing religion," the Sixth Circuit found that Cleveland parents were offered only "a limited and restricted palette" from which to choose. *Simmons-Harris*, 234 F.3d at 960.

But there is no factual support in the record for any of the Sixth Circuit's assumptions. For example, there is no evidence that a single non-religious school chose not to participate because the private choice program's tuition level is too low. *Simmons-Harris*, 234 F.3d at 959. Similarly, there is no evidence that a single participating (or non-participating, but eligible) family thinks that the private choice program offers a "limited and restricted palette." *Id.* 234 F.3d at 960. Although *Amicus* State of Wisconsin views them to have little importance to the Establishment Clause question, the Sixth Circuit's assumptions are in any event without evidentiary support.

Amicus State of Wisconsin will address each of these failings in turn.

1. *The Ohio Program is facially neutral and there is no evidence of a hidden intent to advance religion.*

Because the Ohio private educational choice program is, on its face, "wholly neutral in offering educational assistance to a class defined without reference to religion" (*Witters*, 474 U.S. at 490-491), the Sixth Circuit's Establishment Clause inquiry should have come to a swift conclusion. Instead, relying solely upon *Church of the Lukumi Babalu Aye*, *supra*, the Sixth Circuit went beyond the words of the statute to conclude that the private choice program lacks "neutrality" and "general applicability." *Church of the Lukumi Babalu Aye* is easily distinguishable.

In *Church of the Lukumi Babalu Aye*, this Court held that certain City of Hialeah ordinances prohibiting animal sacrifice were not "neutral" and were not of "general applicability" as required by *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). This Court found "subtle departures from neutrality" and "covert suppression of particular religious belief" as reflected by *both* the plain words of the ordinances and certain statements made by City Council members. *Id.* This Court explained that it "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* (internal quotations omitted).

In its examination of the plain words of the ordinances, this Court noted that the "pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander." *Id.* at 537. In other words, the ordinances function "to suppress Santeria religious worship." *Id.* at 540. In addition to the ordinances' plain words—which targeted only the Santeria religion—this Court examined the evidence of record on the question of "discriminatory object." *Id.* That evidence consisted of statements by residents, Council members, and City officials which further confirmed

"the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation." *Id.* at 542.[7]

Church of the Lukumi Babalu Aye is not relevant here. The Ohio private choice statute does not, on its face, advance religious over non-religious schools. Unlike *Church of the Lukumi Babalu Aye*, there is no facial "gerrymander." Rather, according to the Sixth Circuit, the private choice program allegedly, in practice, "discourages the participation by schools not funded by religious institutions[.]" *Simmons-Harris*, 234 F.3d at 959. And it does this, the Sixth Circuit reasons, because it costs more to educate children in non-religious (and public) schools than it does to educate them in religious schools. Further, and as if to suggest *both* facial non-neutrality and an improper motive by the Ohio legislature, the Sixth Circuit claims that private choice funding levels "'typically approximate[ ] the tuition level set by parochial schools [which] reflects subsidies from other sources.'" *Id.* (quoting Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999)). From this, the Sixth Circuit concludes that the Ohio private choice program "clearly has the impermissible effect of promoting sectarian education." *Simmons-Harris*, 234 F.3d at 959.

A fundamental flaw in the Sixth Circuit's "cost of tuition" comparison is its failure to consider the Cleveland public

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[7] In his concurrence, Justice Scalia convincingly argues that "motivation" is an elusive and inappropriate subject for inquiry in First Amendment cases. *Church of the Lukumi Babalu Aye*, 508 U.S. at 558 (citing *Fletcher v. Peck*, 6 Cranch 87, 130-131, (1810)(Marshall, C.J.); *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968)). Of course, in this case, the Sixth Circuit cited no evidence that the Ohio Legislature was motivated by a desire to "advance" religion or religious schools. The Sixth Circuit's assumptions also run afoul of this Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller*, 463 U.S. 394-95.

schools *themselves*. Undeniably, Cleveland's public schools provide a "public school" choice even if they are not, for whatever reason, currently serving the needs of Cleveland families. (Of course, students remaining in the Cleveland public schools can avail themselves of the program's special tutorial help.) In finding that the choices afforded participants in "this program" are "illusory," the Sixth Circuit found it significant that adjacent public school districts did not join "this program." *Id.* 234 F.3d at 959. The Sixth Circuit's deliberate focus on "this program" rather than *all* educational options available to Cleveland parents—including both Community Schools and the Cleveland public schools themselves—allowed it to conclude that the voucher program had the "effect of promoting sectarian education." *Id.* This case, however, is not about an examination of the choices that *currently and solely* exist in the private choice program. Rather, it is about whether the educational choices made available to low-income Cleveland families suggest that the State of Ohio has abandoned neutrality when it comes to religion. If one chooses, as the Sixth Circuit did, to look at this question as a comparison of funding levels, the clear answer is that Ohio is not promoting religious education.[8]

As the Sixth Circuit points out, the Cleveland public schools *themselves* are backed by $7,097 in public funding. Therefore, they certainly have the financial ability to compete against the participating religious schools and their presumed "subsidies from other sources." *Id.* The fact that the Cleveland public schools are failing is the *raison d'être* of the private choice program. It would be supremely ironic (and

[8] The experience in Wisconsin best demonstrates the need to consider the availability of the Cleveland public schools as a "choice" for parents. As discussed *infra* in Section II(D), there is data demonstrating that the Milwaukee public schools have improved as a result of the competitive pressures brought about by the MPCP. For this reason alone, the Sixth Circuit erred in refusing to consider the Cleveland public schools as part of the "decision matrix."

sad indeed) if this fact were used to defeat the constitutionality of the private choice program on the ground that the Cleveland public schools do not provide a "meaningful public school choice." When the State of Ohio allocates $7,097 per pupil for public schools in Cleveland, but only $2,250 for children to use at private religious and non-religious schools, no "reasonable observer" (*Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring)) can conclude that the State is "promoting sectarian schools." *Simmons-Harris*, 234 F.3d at 959.

In conclusion, aside from the voucher program's obvious facial neutrality—which the Sixth Circuit never clearly admits or denies—there is no evidence to suggest that the Ohio legislature's "object" was to advance religion or religious schools. Simply put, the tuition funding level established by the Ohio Legislature—which is equally available to religious and non-religious schools alike—is an insufficient basis upon which to conclude that the Ohio Legislature "gerrymandered" the voucher program to promote religion. Unlike *Church of the Lukumi Babalu Aye*, there is simply nothing "covert" or "subtle" lurking between the lines of the private choice statute to suggest that the Ohio legislature was motivated by a desire to promote religious education. For these reasons, the Sixth Circuit erred in going beyond the plain words of the Ohio statute.

2. *It is of no constitutional significance that 96% of the students in the Cleveland Program attend religious schools.*

As discussed above, the Sixth Circuit concluded that the private choice statute was "not neutral" because it allegedly discourages non-religious school participation. *Simmons-Harris*, 234 F.3d at 959. In support of this conclusion, the Sixth Circuit found it significant that 96% of the students in the Cleveland program attend religious schools. *Id.* This evidence was then used to support the conclusion that the

private choice program is unconstitutional because the "alleged choice . . . is illusory." *Id.* This precise argument was rejected in *Mueller*, *supra*.

In *Mueller*, an Establishment Clause challenge was lodged against a Minnesota statute that permitted taxpayers to deduct expenses incurred for the "tuition, textbooks and transportation of dependents attending elementary or secondary schools." *Mueller*, 463 U.S. at 391. After this Court found the statute to be facially neutral and equally available to private and public school families, the petitioners in *Mueller* claimed that a statistical analysis demonstrated that "96% of the children in private schools . . . attended religiously-affiliated institutions." Therefore, the petitioners argued, the statute in application "primarily benefits religious institutions." *Id.* at 400-01. This Court declined to resolve the statistical dispute.

> We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Id. 463 U.S. at 401.

Mueller could not have provided a clearer statement of the Establishment Clause principle that controls this case: a facially-neutral statute does not become unconstitutional, in practice, because of the decisions of private actors, viewed at a particular point in time. This rule was re-stated in *Witters*, 474 U.S. at 491, n.3 (Powell, J., concurring) and again in

Agostini, 521 U.S. at 229-230. Therefore, the Sixth Circuit should not have relied upon these percentages to conclude that the Ohio private choice program "clearly has the impermissible effect of promoting sectarian schools." *Simmons-Harris*, 234 F.3d at 959.[9]

3. *The Establishment Clause does not mandate any particular "decision matrix."*

In finding that the Ohio private choice program endorses religion in violation of the Establishment Clause, the Sixth Circuit reasoned that "[t]he absence of any meaningful public school choice from the decision matrix yields a limited and restricted palette for parents which is solely caused by state legislative structuring." *Simmons-Harris*, 234 F.3d at 960.[10] These assertions, presumably, provide the basis for the Sixth Circuit's conclusion that the Ohio private choice program does not *really* afford a "genuinely independent and private choice." *Witters*, 474 U.S. at 752. The Sixth Circuit's conclusions are subject to serious question.

First, religious and non-religious schools are subjected to identical treatment by the government. Notably, the Sixth Circuit offers no explanation for how the participating non-religious schools—which account for 18% of the program—are able to overcome this supposed "government limitation." But even assuming that some non-religious schools have declined to participate because of the low tuition level, that decision is not the *government's* decision, and there is no

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[9] Consistent with *Mueller*, the Wisconsin Supreme Court in a footnote in *Jackson* disposed of a similar attempt to give constitutional significance to the relative percentages of religious/non-religious school participation in the MPCP. *Jackson*, 218 Wis. 2d at 873, n.17, 578 N.W.2d at 619, n.17.

[10] As an aside, because the phrases "decision matrix," "restricted palette," and "meaningful public school choice" are unknown to First Amendment jurisprudence, their use ought to set off alarm bells.

evidence in the record to suggest that the State of Ohio chose the tuition amount for the purpose of limiting the participation of non-religious schools.[11]

Second, with respect to the alleged absence of "meaningful public school choice," the range of options available to public school students is set forth in Judge Ryan's dissent. *Simmons-Harris*, 234 F.3d at 968. As discussed above, the mere fact that adjacent school districts have not yet elected to participate in the voucher program does not leave the public school student without "public school" options. Such a student is free to remain in the public school if it is serving his or her needs. But even if these public school options were not optimal, it is not clear where the Sixth Circuit's objection would fit within First Amendment jurisprudence. The Sixth Circuit's rejection of the private choice program because it allegedly provides a "limited and restricted palette" is not supported by the record and, more importantly, not relevant to the Establishment Clause inquiry. *Id.* at 970-971.

Finally, the Sixth Circuit lost sight of the central Establishment Clause principle in school-aid cases: "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries." *Witters*, 474 U.S. at 490-491 (Powell, J., concurring). If a statute satisfies this inquiry on its face, the relative number or quality of participating schools should be irrelevant. Indeed, if it were otherwise, the constitutionality of private choice programs would depend on "annual

[11] Notably, as set forth in Section II(B), *infra*, the trend in Wisconsin demonstrates that, over time, the participation of non-religious schools has increased. This fact undercuts the Sixth Circuit's assumption about the inability of non-religious schools to compete.

reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401.

For all these reasons, the (allegedly) "limited and restricted palette" of the Ohio private choice program during the 1999-2000 school year is in the nature of an "annual report," and therefore of "little importance" to the Establishment Clause inquiry. *Mueller*, *supra*.

IV. THE EXCLUSION OF RELIGIOUS SCHOOLS WOULD RAISE SERIOUS QUESTIONS UNDER THE FREE EXERCISE CLAUSE.

In *Zobrest*, *supra*, this Court stated:

> We have never said that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.

Zobrest, 509 U.S. at 8 (quotation omitted). Here, the Sixth Circuit noted that the "mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects." *Simmons-Harris*, 234 F.3d at 949. But this "fact" is not relevant to the Establish-ment Clause inquiry.

In *Zobrest*, the parties stipulated that "the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe." *Id.* at 4, n.1. Notwithstanding that stipulation, this Court rejected the Establishment Clause challenge. As this Court explained in *Mitchell*, *supra*, "[i]t is well-established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." 530 U.S. at 828. As if to remove any doubt, this Court in *Mitchell* held:

> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and *other doctrines*

> *of this court* bar it. This doctrine, born of bigotry, should be buried now.

Mitchell, 530 U.S. at 829 (emphasis supplied). The "other doctrines of this court" include the Free Exercise Clause. *Id.* at 835, n.19. Under the Sixth Circuit's reasoning, participating *parents* who wish to send their children to religious schools would be denied the opportunity to do so merely because an allegedly insufficient number of non-religious schools (and neighboring public schools) have chosen (for whatever reason) not to participate in the private choice program.

Imagine if this principle were to be applied in this Court's free speech cases, such as *Good News v. Milford Central School*, *supra*. This Court would have to weigh the relative religious/non-religious content of the speech that occurred at Milford Central. So, for example, if the evidence showed that some percentage (greater than 50%?) of the groups meeting after hours were religious, the State might be found to be advancing religion. Under the Sixth Circuit's reasoning, speech by religious groups would have to be suppressed because, for whatever reason, non-religious groups chose not to take advantage of the forum.

In conclusion, the Sixth Circuit's rejection of participation in the Cleveland private educational choice program by religious schools—which only receive tuition payments if parents choose them—raises serious concerns under the Free Exercise Clause. Indeed, the Cleveland program's alleged Establishment Clause flaw pales in comparison to the Free Exercise Clause flaw in the Sixth Circuit's reasoning in *Simmons-Harris*.

CONCLUSION

For the foregoing reasons, *Amicus* State of Wisconsin respectfully requests that the judgment of the Sixth Circuit be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SENEL TAYLOR, JOHNNIETTA MCGRADY, CHRISTINE SUMA, ARKELE WINSTON, AND AMY HUDOCK,

&

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION,

&

HANNA PERKINS SCHOOL, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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AMICI CURIAE BRIEF FOR THE CENTER FOR EDUCATION REFORM, *et al.* IN SUPPORT OF PETITIONERS

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39 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

INTRODUCTION 7

ARGUMENT 14

I. FACTUAL AND SOCIAL CONTEXT IS CRUCIAL TO A DETERMINATION THAT THIS SCHOLARSHIP PROGRAM "ADVANCES RELIGION." 14

A. Plaintiffs in an Establishment Clause Case Bear the Burden of Proving Every Factual Element of Their Claim, But Failed To Do So 14

B. The Decisions Below are "Clearly Erroneous" as a Matter of Fact, and as a Matter of Law 17

II. THE EQUAL PROTECTION AND ESTABLISHMENT CLAUSES REQUIRE A FACTUAL INQUIRY BEFORE THIS REMEDIAL LEGISLATION IS INVALIDATED 25

A. The Decisions Below Inhibit Ohio's Ability to Meet Its Remedial Obligations Under Federal and State Constitutional Law 25

B. The Decisions Below Are Inconsistent with the Principle of Equal Protection of the Laws Embodied in the First and Fourteenth Amendments 29

CONCLUSION.....30

TABLE OF AUTHORITIES

CASES Page

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).....22

Agostini v. Felton, 521 U.S. 203 (1997).....7, 16, 30

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Board of Educ. of the Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994).....24, 29

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).....23

Bowen v. Kendrick, 487 U.S. 589 (1988).....7, 16, 23, 30

Brown v. Board of Educ., 347 U.S. 483 (1954).....6

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Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).....14

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Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093 (2001).....16, 23

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Lemon v. Kurtzman, 403 U.S. 602 (1971) 7, 14, 16, 30

Lynch v. Donnelly, 465 U.S. 668 (1984).....14

Malcom-Smith v. Goff, No. CV-342589, 1999 WL 961495 (Ohio App. Oct. 21, 1999) 10

McDaniel v. Paty, 435 U.S. 618 (1978).....30

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Reed v. Rhodes, 422 F. Supp. 708 (N.D. Ohio 1976).....8

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Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).....15

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Wright v. Rockefeller, 376 U.S. 52 (1964).....29

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 14

Zobrest v. Catalina Hills Sch. Dist., 509 U.S. 1 (1993).....24

CONSTITUTIONAL PROVISIONS

U.S. Const. art. VI.....30

U.S. Const. amend. I ..... *passim*

U.S. Const. amend XIV ..... *passim*

Ohio Const. art. V, §2 .....18, 25, 28

STATUTES

Ohio Rev. Code Ann. § 3313.98 (Anderson 2001) 13, 19

Ohio Rev. Code Ann. § 3313.978 (Anderson 2001) 12

Ohio Rev. Code Ann. § 3313.974-.979 (Anderson 2001) 20

Ohio Rev. Code Ann. § 3313.981 (Anderson 2001) 20

Ohio Rev. Code Ann. § 3317.012(A)(1) (Anderson 2001) 20

Ohio Rev. Code Ann. § 3317.03(I)(1) (Anderson 2001) 21

RULES

Fed. R. Civ. P. 56(c) 22

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Nos. 00-1779, 00-1751, 00-1777

In the Supreme Court of the United States

Senel Taylor, Johnnietta McGrady, Christine Suma, Arkele Winston, and Amy Hudock

&

Susan Tave Zelman, Superintendent of Public Instruction,

&

Hanna Perkins School, *et al.*,

Petitioners

v.

Doris Simmons-Harris, *et al.*,

Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

AMICI CURIAE BRIEF FOR THE CENTER FOR EDUCATION REFORM, *et al.* IN SUPPORT OF PETITIONERS[1]

INTERESTS OF AMICI CURIAE[2]

The Center for Education Reform ("CER") is a national, independent, non-profit advocacy organization founded in 1993 to advance substantive reforms in public

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[1] Pursuant to Supreme Court Rule 37.6, no person other than Counsel identified on the cover and the staff of The Center for Education Reform participated in authoring this brief. No entity other than amici and their counsel provided financial support for this brief.

[2] The consent of the parties to the filing of this *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

education. CER works with parents and teachers, community and civic groups, policymakers, grassroots leaders, and all other interested citizens to ensure that ideas critical to education reform are identified, understood and implemented. CER is an active broker in bridging policies and practices through coalition building and by working with diverse constituencies to implement reforms that improve access, accountability, and assessment, and that help restore education excellence and equity to America's public schools.

The American Legislative Exchange Council is the nation's largest bipartisan association of state legislators. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve individual liberty.

The Arizona School Choice Trust was founded on the philosophy that parents should have a choice in their children's education, and provides tuition grants for children from disadvantaged families to attend any private school in Arizona.

California Parents for Educational Choice, the Coalition for Parental Choice in Education (Massachusetts), the Education Excellence Coalition (Washington), Floridians for School Choice, the Illinois Coalition for Parental Choice, the Maine School Choice Coalition, and United New Yorkers for Choice in Education are non-profit, largely grassroots organizations dedicated to the right of parents to choose the best education for their children and to promoting meaningful school choice programs.

The Center for Equal Opportunity ("CEO") is a District of Columbia non-profit organization whose main purpose is to study issues concerning race and ethnicity.

CEO has participated actively in a wide variety of civil rights cases.

The Center for Public Justice is a national nonprofit organization that has been making the case for justice in the reform of educational governance and funding for nearly 25 years by advocating equal funding of all students in any licensed school, whether publicly governed or independent, secular or religious.

Children First: CEO Kansas is the state affiliate of the national Children First: CEO America scholarship program for underprivileged students. Their purpose is to assist in equalizing educational opportunities for low-income families by offering options normally denied to them because of cost.

Citizens for Educational Freedom (CEF) is a national, grassroots organization with its headquarters in Missouri. Founded in 1959, CEF is dedicated to supporting parents' rights to choose schools for their own children. **The Educational Freedom Foundation** is a charitable foundation affiliated with CEF and serves to educate the public about parental rights in education and school choice issues.

The Commonwealth Foundation of Pennsylvania is an independent, non-partisan, non-profit public policy organization committed to advocating policies that expand choice and opportunity in education, while also presenting innovations and ideas aimed at reinvigorating the current system and empowering parents and taxpayers.

Excellent Education for Everyone is a coalition of New Jersey citizens that works to enable public schools to better educate children by subjecting their schools to the competitive pressures of school choice, believing that competition will improve school performance, provide

accountability, and assure that all children receive a quality education.

"I Have A Dream" Foundation of Washington D.C. is a non-profit education foundation serving at-risk inner city youth. The Foundation supports school choice because it will provide a better education and a better chance for a bright, successful future for these youth.

The Hispanic Council for Reform and Educational Options is dedicated to improving educational outcomes for Hispanic children by empowering families to access all educational options and to be an agent for educational equity and quality.

Minnesota Business Partnership ('MBP") is a non-profit, non-partisan public policy organization whose members are leaders of 103 of Minnesota's largest companies. Since its founding in 1977, MBP's mission has been to develop and advocate public policy that strengthens Minnesota's economy and improves the quality of life. Improving the education system is a critical component of that mission.

The **Nevada Manufacturers Association** ("NMA") represents manufacturers in Nevada. The **Pennsylvania Manufacturers Association** ("PMA") represents manufacturers in Pennsylvania and other Midwestern and Mid-Atlantic states, including Ohio. **Associated Industries of Vermont** ("AIV") represents manufacturers and other businesses in Vermont. The NMA, PMA, and AIV have a long-term interest the development of a skilled, educated, and effective workforce.

The Texas Justice Foundation is a non-profit, public interest, litigation foundation that works in the area of education law and school choice, representing parents and their fundamental right to direct the upbringing and

education of their children, a right recognized by this Court since 1923.

The Toussaint Institute Fund helps minority parents find and access good schools for their children in the public and private sectors, and also works with communities to build better schools.

The Urban League of Miami is a non-profit organization dedicated to enabling Blacks to reach their potential and exercise their rights as human beings. Public education reform is a priority of the Urban League.

Beatrice D. Fowler of the Brevard County School Board (Florida) and **Kyle Persinger** of the Marion School Board (Indiana), representing themselves, are members of bodies charged with providing quality education for children at all socio-economic levels.

SUMMARY OF ARGUMENT

When the Ohio General Assembly first adopted the Cleveland Scholarship and Tutoring Grant Program ["the Scholarship Program"] in 1995, Cleveland's school children and their parents had been litigating desegregation and education reform issues for more than a generation.[3] See *Reed v. Rhodes*, 179 F.3d 453 (6th Cir. 1999). By the time the Scholarship Program was reenacted in 1997, it was clear that the effort to provide Cleveland's children with an adequate education untainted by racial discrimination had failed. Notwithstanding the good faith efforts of the District Court, the Ohio Supreme Court, the Ohio General

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[3] *Reed v. Rhodes* was filed in 1973. The Sixth Circuit approved the District Court's 1996 finding of unitary status with respect to student assignments in 1999. The Cleveland City School District complied with the last of its obligations under the consent decree on June 30, 2000. The litigation is chronicled in nearly forty published opinions in the federal courts, two opinions of the Ohio Supreme Court, and several opinions of the Ohio Court of Appeals.

Assembly, the State Board of Education, and the Mayor of Cleveland, the Ohio Department of Education rated the Cleveland City School District [CCSD] an "academic emergency."[4]

The Ohio Supreme Court recognized the relevance of these facts when it rejected Respondents' Establishment Clause challenge to the Scholarship Program. In its view, "[t]he General Assembly took extraordinary measures to attempt to alleviate an extraordinary situation." *Simmons-Harris v. Goff*, 711 N.E.2d 203, 214 (Ohio 1999). The Sixth Circuit, by contrast, explicitly refused to look at the legal and social context. Where the Ohio Supreme Court saw "a general program[, the] benefits [of which] are available irrespective of the type of alternative school the eligible students attend," *Goff*, 711 N.E.2d at 209, the Sixth Circuit saw a sham designed to provide State financing for religious schools. The actual design of Ohio's school financing program (of which the Scholarship Program is but a small part), the actual reasons why suburban districts do not accept inter-district Scholarship Program students, and the actual choices available to Cleveland's parents and children were, in its view, "*at best* irrelevant" to the Establishment Clause analysis. *Simmons-Harris v. Zelman*, 234 F. 3d 945, 958-959 (6th Cir. 2000) (emphasis added).

Amici submit that this Court's holdings under the Establishment, Due Process, and Equal Protection Clauses show that evidence outlining the purpose, operation, and effects of a specific education reform effort is just as essential to an inquiry under the Establishment Clause as it would be to a review of that reform under *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny.

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[4] *See* 2000 Ohio State Dep't of Educ. Cleveland City Sch. Dist. Rep., http://odevax.ode.state.oh.us/ lrc_www/99_Dist/043786.pdf, at 2.

Respondents produced no "evidence in [this] record that the [government] is in fact violating" the law. *Agostini v. Felton*, 521 U.S. 203, 228 (1997). They neither offered any proof that "the manner in which the statute is presently being administered" raises questions concerning the purpose and effect of the Cleveland Scholarship Program, *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988), nor did they demonstrate that the General Assembly's purpose was other than to take positive steps to remedy the present and future effects of racial discrimination by the Cleveland City School District [CCSD]. Based on appearances alone, the Sixth Circuit concluded that the Scholarship Program was not an *expansion* of the choices available to Cleveland's long-suffering parents and children the General Assembly intended, but rather a "government *limitation* of the available choices to overwhelmingly sectarian private schools." 234 F.3d at 960 (emphasis added).

An even-handed reading of the history and operation of the Cleveland Scholarship Program demonstrates that it is materially different in its purpose, genesis, design, operation, fiscal impact on parents and schools, and in its overall effect from the program struck down in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). Respondents have not even proved that the Scholarship Program "advances religion," *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), much less that advancement of religion is the Program's "principal or primary effect." The decision of the Sixth Circuit should be reversed.

INTRODUCTION

The background against which the State of Ohio enacted the Cleveland Scholarship and Tutoring Grant Program is unusual, if not unique. The Scholarship Program is the direct outcome of an intensely fought, politically bruising, and enormously expensive education

reform effort on the part of Cleveland's public school children and their parents. That effort began years before the plaintiffs in *Reed v. Rhodes* asked the federal courts to desegregate the system, and it is safe to predict that those efforts will continue in other fora until they are satisfied that the State of Ohio is providing both equal and adequate educational opportunities for *all* of its children.

The crisis in which the CCSD finds itself is the logical and inevitable outcome of policies and attitudes that divide communities by race, ethnicity, religion, and class, and that make the political compromises necessary to support far-reaching educational reform difficult if not impossible. *See, e.g., McGwinn v. Board of Ed. of Cleveland City Sch. Dist.*, 69 N.E.2d 391 (Ohio Com. Pl., 1945) (action by Cleveland taxpayers to prohibit free tuition for children residing on land owned by the federal government), *aff'd*, 69 N.E.2d 381 (Ohio 1946). Nearly ten years ago, Chief Judge Frank Battisti aptly summarized the situation in which the CCSD finds itself today:

> In *Reed v. Rhodes,* as in other things, a sense of history is necessary for any comprehension of the present and the future. … Despite judicial rulings, upheld on appeal, that the Defendants had engaged in clear and intentional racial segregation, for more than a decade they displayed a recalcitrance and hostility toward the laws of the land and the remedial orders of this Court that not only prevented progress in this case but also inflicted grievous wounds on the community as a whole. Of late, no one has been heard to assert that the schools are operated in a satisfactory manner; to put it another way, every voice laments the unsatisfactory condition of the school district. This is the challenge that the Defendants, state and local, must face.

Reed v. Rhodes, No. C73-1300, 1992 WL 80626 at *1 (N.D. Ohio, Apr. 2, 1992).

Structural Changes

The CCSD has tried virtually everything. The desegregation plan opened up school assignments, implemented non-discriminatory testing and tracking procedures, required significant efforts to improve reading scores, added magnet, charter, and vocational opportunities, upgraded and reorganized transportation, implemented stronger financial and management practices, desegregated teacher and professional staff assignments, and provided extra State funding. *See Reed v. Rhodes*, 934 F. Supp. 1533, 1551-52 (N.D. Ohio 1996). See also Scott Stephens, *School Board Unveils Steps to Curb Violence*, Cleveland Plain Dealer, Oct. 29, 1994, at 1B (noting that the School Board took steps to curb rising violence in Cleveland schools); Jeanne Allen, *The School Reform Handbook*, Ch. 7, p. 62 (Center for Education Reform, Washington, D.C. 1995) (http://www.edreform.com/handbook/srhch7.htm) (noting that the State of Ohio also introduced minimum standards tests for graduating high school seniors set at a level of ninth grade proficiency).

Funding

The Scholarship Program was not the only financing change affecting the funds available to the CCSD during this period. In 1997, the Ohio Supreme Court held that certain portions of Ohio's school funding formula were unconstitutional because the complaining "school districts were starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs, and that their pupils were being deprived of educational opportunity." *DeRolfe v. State*, 677 N.E.2d 733, 742 (Ohio 1997) (*DeRolfe I*), *reh'g and clarification*, 678 N.E.2d 886 (Ohio 1997), *clarification*, 699 N.E.2d 518 (Ohio 1998).

DeRolfe I succeeded in forcing major changes in the school funding program. Since 1997, the General Assembly has enacted numerous reforms in the funding system. Some of those revisions were challenged and held to violate the Ohio Constitution, *see DeRolfe v. State*, 728 N.E.2d 993 (Ohio 2000) (*DeRolfe II*). The legislature responded once again, and on September 6, 2001, the Ohio Supreme Court issued its final opinion in the matter, approving, with conditions, the General Assembly's most recent attempts to reform the State's school funding program. *DeRolfe v. State* (*DeRolfe* III), 754 N.E.2d 1184 (Ohio 2001).

By 1995, the political infighting caused by reform efforts caused the "total fiscal and administrative collapse" of the Cleveland School District. *Reed v. Rhodes*, 934 F.Supp. 1533, 1538-39 (App.A) (N.D. Ohio, 1996). As a last resort, the District Court ordered the State Board of Education and the State Superintendent to "assume immediate supervision and operational, fiscal and personnel management of the District." *Id.* at 1560. In August 1997, Governor Voinovich signed a bill specifically designed to change the composition of the Cleveland School Board by giving the Mayor a major role in the selection of its members, and to bring some orderly resolution to competing visions of education reform. See *Mixon v. State of Ohio*, 193 F.3d 389 (6th Cir. 1999) (upholding the plan); *Malcolm-Smith v. Goff*, No. CV-342589, 1999 WL 961495 (Ohio App., Oct. 21, 1999) (unpublished, same).

The Present State of the Cleveland City School District

"Because of the confluence of poverty, poor management, and low educational achievement," the CCSD is renowned as the country's greatest educational failure. Diane Ravitch, *School Reform, Past, Present, and Future*, 51 Case West. L. Rev. 187, 189 (2001). *See also* Beth Reinhard, *Cleveland: A Study in Crisis*, Education Week, Jan. 8, 1998, at 26. Conditions are so appalling, and the crisis has persisted for so long, that the Ohio Department of Education recently gave the Cleveland City School District "academic emergency" status.[5] The Ohio Supreme Court has recognized that "the Cleveland City School District is in a crisis related to the supervision order." *Simmons-Harris v. Goff*, 711 N.E.2d 203, 214 (Ohio 2000). This is tragic. Desegregation, properly understood, *is* education reform, and *Reed v. Rhodes* was an education reform case in every sense. It is impossible therefore to extract either *Reed*, or this case, from a social, political, and educational context where, after 25 years of litigation, only 20% of the ninth-graders in Cleveland passed the State's proficiency test, when 69% of their ninth-grade classmates can do so. *See 2000 Ohio State Dep't of Educ. Cleveland City Sch. Dist. Rep.*, http://ode000.ode.state.oh.us/ lrc_www/99_Dist/ 043786.pdf, at 2. At a social level, the indicators are even worse.

> [P]ublic schools in the Cleveland area are remarkably segregated. Most students attend schools that are almost all white or almost all minority and very few students attend schools that resemble the racial proportion in the whole community. Families wishing to attend a racially integrated school in the public system in Cleveland have very few opportunities to do so.

Appendix II, Jay P. Greene, Ph.D., *The Racial, Economic, and Religious Context of Parental Choice in Cleveland*

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[5] A rating of "academic emergency" applies to districts that meet eight or fewer of Ohio's twenty-seven performance standards. CCSD did not meet any of the standards during the 1998-1999 school year [score: 0/27], thus earning last place among all Ohio's school districts. *See* http://www.ode.state.oh.us/reportcard/RatingbyCD.pdf. In 1999-2000 CCSD met three standards, and remains an "academic emergency." *See* http://www.ode.state.oh.us/reportcard/ratings/ fy00_std_seq.htm.

(1999), reproduced in Joint Appendix (J.A.) at 213a [hereafter "Greene, *Context of Parental Choice*"].

Trying Innovative Solutions

Recognizing the intractable nature of these problems, Chief Judge Frank Battisti suggested in 1992 that the State of Ohio should be free "to think about innovative programs and undertakings, where such programs offer a realistic promise of eliminating remaining vestiges." *Reed v. Rhodes*, 1992 WL 80626, at *3. In response to this challenge, the Governor and the General Assembly adopted the Cleveland Scholarship and Tutoring Grant Program ("Scholarship Program"). Signed into law on June 29, 1995 by Governor George Voinovich, its goal was to provide funded options for poor students trapped in the Cleveland system.

With the adoption of the Scholarship Program in 1995, Cleveland's low-income families[6] had achieved one of their key educational goals.

> If a family wants to live in the Cleveland area and wants to send their children to a racially integrated school at public expense, they are more likely to do so by choosing a private school with a voucher than they are by attending a public school. Despite court orders and political pressure to improve integration in the public schools, the Cleveland Scholarship Program offers families a better opportunity for a racially integrated school experience.

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[6] Ohio Rev. Code Ann. §3313.978 [App. F, J.A. 33a] provides, in relevant part: "Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the scholarship amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the scholarship amount."

Greene, *Context of Parental Choice*, J.A. at 213a-214a.

They could make *real* choices in the interest of their children from among a range of available educational alternatives. Cleveland's low income school children now have the following choices:

- Remain in their neighborhood school;
- Transfer within the CCSD;
- Attend a magnet school within CCSD;
- Enroll in one of Ohio's charter "community" schools;
- Use the scholarship for supplemental services such as tutoring;
- Use the scholarship to pay a portion of private school tuition; or
- Enroll *at full public expense* in any public school district in the State that has agreed by resolution to admit them under Ohio Rev. Code Ann. § 3313.98.

In sum, the Scholarship Program at issue in this case was not enacted in a vacuum. The recognized failure of the CCSD and its resistance to judicial efforts to cure its defects are "social facts" that this Court cannot ignore. *Amici* respectfully submit that the Sixth Circuit erred when it held that they are irrelevant to an Establishment Clause analysis of the Scholarship Program.

ARGUMENT

I. FACTUAL AND SOCIAL CONTEXT IS CRUCIAL TO A DETERMINATION THAT THIS SCHOLARSHIP PROGRAM "ADVANCES RELIGION."

A. Plaintiffs in an Establishment Clause Case Bear the Burden of Proving Every Factual Element of Their Claim, But Failed To Do So.

Reference to factual context is crucial when State action is alleged to violate the Constitution. *See, e.g., Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2467 (2001) (O'Connor J., concurring) ("careful examination and weighing of all the relevant circumstances"). A thorough understanding of the immediate facts and social context is critical in Equal Protection cases, see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); in cases involving free speech, see *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); and in cases raising free exercise claims. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Amici* submit that context is equally critical in Establishment Clause cases. *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) ("communicat[ion of] an endorsement of religion" is "in large part a legal question to be answered on the basis of judicial interpretation of social facts.")(O'Connor, J., concurring).

Over the years since the Court synthesized its approach to Establishment Clause adjudication in *Lemon v. Kurtzman*, 403 U.S. at 612-613, there has been a good deal of confusion concerning the relationship between and among the fact-based inquiries it requires. The stark contrast between the approach of the Ohio Supreme Court in *Simmons-Harris v. Goff*, and that of the Sixth Circuit in this case is a textbook example of a profound disagreement

over the proper approach to fact-based claims and defenses arising under the Establishment Clause.[7]

Where, as here, plaintiffs challenge an education reform program utilizing *Lemon's* three-part test, plaintiffs must prove by a preponderance of the evidence:

> That the statute – taken as a whole and viewed in context – either has no secular legislative purpose, or that the alleged purpose of the statutory scheme at issue is a pretext for an otherwise unconstitutional attempt to advance or inhibit religion;
>
> That "the principal or primary effect of the statute" – read in the education reform and remedial context in which it was adopted and operates – "advances [or] inhibits religion" in a tangible or demonstrable way; or
>
> That the nature and degree of any "entanglement with religion" under the statute is "excessive" given the nature and purpose of the programs involved and the general regulatory context in which it operates.

See Edwards v. Aguillard, 482 U.S. 578, 595 (1987) (exploring facts and history). *Cf. Gillette v. United States*, 401 U.S. 437, 451-52 (1971) (challenger must show no legitimate purpose in absence direct evidence of sectarian motive). *See also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)

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[7] The disagreement is widespread. *Compare Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352, 359-61 (Vt. 1994) (fact-based inquiry); *Jackson v. Benson*, 578 N.W.2d 602, 617-19 (Wis.), *cert. denied*, 525 U.S. 997 (1998)(same); *Kotterman v. Killian*, 972 P.2d 606, 612-15 (Ariz.), *cert. denied*, 528 U.S. 921 (1999)(same) *with Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 133-35, 144-45 (Me.), *cert. denied*, 528 U.S. 947 (1999) (intent to discriminate found but no examination of factual context or justification); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999) (no analysis of a primary effect of "inhibiting religion")

("historical background" and "specific sequence of events" preceding enactment); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993)(specific intent).

All of this Court's Establishment Clause cases indicate that context is relevant. Since *Bowen v. Kendrick*, 487 U.S. 589 (1988), this Court has held that appearance or "risk" *alone* does not violate the Establishment Clause. *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 593 (2000); *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093 (2001). It makes no difference whether the analysis proceeds under *Lemon*, explores whether the "government intends to convey a message of endorsement or disapproval of religion," scrutinizes the government's actions for evidence of coercion, or utilizes neutrality as the touchstone of the analysis, it is impossible to find the ultimate "constitutional fact" – whether the government's action is intended to serve or hamper religion – without *some* evidence of intent and application.

Whether a specific program has a "purpose or primary effect that advances or inhibits religion" is an inherently fact-sensitive inquiry. Its truth or falsity necessarily turns on a variety of factors that will differ from case-to-case, such as curriculum content, teaching perspective, classroom demographics, the denominational affiliation of the children, their teachers and the institution, the behavior and good faith of teachers and administrators, cash flow, and the state's ability to recover funds spent for illegal purposes. Neither the Sixth Circuit nor the District Court addressed the relevance of *any* of these factors, even though they were clearly presented in the record. *See* Affidavits of Delories Jones, App. AA, and Cynthia L. Felden, App. BB in J.A. 186a-189a.

Because Respondents did not undertake to demonstrate *how* the Scholarship Program funds flowing to parents who

chose religiously affiliated schools *actually* "advance religion," Petitioners were entitled to summary judgment as a matter of law.

B. The Decisions Below are "Clearly Erroneous" as a Matter of Fact, and as a Matter of Law

Relying on a narrow reading of *Nyquist*, the District Court found that the primary *effect* of the Scholarship Program was to provide substantial benefits for religiously affiliated schools, notwithstanding undisputed evidence that the scholarship does not even come close to covering the cost of educating scholarship students. *See* Affidavit of Shelia Bolek ¶9, App. Z, J.A. 184a. In the District Court's view, 72 F.Supp.2d at 849, this purported effect was so substantial that it supported a finding that the "function" of the Scholarship Program – *i.e.* its *purpose* – was "to provide assistance to private schools, the great majority of which are sectarian."

No attention whatever is given in this analysis to the *raisons d'être* for the options first made available to Cleveland parents and children in 1995: an *existing* constitutional mandate to desegregate Cleveland's schools, the need to reform them in a manner that creates a unitary school system meeting the needs of the poor and underserved, and the titanic political struggles over Ohio's school finance program. For the Court of Appeals, the existence of "other options available to Cleveland parents such as the Community Schools is "at best irrelevant." 234 F.3d at 958.[8]

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[8] Other courts have taken an equally hostile attitude toward facts that this Court has held are clearly relevant in an Establishment Clause inquiry. In *Strout v. Albanese*, 178 F.3d at 64, the First Circuit professed to be "at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery" in a case where the State Legislature changed a neutral rule of general applicability into one that discriminates on the basis of religion. *Accord Bagley*, 728 A.2d at 133-35, 144-45 (finding that the statute

Amici submit that Circuit Judge Ryan was correct when he observed that both the majority and the District Court had misperceived the nature of both the factual and legal burden respondents were required to carry under the precedents of this Court. 234 F.3d at 963 (Ryan, J., dissenting) ("the majority has simply signed onto the familiar anti-voucher mantra that voucher programs are no more than a scheme to funnel public funds into religious schools."). The ruling below is tantamount to a bright line rule that a State may not provide aid to students to attend private schools, *regardless of its legislative intent*, whenever *some* significant percentage of the schools available are religiously affiliated.

The Ohio Supreme Court has held that "[w]hen a district falls short of the constitutional requirement that the system be thorough and efficient, it is the state's obligation to rectify it." *DeRolfe* I, 677 N.E.2d at 745. *See* Ohio Const. art. VI, §2. When the task is to remedy the past and present effects of *de jure* racial discrimination, the obligation is compelling under both State and federal law. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971); *Ritchey Produce Co., Inc. v. Ohio Dept. of Admin. Servs.*, 707 N.E.2d 871, 913 (Ohio 1999).

Ohio Provides Three *Funded Options Outside the Troubled Cleveland Public Schools.*

The Sixth Circuit refused to consider the legal and factual context of Ohio's school finance program because:

> [W]e would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship programs available to children who qualify for the school voucher program. We would

singled out *only* religious schools for adverse treatment without considering whether intentional discrimination on the basis of religion or religious viewpoint has "a purpose or primary effect that … *inhibits* religion").

> be considering and comparing every available option for Cleveland children.

234 F.3d at 958. *Amici* respectfully submit that, to the extent education reforms are a "necessary and proper" means of compliance with the Equal Protection Clause, the court was required to consider the three funded options to parents and children who seek education outside the troubled Cleveland public schools:

Community Schools are publicly funded, independent schools, operated through a contract with a sponsoring agency. They are known as charter schools around the country, but community schools in Ohio are "chartered *public* schools."[9]

Statewide Open Enrollment. The second funded option for Cleveland's children is the statewide open-enrollment program created by Ohio Rev. Code Ann. §3313.98. It permits *fully funded* inter-district transfers to public school districts that permit them. *See Equal Open Enrollment Association v. Board of Educ. of the Akron City Sch. Dist.*, 937 F. Supp. 700 (N.D. Ohio, 1996) (enjoining operation of school district policy prohibiting white students from transferring to adjacent school districts under Ohio open-enrollment law). To date, the CCSD itself permits a limited number of students from outside district limits to attend, *and receives full state support for each of them*. For reasons of their own, most of Cleveland's suburban districts do not accept any inter-district transfers at this time,[10] Their schools are open only to residents.

[9] Payments to Community Schools are detailed at https://www.edohio.org/school_options/default.asp. See also http://www.ode.state.oh.us/oso/options/commschools/generalinterest/faq.htm (basic questions and answers about the program).

[10] On October 23, 2001, staff at the Center for Education Reform called the following districts surrounding Cleveland: Brooklyn, Shaker Heights, Cleveland Heights/University Heights, Parma, Lakewood,

The State of Ohio provides $5,137.50 for each student enrolled in a public school in Cuyahoga County.[11] Were a student from Cleveland to enroll in a suburban district within the county under the open-enrollment option, state funding at the county rate would follow her.[12]

The Cleveland Scholarship and Tutoring Grant Program. Created by Ohio Rev. Code Ann. §§ 3313.974 through 3313.979, the Scholarship Program provides limited tuition at public or private schools willing to

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Euclid, Rocky River, East Cleveland, and Cuyahoga Heights. Each district was asked two questions. First, each district was asked if it allows students within its district to transfer to other schools within the district, i.e. intra-district transfers. All the above districts where there is more than one school per grade grouping permits intra-district transfers. Only the Brooklyn, Rocky River and Cuyahoga Heights districts do not permit intra-district transfers because each district only has one school per grade grouping. However, even those which allow intra-district transfers have limitations such as the Shaker Heights district which allows such transfers only "with permission." Second, each district was asked if it accepts students from outside the district, i.e. inter-district transfers. None of these districts accepts students from outside their respective district.

[11] Under Ohio law, if a student were to select an inter-district transfer, the amount of funding payable to the receiving district is the "adjusted formula amount for the district." Ohio Rev. Code Ann. § 3313.981. For the 2001-02 school year, the formula amount is $4,814 per student, which is the amount the State has determined to be the base cost of an adequate education. *See* Ohio Rev. Code Ann. § 3317.012(A)(1). The formula amount is then multiplied by a cost-of-doing-business factor (CODBF), depending upon the county where the receiving district is located. For Cuyahoga County, the CODBF is 1.0672 (also defined by statute), resulting in an adjusted formula amount for this school year of $5,137.50.

[12] For tangible examples of the program "in operation," *see* http://www.ode.state.oh.us/sf/foundation/WWW-SF3-HEADER-FY2002.HTML. To process the request, select 5-Oct-2001 in the first pull-down box, the appropriate specific school district that accepts open enrollment students (*e.g.*, Akron City School District), and check Line 22D "open enrollment." When "process" is pressed, the system will generate *current* open-enrollment financial information.

participate. A suburban school district that agrees to take out-of-district students under the Scholarship Program is compensated by the State in accordance with the formula set out in Ohio Rev. Code Ann. § 3317.03(I)(1). The receiving district thus gets the scholarship, *and* counts the scholarship student as a part of its "Average Daily Membership" (ADM) for purposes of state reimbursement.

The Sixth Circuit, by contrast, believed that the scholarship amount was the *only* payment the State would make to a suburban district. The majority opinion states: "At a *maximum* of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program." 234 F.3d at 959. The facts, however, are to the contrary. The amount of the scholarship is *added* to the base payment available to the student under the State's foundation formula. Thus, the reason that "there are no spaces available for children who wish to attend a suburban public school in place of a private school under the program," *id.*, is not tied to school finance at all. *The suburban schools are open only to their residents*. The Sixth Circuit's conclusion that the financial structure "clearly has the impermissible effect of promoting sectarian schools", *id.*, is plain error.

Respondents Did Not Prove That Any Portion of the State's Payments Under the Scholarship Program Supports Religious Activities or Teaching.

The District Court held, correctly, that while the Scholarship Program serves an important secular goal, this fact alone "d[id] not obviate th[e] court's duty to further question whether the Program also has the direct and immediate effect of advancing religion." 72 F. Supp. 2d at 848. From that point forward, however, it studiously ignored the constitutional significance of undisputed facts concerning the Program's *actual* operations. It presumed – on largely doctrinal grounds that did not permit rebuttal,

that the relevant constitutional fact – that the Cleveland Scholarship Program "advanced religion" – had been proved.

The District Court did not, for example, question the fact that "educating [public school scholarship] students with such needs costs the [receiving private] schools more than the payment they receive." 72 F. Supp. 2d at 849. Assuming, as we must under Rule 56 of the Federal Rules of Civil Procedure, that the court must view the evidence in a light most favorable to the non-moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n*, 909 F.2d 941, 943-44 (6th Cir. 1990), the "most favorable" conclusion that can be drawn from this undisputed fact is that when private schools accept scholarship students at rates below their normal cost of attendance, *there is no subsidy to the school*. The subsidy – in the form of a below-cost "tuition discount"– *runs in favor of the State*. The Cleveland Public Schools are subsidized as well, in that none of the costs associated with students in the Scholarship Program who choose to attend a private school are borne by the CCSD.

Rule 56(c) states plainly that summary judgment is inappropriate unless there is "*no* genuine issue as to *any* material fact" (emphasis added). But there were many such disputes in the case at bar, including one implicit in the District Court's formulation of one of the key "constitutional fact issues": whether the Scholarship Program "benefits the participating schools *in such a way as to impermissibly foster* religion." 72 F. Supp. 2d at 849 (emphasis added). Given those disputes, it should have been incumbent on the Respondents to prove, by a preponderance of the evidence, the *precise ways* in which the Scholarship Program "has the direct and immediate effect of advancing religion." 72 F. Supp. 2d at 848 (citing *Nyquist*, 413 U.S. at 783 n.39). Because they did not do so

– and did not rebut the evidence presented by the Petitioners – summary judgment for the Petitioners should have been granted.

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), this Court held that an Establishment Clause challenge is no different in kind from any other claim arising under the incorporated First Amendment. The duty of the District Court is to

> consider[] ... the evidence presented by [the parties] insofar as it sheds light on the manner in which the statute is presently being administered. It is the latter inquiry to which the court must direct itself on remand.... As our previous discussion has indicated, and as *Tilton, Hunt,* and *Roemer* make clear, it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is "religiously inspired."

487 U.S. at 621. *See, e.g., United States v. Playboy Entertainment, Inc.*, 120 S. Ct. 1878, 1891 (2000) (noting that the government had failed to make its case on the facts); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (appellate review of facts to decide whether petitioner's activity was protected speech); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (plaintiffs in both public- and private-figure cases concerning matters of public concern bear the burden of proof on the issue of falsity); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984) (requiring "independent appellate review" of factual determinations that a libel defendant acted with actual malice). *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).

Since *Kendrick*, this Court has consistently affirmed the importance of constitutional fact-finding in Establishment Clause litigation. *Good News Club*, 121 S.

Ct. 2093; *Mitchell v. Helms*, 530 U.S. 593; *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger*, 515 U.S. 819 (1995); *Capitol Square Review*, 515 U.S. 753; *Board of Educ. of the Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Zobrest v. Catalina Hills Sch. Dist.*, 509 U.S. 1 (1993). In the case at bar, however, the District Court and Court of Appeals treated an essentially fact-based inquiry under the Establishment Clause as one of doctrine, even though the parents and children who signed affidavits in support of the Scholarship Program view their choices as *real*, not "illusory." [App. CC and DD, J.A. at 190a-194a].

> Programs like [the Cleveland Scholarship Program] only modify or regulate the existing choice environment. And the kinds of choices exercised with a voucher have to be viewed in the context of all of the other choices provided.

Greene, *Context of Parental Choice in Cleveland*, App. II, J.A. at 217a-218a.[13]

Allowing the federal courts to strike down voucher programs in their infancy simply because a majority of students taking the cash option have chosen to attend religious schools will ensure that virtually no voucher program will survive long enough so that its *educational* effects can be measured – a result that is unsound as a matter of policy, as well as constitutionally incorrect. Interview with Caroline M. Hoxby, *Battle Over School Choice: Competition, School Choice & Charter Schools*, PBS Frontline (May 23, 2000)[hereinafter, Hoxby Interview] (arguing that voucher programs need time to

[13] Given the range of funded options available under Ohio law, the percentage of student enrolled in religious schools drops dramatically when the number of students enrolled in each is factored into the equation.: scholarship only (96.6%); community (62.1%)); magnet (16.5%); neighborhood (3.2%). *Id.*

take hold before new secular private schools are built to meet rising demand); Policy Note, *Private School Competition Raises Salaries of Public School Teachers*, Buckeye Inst. for Public Policy Solutions (Dec. 1988, http://www.buckeyeinstitute.org/policy/1998_12.htm (discussing Richard Vedder and Joshua Hall, *Private Schools and Public School Teacher Salaries*, Ohio University (Feb. 1999).

Because the decisions below eschew fact-finding in Establishment Clause challenges to education reform initiatives, this Court should reverse.

II. THE EQUAL PROTECTION AND ESTABLISHMENT CLAUSES REQUIRE A FACTUAL INQUIRY BEFORE THIS REMEDIAL LEGISLATION IS INVALIDATED

A. The Decisions Below Inhibit Ohio's Ability to Meet Its Remedial Obligations Under Federal and State Constitutional Law.

The Scholarship Program is an important element of the Ohio's decades-long effort to rectify the past and present effects of racial segregation in Cleveland's schools. It is also an innovative attempt by the State to utilize the private education market to help satisfy its obligation under State constitutional law to provide an adequate educational program for all of Cleveland's children. *See* Ohio Const. art. VI § 2; *Simmons-Harris v. Goff*; *DeRolfe I*. As the Ohio Supreme Court observed in *Ritchey Produce Co.*, 707 N.E.2d 871 at 913 (citations omitted), these interests are "compelling," both legally *and morally*:

> There is no question that a state has a compelling interest in remedying the past and present effects of identified racial discrimination within its

> jurisdiction where the state itself was involved in the discriminatory practices. ...In addition to the foregoing legal authorities, it is also, from our perspective, the truly right thing to do.

The Ohio General Assembly "took extraordinary measures to attempt to alleviate an extraordinary situation" when it adopted the Scholarship Program, *Simmons-Harris v. Goff*, 711 N.E.2d at 214, because the CCSD had consistently failed to provide an adequate education for its minority students. Whether considered from an equal protection or an education reform perspective, the State's responsibility to ensure a quality education for all of Cleveland's children is far from being discharged. By foreclosing funded school choice as an option as long as religiously affiliated schools can participate, the courts below have made it significantly more difficult for the State to meet its legal obligations under federal and state constitutional law.

The State's need to enact reforms as a means of compliance with the Equal Protection Clause in a school desegregation context is clearly relevant to a challenge to those reforms under the Establishment Clause. There was really no dispute in the court below that the "principal purpose" of the Scholarship Program is to further the remedial goals set by the court and accepted by the State of Ohio in *Reed v. Rhodes*. Nor could there be. Respondents produced no evidence to that effect.

Statistical studies have shown that voucher programs can be an important tool for achieving racial desegregation in education. A General Accounting Office report showed that students in Cleveland public schools were more racially isolated than the students who are using the Scholarship Program to attend private schools. *See* General Accounting Office, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee*, at 21 (Aug. 31,

2001). In a unique district like Cleveland, which has had racially segregated schools for virtually its entire existence, the Scholarship Program provides an important tool to alleviate the appalling social schism between students of different races, economic means, religions, and ethnic origin. Respondents did not adduce any evidence to *disprove* the utility of scholarships, nor did they make any attempt to prove that the Scholarship Program was really a pretext for supporting religiously affiliated schools. Nor could they: the evidence in the record is to the contrary.

Dr. Greene's study underscores the importance of funded school choice programs that include private schools. Funded school choice is a tool designed to foster the common good. It is not now, nor has it ever been, a nefarious plot either to destroy the public schools or provide money to religious causes. *Accord Goff*, 711 N.E.2d at 212. Its goal is to help children and parents choose the school that best meets their needs.

The only question before this Court is whether the "principal or primary effect" of the Scholarship Program "advances religion" because Cleveland's children and their parents have chosen to attend the only schools that are *currently* able to meet the demand for alternative nonpublic schools. The State of Ohio did not create the current private education market in Cleveland, and cannot be held responsible because the private commercial and nonprofit sectors have not, as yet, rushed in to create secular private schools. As one scholar has explained:

> It so happens that most of the existing private schools that are very inexpensive are parochial private schools in the United States.... Right now we have small, essentially experimental school choice programs.... But, if we were to have a school voucher policy that was more universal or more general, and if the size of the voucher were to be

> somewhat larger ... even if it were only 2/3 of per pupil spending in the United States, it would still be high enough so that what we would get would be private schools that were created to take students who have vouchers.

Hoxby Interview, *supra*. School choice programs need time to take hold before new secular private schools are built to meet rising demand. Once there is some degree of legal certainty that the Scholarship Program will continue to exist, the number of seats in secular schools will likely grow. "If we were to have ... universal vouchers, most of the [new] private schools that would come into existence would not be religious private schools." *Id.* Respondents did not produce any evidence to show either that the State was responsible for the choices these parents and children have made, or that it created the market in which those choices must be made. Without such evidence, it is impossible to prove that the State of Ohio *intended* to influence or limit the range of choices available.

In fact, the available evidence in the record demonstrates that the State of Ohio is attempting to *create* a diversified private-public marketplace for educational services throughout the State. It has created a framework for parental choice that includes tutoring, community (charter) schools, magnets, partial tuition scholarships, and *fully funded* inter-district open enrollment. Given time, stability, and enough demand, a diversified market will develop, and the State of Ohio will remain obligated under its own constitution to provide "a thorough and efficient system of common schools throughout the State." Ohio. Const. art. IV § 2.

Because the decisions below completely foreclose the use of school choice programs in any jurisdiction where the majority of the private schools are religious at the time the program is created, and because this result unreasonably

interferes with the State's ability to meet its remedial obligations to its students under the United States and Ohio Constitutions, the decision below should be reversed.

B. The Decisions Below are Inconsistent with the Principle of Equal Protection of the Laws Embodied in the First and Fourteenth Amendments.

The Establishment and Equal Protection Clauses are distinct affirmations of the principles of equal citizenship and equal protection.

> [T]he Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.

Kiryas Joel, 512 U.S. at 728-729 (Kennedy, J., concurring); *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting) (quoted in *Shaw v. Reno*, 509 U.S. 630, 648-49 (1993)).

The presumption that the constitutionality of a social welfare program is determined by reference to the percentage of religious groups participating, 234 F.3d at 959, is flatly contradicted by decisions of this Court. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 398-99 (1983); *Mitchell v. Helms*, 530 U.S. at 842 (O'Connor, J., concurring).. Respondents must produce evidence demonstrating *how* the Scholarship Program "advances religion." *See Washington v. Davis*, 426 U.S. 229 (1976). A presumption that religiously affiliated schools cannot participate *because they are religious* is discriminatory on its face.

The courts below rested their conclusions as to the constitutional fact on the basis of inappropriate "conclusive" presumptions about the willingness or ability of religiously affiliated schools and teachers to comply with the law. This Court rejected such reasoning in *Lemon*, 403 U.S. at 606-607. Unless plaintiffs in Establishment Clause cases are compelled to adduce evidence of either misconduct or inability to comply with the rules, see *Kendrick*, *Agostini*, and *Mitchell*, the result will be judicially mandated intentional discrimination on the basis of religion *without regard to the actual intent or conduct of the State*. This is a result that violates the First and the Fourteenth Amendments. *See McDaniel v. Paty*, 435 U.S. 618 (1978). *Cf.* U.S. Const. art. VI (No Religious Test Clause, forbiding religious discrimination as a qualification for a public trust, such as the expenditure of scholarship money earmarked for secular education programs only). *See* Michael S. Ariens & Robert A. Destro, *Religious Liberty in a Pluralistic Society* (Carolina Academic Press 1996) 666-70.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the judgment of the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF OHIO, ET AL., *Petitioners*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

HANNA PERKINS SCHOOL, ET AL., *Petitioners*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

SENEL TAYLOR, ET AL., *Petitioners*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR NEW MEXICO GOVERNOR GARY E. JOHNSON AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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37pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. FAILING PUBLIC SCHOOLS ARE AMONG THE MOST SERIOUS PROBLEMS FACING THE STATES 3

II. SCHOOL CHOICE HOLDS GREAT PROMISE BECAUSE IT WILL ALLOW COMPETITION TO PERFORM THE SAME FUNCTION IN EDUCATION AS IN THE ECONOMY AS A WHOLE 7

III. THE PRIMARY EFFECT OF THE CLEVELAND PROGRAM IS THE ADVANCEMENT OF CHILDREN'S EDUCATION, NOT THE ADVANCEMENT OF RELIGION 11

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: Page:

Agostini v. Felton,
521 U.S. 203 (1997) 13, 21

Brown v. Board of Ed. of Topeka,
347 U.S.483 (1954) 4

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980) 7

Capitol Square Review and Advisory Bd. v. Pinette,
515 U.S. 753 (1995) 16, 17

Committee for Public Education and Religious Liberty v. Nyquist,
413 U.S. 756 (1973) 11, 18

DeRolph v. State,
89 Ohio St. 3d 1, 728 N.E.2d 993 (2000) 4

Felton v. Secretary,
739 F.2d 48 (2d Cir. 1984) 14

Good News Club v. Milford Central School,
121 S. Ct. 2093 (2001) 13, 17, 19

Jackson v. Benson,
218 Wis. 2d 835, 578 N.W.2d 602 (1998) 10

Lemon v. Kurtzman,
403 U.S. 602 (1971) 11

Milliken v. Bradley,
418 U.S. 717 (1974) 4

Mitchell v. Helms,
530 U.S. 793 (2000) 13, 17, 19

Mueller v. Allen,
463 U.S. 388 (1983) ..... *passim*

National Soc'y of Professional Engineers v. United States,
435 U.S. 679 (1978) 7

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 5

Reed v. Rhodes,
934 F. Supp. 1459 (N.D. Ohio 1996) 5, 6, 20

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 4, 5

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 3, 19, 20

United States v. Grinnell Corp.,
236 F. Supp. 244 (D.R.I. 1964) 7

United States v. Lopez,
514 U.S. 549 (1995) 4

Wallace v. Jaffree,
472 U.S. 38 (1985) 19

Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986) 17

Constitutional Provisions:

Fla. Const. art. IX, § 1 3

N.M. Const. art. V, § 4 3

Other Authorities:

Alan J. Borsuk, *MPS Establishment Taking Korte's Cue for Sweeping Change*, Milw. J. Sentinel, Nov. 28, 2000 10

Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (Florida State Univ. 2001) 9

Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* (Buckeye Institute 1999) 15, 16, 17

Frederick Hess, Robert Maranto & Scott Milliman, *Coping with Competition: How School Systems Respond to School Choice* (Program on Education Policy and Governance research paper 1998) 8

Caroline M. Hoxby, ed., THE ECONOMIC ANALYSIS OF SCHOOL CHOICE (forthcoming, Univ. of Chicago 2001) 5, 6, 8, 13, 16

Carol Innerst, *Competing to Win: How Florida's A+ Plan Has Triggered Public School Reform* (Urban League of Greater Miami 2000) 10, 11

MPS and Virtues of Choice, Milw. J. Sentinel, Jan. 31, 2001 11

Reding, Wrighting & Erithmatic, Wall St. J., Oct. 2, 1989 8

Nina Shokraii Rees, *Public School Benefits of Private School Vouchers*, 93 Policy Rev. (Jan./Feb. 1999) 10

Joe Williams, *MPS Guarantees Help for Poor Readers*, Milw. J. Sentinel, Dec. 23, 1998 10

INTEREST OF *AMICUS CURIAE*

Gary E. Johnson, as Governor of the State of New Mexico, submits this brief *amicus curiae* in support of Petitioners.[1] Since his election in 1994, and continuing since his re-election in 1998, Governor Johnson has made school reform the highest priority of his administration. Governor Johnson has implemented measures that have dramatically increased funding for operations and capital projects for New Mexico's public schools, increased teacher salaries, and brought new accountability to the public school system. Despite these reforms, the performance of New Mexico's public schools remains unacceptable. A clear majority of children continue to be unable to achieve grade-level competency in reading, math, and other basic subjects, and a scandalously high proportion -- over one-third -- of public schools received the lowest possible rating ("probationary") from the state Department of Education.

Seeking success where traditional reforms have failed, Governor Johnson has submitted school choice proposals in each of the last three legislative sessions. His 2001 bill would have provided a voucher worth close to 80 percent of public school per-pupil unit value from New Mexico's general fund revenues to all children for use at a school of their choice, whether religious or non-religious. *See* House Bill 84, 45th N.M. Legis., 1st Regular Sess. (2001). Although Governor Johnson has fought for the passage of these school choice initiatives, none has been enacted. In the coming months, Governor Johnson will propose a new universal choice initiative and once again will make its enactment one of his highest priorities.

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[1] All Petitioners and Respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief.

Governor Johnson believes that school choice represents the best hope for achieving real improvements in the education of New Mexico's children. School choice would be a win-win proposition -- children currently trapped in failing public schools could use a voucher to escape to a better school, while the healthy incentives of competition would spark improvements in the public schools themselves. Moreover, for the reasons set forth below and in Petitioners' briefs, Governor Johnson believes that the Establishment Clause of the First Amendment poses no bar to the inclusion of religious schools in a choice program such as the Cleveland Pilot Scholarship Program.

SUMMARY OF ARGUMENT

In the 1990s, the Cleveland public schools had descended into collapse. Ohio responded with a bold and innovative measure known as the Pilot Scholarship Program. By supplying a voucher that low-income parents could use to pay tuition at a private school, whether religious or not (or at a public school in a neighboring district, had any chosen to participate), Ohio enabled many disadvantaged children to escape Cleveland's failed schools. At the same time as it provided an immediate lifeline to these students, Ohio sought to lay the groundwork for durable and significant improvements in the Cleveland public schools themselves, by replacing the "quiet life" of monopoly with the healthy incentives of competition. By empowering parents to choose private schools if the public schools fail to fulfill their obligations, Ohio has taken a long-overdue step toward reforming "the communist economy" that even the former president of the American Federation of Teachers recognizes prevails in public education today. *See infra* at 7-8.

To strike down the Scholarship Program, the Sixth Circuit majority committed multiple errors. The court relied nearly exclusively on the percentage of parents that chose to use their vouchers at religious schools, contrary to *Mueller v.*

Allen, 463 U.S. 388 (1983). The court willfully blinded itself to the Scholarship Program's history and context, contrary to this Court's "endorsement" jurisprudence, and ignored in particular the innocuous reasons why a high percentage of parents chose religious schools. And the court impugned Ohio's motives, without a shred of evidence and contrary to this Court's precedents demanding respect -- not suspicion -- of States' assertions of their legislative purposes.

The court was wrong to convict Ohio of hatching a covert plot to promote religion behind a mask of sham facial neutrality. Ohio has provided families with genuine choices -- not "illusory" or "alleged" choices, *see* 234 F.3d at 959 -- between religious schools, private non-religious schools, community schools, and traditional public schools, and all monies that flow to religious schools under the Scholarship Program do so only as a result of such genuine and private choices. This case is nothing like *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). Ohio is no serial Establishment Clause violator, and there is no evidence that the Scholarship Program's neutrality is just an empty wink and a nod. This Court should hold that the "primary effect" of the Scholarship Program is the plainly secular and critically important effect of improving the education of Cleveland's children, and should reject the Sixth Circuit's baseless attack on Ohio's legislative motives.

ARGUMENT

I. FAILING PUBLIC SCHOOLS ARE AMONG THE MOST SERIOUS PROBLEMS FACING THE STATES

The several States, and their governors as chief executives, *see, e.g.*, N.M. Const. art. V, § 4, bear responsibility for ensuring that a quality education is available to all children. *See, e.g.*, Fla. Const. art. IX, § 1

(declaring that it is "a paramount duty of the State to make adequate provision for the education of all children residing within its borders"). In particular, the Ohio Constitution has been held to impose such a duty upon the State. *See DeRolph v. State*, 89 Ohio St.3d 1, 10, 728 N.E.2d 993, 1001 (2000) (holding that Ohio Const. art. VI, § 2 requires legislative provision for a system sufficient for "all students to be afforded an educational opportunity").

The importance of fulfilling this duty to provide for quality education for all children has only increased since this Court observed a half-century ago that "education is perhaps the most important function of state and local governments." *Brown v. Board of Ed. of Topeka*, 347 U.S. 483, 493 (1954). As the Court emphasized, education "is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* In *Mueller*, this Court similarly recognized that "[a]n educated populace is essential to the political and economic health of any community." 463 U.S. at 395. It would be impossible to overstate the importance of education to social and economic progress.

Moreover, this Court has recognized that the responsibility to provide quality education lies uniquely with the States. *Cf. United States v. Lopez*, 514 U.S. 549, 564 (1995) (observing that "education" is an "area[ ] . . . where States historically have been sovereign"); *id.* at 580 (Kennedy, J., joined by O'Connor, J., concurring) ("it is well established that education is a traditional concern of the States") (citing, *inter alia*, *Milliken v. Bradley*, 418 U.S. 717, 742-142 (1974). This Court also has recognized the wisdom of our federal system's allocation of education to the province of state and local governments, observing that "[p]luralism" in education encourages "experimentation, innovation, and a healthy competition for education excellence." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411

U.S. 1, 50 (1973) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Against a background of abject failure necessitating judicial supervision of the Cleveland school system, *see Reed v. Rhodes*, 934 F. Supp. 1459, 1460-61 & n.1 (N.D. Ohio 1996) (detailing "the documented administrative and fiscal mismanagement of the Cleveland School District"), Ohio acted in the best experimental traditional of our federalism when it enacted the Scholarship Program. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 50 ("No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education."). In this domain of traditional State authority, the federal courts must take special care to respect "the happy incident[ ] of the federal system" that permits a State to "try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

In New Mexico and across the Nation, States have been striving to deliver on the promise of a quality education for all. Unfortunately, but undeniably, serious problems remain. In particular, although States have increased the amount of money spent on education, additional spending has not produced improved results. To the contrary, Caroline Hoxby has calculated that "average public school productivity was about 65 percent higher in 1970-71 than in 1998-99."[2] In fact, the "measured productivity of school inputs is so low, even by the most optimistic estimates," that most studies "have focused on the question of whether there is *any* relationship at all" between inputs such as per-pupil spending and student achievement. Caroline M. Hoxby,

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[2] Caroline M. Hoxby, *School Choice and School Productivity (or, Could School Choice Be a Tide that Lifts All Boats?)* 2, in Caroline M. Hoxby, ed., THE ECONOMIC ANALYSIS OF SCHOOL CHOICE (forthcoming, Univ. of Chicago 2001), *available at* http://www.nber.org/books/schools.

Introduction 7, in Hoxby, THE ECONOMIC ANALYSIS OF SCHOOL CHOICE, *supra* note 2.

State budget increases have proved powerless to turn around New Mexico's highly troubled education system. New Mexico more than doubled per-pupil spending during the 1990s. Yet less than half of children in grades three through nine achieved grade-level competency in basic subjects in 2000, and nearly half of the State's public schools were rated as "probationary" (the lowest rating possible). In Albuquerque, which contains the largest school district in the State, more than a third of high school students drop out over four years. Even as school spending has shot up, it has been outpaced by school violence and vandalism, which increased 232 percent between 1991 and 1999.

Cleveland's public-education crisis is a powerful testament to the futility of throwing money at the failings of our public schools. In the early 1990s, the Cleveland public school district amassed $140 million in debt and could not account for $40 million advanced by the State. *See Reed*, 934 F. Supp. at 1460, 1464. These "soaring expenditures" were matched only by soaring absentee, dropout, and non-promotion rates. *See id.* at 1460 n.1 (citations omitted). Plainly, the solution to the district's problems could not be merely financial.

Faced with the demonstrated failure of traditional reform efforts and a deepening crisis, many governors, mayors, and other elected officials have concluded that a fundamentally different approach is needed. The crisis in public education cannot be fixed by spending more money or by any of the incremental reforms (such as reducing class size) that governments have attempted to impose on the system from the top down. Governor Johnson, along with numerous others, believes that school choice holds the greatest hope of succeeding where past efforts have failed.

II. SCHOOL CHOICE HOLDS GREAT PROMISE BECAUSE IT WILL ALLOW COMPETITION TO PERFORM THE SAME FUNCTION IN EDUCATION AS IN THE ECONOMY AS A WHOLE

This Nation has long trusted competition to deliver better and cheaper goods and services in nearly every sector of our economy. This Court has described the federal antitrust laws as "the Magna Carta of the free enterprise system," because they ensure that competition remains robust. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The heart of our national economic policy long has been faith in the value of competition." *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (quotation omitted).

Concomitantly, the Nation has long understood that the absence of competition fosters inefficiency, unresponsiveness, and a lack of innovation. *See United States v. Grinnell Corp.*, 236 F. Supp. 244, 258 (D.R.I. 1964) (describing "the danger of a business becoming slothful, routinized, sleepy, or wanting in alertness, initiative, and progressiveness, as a result of the quiet life sought and usually achieved by a monopolist"), *aff'd in part and rev'd in part on other grounds*, 384 U.S. 563 (1966). Yet one of the largest and most critical sectors of the economy remains hobbled by a system of monopoly. No less an authority on this subject than the former president of the American Federation of Teachers recognizes this anomaly:

> It's time to admit that public education operates like a planned economy, a bureaucratic system in which everybody's role is spelled out in advance, and there are few incentives for innovation and productivity.

> It's no surprise that our school system doesn't improve: It more resembles the communist economy than our own market economy.

Reding, Wrighting & Erithmatic, Wall St. J., Oct. 2, 1989.

The need to remedy this anomaly is overdue. Ending "the quiet life" in the critical sector of education can produce fundamental changes in the public education system. By empowering families rather than bureaucrats and imposing the same discipline that works so well in the rest of our economy -- provide a service that people value at a fair price, or lose their business -- school choice can refashion the incentive structure of the public education system.

For these reasons, choice is an invaluable weapon in the States' struggle to provide a quality education for all children. It is critical to emphasize in this regard that school choice does not improve the lot of the children that escape failing public schools *at the expense* of those that remain in public schools. To the contrary, and unlike the traditional reform efforts that have failed to achieve real progress, choice provides an organic incentive to continuous improvement in the entire sector. Choice thus is not a scheme to eliminate public education, but a means to improve public education. The healthy incentive to compete functions as "a tide that lifts all boats."[3]

The "rising tide" effect of choice not only is consistent with what we know about the effects of competition in other sectors of the economy. It is also well-documented, even with the limited experience that the few existing school choice programs have provided thus far. Professor Hoxby's study of choice in Milwaukee, Michigan, and Arizona concluded that "[i]n each case . . . regular public schools boosted their productivity when exposed to competition. In

[3] Hoxby, *School Choice and School Productivity (or, Could School Choice Be a Tide that Lifts All Boats?)*, in Hoxby, ECONOMIC ANALYSIS OF SCHOOL CHOICE, *supra* note 2.

fact, the regular public schools responded to competitive threats that were, if anything, surprisingly small." *Id.* at 54. Moreover, "[i]n each case, the regular public schools increased the growth rates of their productivity by raising achievement, not by lowering spending while maintaining achievement." *Id.* Another evaluation of Arizona's charter school program similarly concluded that "significant responses have already occurred in just the first three years of competition. Further, often these responses are found in the lower performing districts, which probably are in most need of change."[4]

Jay Greene's study of Florida's school choice program found remarkable evidence that public schools responded to competition when they faced the prospect of losing some of their students to private schools. "The results show that schools receiving a failing grade from the state in 1999 and whose students would have been offered tuition vouchers if they failed a second time achieved test score gains more than twice as large as those achieved by other schools."[5]

There is also unmistakable anecdotal evidence of public schools reforming themselves in response to competition. A review of Florida public schools' own statements confirmed the Greene study's findings. "As the schools themselves state in various documents obtained through public records requests, the mere threat of losing students through the Opportunity Scholarship program and the other school choice options of the Florida A+ Plan has led districts with

[4] Frederick Hess, Robert Maranto & Scott Milliman, *Coping with Competition: How School Systems Respond to School Choice* 29 (Program on Education Policy and Governance research paper 1998), *available at* http://www.ksg.harvard.edu/pepg/papers.htm.

[5] Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* ii (Florida State Univ. 2001), *available at* http://www.ksg.harvard.edu/pepg/papers.htm.

schools that have received one 'F' to launch major reform efforts."[6] Even a privately-funded voucher program limited to a single failing elementary school in Albany, New York had a similar effect. The "exodus" of voucher recipients "sent a much-needed wake-up call to Albany public school officials who immediately took steps to reform Giffen Elementary."[7]

The evidence from Milwaukee is particularly striking. After the Wisconsin Supreme Court upheld the Milwaukee voucher program, *see Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602 (1998), Milwaukee public schools ("MPS") superintendent Alan Brown "issued a bona fide guarantee to public school students: learn to read on grade level by the end of second grade or the district will pay for individualized help. Brown's guarantee was one of the strongest signs to date that [MPS] may be stepping up to make its schools more competitive in the growing educational marketplace." Joe Williams, *MPS Guarantees Help for Poor Readers*, Milw. J. Sentinel, Dec. 23, 1998, at 1. A state legislator enthused that "[t]his was our goal when we offered Milwaukee options like school choice and charter schools." *Id.* A later article catalogued the "big steps" taken to change "the fundamental realities" of MPS in order to make MPS "more popular with parents." Alan J. Borsuk, *MPS Establishment Taking Korte's Cue for Sweeping Change*, Milw. J. Sentinel, Nov. 28, 2000, at 1A. More recently, the *Journal Sentinel* observed that "[m]uch of what the system is doing to improve gained impetus because of the expansion of choice in Milwaukee," and thus that "competition for students can

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[6] Carol Innerst, *Competing to Win: How Florida's A+ Plan Has Triggered Public School Reform* 5 (Urban League of Greater Miami 2000), *available at* http://edreform.com/school_choice/compete.htm.

[7] Nina Shokraii Rees, *Public School Benefits of Private School Vouchers*, 93 Policy Rev. (Jan./Feb. 1999), *available at* http://www.policyreview.org/jan99/rees.html.

lead to ferment that benefits schoolchildren." *MPS and Virtues of Choice*, Milw. J. Sentinel, Jan. 31, 2001, at 10A.

None of this should be surprising. School choice removes public schools' freedom to fail with impunity. Under Florida's A+ Plan, for example, public school officials understand that failure has consequences: "Schools reconstituted, State intervention, Opportunity scholarship, Loss of students and [full-time equivalent funding]." Innerst, *supra* note 6, at 9. Florida's choice program directs the public schools to improve their performance, and supplies a powerful answer to the question posed by the Broward County school board: "What will happen if we don't?" *Id.* For too long, without choice, the answer to that question has been: nothing much.

III. THE PRIMARY EFFECT OF THE CLEVELAND PROGRAM IS THE ADVANCEMENT OF CHILDREN'S EDUCATION, NOT THE ADVANCEMENT OF RELIGION

1. a. The Sixth Circuit did not hold that Ohio lacked a "secular legislative purpose," *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), when it enacted the Scholarship Program. Such a holding would have been extraordinary, as this Court consistently has found valid secular purposes supporting programs of aid to religious schools. Even in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), for example, the Court noted that it "need touch only briefly on the requirement of a 'secular legislative purpose,'" and accepted without hesitation "the recitation of [secular] purposes appended to New York's law." *Id.* at 773. Indeed, Respondents appear to have conceded that the Scholarship Program satisfies the "secular legislative purpose" requirement. *See* 234 F.3d at 967 (Ryan, J., dissenting).

Although the Sixth Circuit thus did not rely overtly on *Lemon*'s "secular legislative purpose" prong, the court

proceeded to hold that the Scholarship Program failed *Lemon*'s "primary effect" prong by impugning Ohio's legislative *purpose*. According to the Sixth Circuit, the Program, while facially religion-neutral, is not really neutral, because it was "*designed in a manner calculated to attract religious institutions*." 234 F.3d at 961 (emphasis added).

b. The majority's rationale for transforming the inquiry into the Scholarship Program's "primary *effect*" into an inquiry into subjective motivation is not clear. The majority evidently was disturbed by the percentage of parents who chose to use the Cleveland aid at a religious school, and even declared that "[t]here is no neutral aid when that aid principally flows to religious institutions." *Id.* That broad declaration, however, collides squarely with *Mueller,* which makes clear that the constitutionality of a facially neutral program does not turn on the percentage of parents who choose to use the aid at a religious school. *See* 463 U.S. at 401 (holding that program did not have "primary effect" of advancing religion even though 96% of beneficiaries attended religious schools; "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."). With *Mueller* foreclosing straightforward reliance on the percentages here, perhaps the majority thought that its subjective approach to the "primary effect" inquiry offered a way around *Mueller*. *See* 234 F.3d at 961 (purporting to distinguish *Mueller* on the ground that "the Ohio scholarship program is designed in a manner calculated to attract religious institutions").

2. Whatever the majority's rationale for questioning Ohio's motives, its holding that the Scholarship Program's "primary effect" is to advance religion is wrong.

a. In its haste to impute an unconstitutional motive to Ohio's legislature based on the high percentage of children attending private schools who chose religious schools, the

Sixth Circuit overlooked a simple and innocuous explanation for that percentage: a very high percentage of private schools in Cleveland were religious schools. *See* Ohio Pet. for Cert. 19-20 (explaining that "Cleveland's longstanding preponderance of religiously-affiliated private schools serving low- and moderate-income students did not arise as a result of any government action, much less the Scholarship Program"); Hoxby, *supra* note 4, at 25 (noting that "[i]n the United States, 85 percent of private school students attend a school with religious affiliation). Because religious schools far outnumbered non-religious private schools in Cleveland, the facts that far more religious schools than non-religious private schools chose to participate and that far more families chose religious schools than non-religious private schools are entirely unsurprising. *Cf. Mitchell v. Helms,* 530 U.S. 793, 810 (2000) (plurality opinion) (noting "the preference for pre-existing recipients that is arguably inherent in any governmental aid program"). Yet the Sixth Circuit treated these facts as evidence of a covert government plot to establish religion behind an "illusory" veil of facial neutrality. *See* 234 F.3d at 959.

There is no basis in law or logic for the Sixth Circuit's inference of an improper legislative motive on the record here. Even if (contrary to *Mueller*[8]) the percentages of

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[8] The Sixth Circuit's by-the-numbers approach conflicts not only with *Mueller,* but also with this Court's more recent decisions. In *Agostini v. Felton,* 521 U.S. 203 (1997), the Court reiterated that it was not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.* at 229. Because the program at issue was neutral as between religious schools and non-religious private schools, the Court upheld it even though more than 90% of the private schools in the district were religious. *See id.* at 210; *cf. Good News Club v. Milford Central School,* 121 S. Ct. 2093, 2107 (2001) (explaining that where a forum is made available on a religion-neutral basis, "we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a

participants choosing religious schools compared to non-religious private schools could erase a program's facial neutrality, the percentages cannot be meaningfully analyzed in isolation. If most of the private schools in a city are *non-religious,* but most participants choose religious schools, that surprising asymmetry conceivably could counsel examination of whether the State somehow "designed" the program to favor religious schools behind a mask of facial neutrality. But where, as here, most local private schools are religious, the fact that most participants choose religious schools says nothing about whether the program was "designed in a manner calculated to attract religious institutions." 234 F.3d at 961.

b. The court not only focused on the participation percentages in isolation from the background percentages of religious vs. non-religious private schools. The court then compounded that error by restricting its analysis to the participation percentages in only one year of the Scholarship Program's operation and in isolation from its context.

If the Sixth Circuit had considered the Program in its historical context, it would have discovered another simple and innocuous explanation (beyond the high background percentage of religious private schools) for the high percentage of participants choosing religious schools. As the majority itself noted, at an earlier time in the Scholarship Program's operation, "as many as 22% of the students enrolled in the program attended nonreligious schools." 234 F.3d at 949. Although the majority held that the Program was not religion-neutral where 96% of the students attended religious schools, it did not suggest that a percentage of 78%

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particular time"); *Felton v. Secretary,* 739 F.2d 48, 66 (2d Cir. 1984) (Friendly, J.) ("there could be no greater step away from the goal of reasonable certainty than to adopt a rule that the validity of a program should hinge on its precise workings from year to year"), *aff'd sub nom. Aguilar v. Felton,* 473 U.S. 402 (1985), *overruled sub nom. Agostini v. Felton,* 521 U.S. 203 (1997).

would be unconstitutionally high. Yet the majority ignored why the percentage of participants attending religious schools increased from 78% to 96%. The explanation for that increase is plain:

> the creation and expansion of the community school program in the last two years has significantly reduced the percentage of students attending secular schools in the scholarship program by drawing away the two largest scholarship schools. The Hope schools, which have now been re-established as community schools, educated nearly 15% of all scholarship students in past years.[9]

Community schools receive over $4500 in state funding per student, more than twice the $2250 provided by the Scholarship Program. Because Ohio made the community school program more attractive than the Scholarship Program, it created an incentive for non-religious private schools to exit the Scholarship Program and convert into community schools -- an option that, of course, was not open to religious private schools.

The court below acknowledged these facts, *see* 234 F.3d at 959 (describing the "incentive for private nonsectarian schools to participate in the community schools program rather than in the school voucher program"), but drew the precisely wrong inference from them. According to the majority, the high percentage of religious schools that remained in the Scholarship Program demonstrated that Ohio was guilty of a preference in favor of religion. *See id.* at 959-61.

In reality, these facts demonstrate the opposite. Ohio treated non-religious private schools *more favorably* than religious schools, by allowing non-religious private schools

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[9] Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* 4 (Buckeye Institute 1999), *available at* http://www.ksg.harvard.edu/pepg/papers.htm.

to participate in a more generous program while religious schools had no option but to remain in the less generous Scholarship Program. The increase in the percentage of religious schools in the Scholarship Program thus reflects a preference in favor of *non-religion*.[10]

c. The Sixth Circuit was able to blind itself to this reality only by refusing to consider the Scholarship Program in its statutory context. The court dismissed the "other options available to Cleveland parents such as the Community Schools" as "at best irrelevant," and it self-consciously refused to "examine the entire context of Ohio education." 234 F.3d at 958. This refusal was unjustified, for "the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 782 (1995) (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and in the judgment).

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[10] In addition, the Sixth Circuit's exclusive focus on the percentages in one year was erroneous for the more general reason that there is every reason to expect that a choice program, if allowed to operate for a sufficient time, will stimulate demand for private schools, make it possible for more non-religious private schools to operate economically, and thus spur the creation of new non-religious private schools. *See, e.g.*, Hoxby, *Introduction* 14, in Hoxby, THE ECONOMIC ANALYSIS OF SCHOOL CHOICE, *supra* note 2 ("Another common misapprehension is that, under a voucher program that allowed religious private schools to accept vouchers, approximately 85 percent of private school enrollment would be in religious schools because that is the current composition of private schools. Such misapprehensions stem from the belief that the supply of schooling is inelastic."); Greene, *supra* note 9, at 12 ("In Milwaukee the number of secular private schools participating in the voucher program more than quadrupled between 1990 and 1999, from 7 to 30. The number of students enrolled in secular private schools in Milwaukee grew more than six-fold during that time, from 337 to approximately 2,100."). To strike down a voucher program based on the percentage of participants choosing religious schools soon after the program's enactment would be to condemn the program for not having had time to work.

To decide whether a "reasonable observer" would believe that "the State itself is endorsing a religious practice or belief," *Mitchell*, 530 U.S. at 843 (O'Connor, J., joined by Breyer, J., concurring in the judgment), a court must examine "the history and context of the community" and the challenged program, *Good News Club*, 121 S. Ct. at 2106. *See also, e.g., Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 492 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) (emphasizing that the Court must examine "the nature and consequences of the program viewed as a whole").

The "reasonable, informed observer" whose perception this Court considers, *Pinette*, 515 U.S. at 773 (opinion of O'Connor, J.), knows that the percentage of participants in the Scholarship Program who attend religious schools is very high because Ohio has "draw[n] away the two largest scholarship schools" into a different and more generous program. Greene, *supra* note 9, at 4. Those non-religious private schools, and the parents and children who chose them, have benefited from Ohio's decision to provide extra funding for non-religious private schools that convert into community schools. Compared to the non-religious schools that may *exit* the Scholarship Program, Ohio *disfavors* the religious schools that have no choice but to remain in that Program. No reasonable observer could transform Ohio's decision to provide extra funding to non-religious private schools into "[a] government statement that religion or a particular religious belief is favored or preferred." *Pinette*, 515 U.S. at 773 (quotations omitted).[11]

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[11] Perhaps the most egregious error to flow from the Sixth Circuit's determination to view the Scholarship Program in total isolation is the court's complaint that, under the Scholarship Program, "[s]tudents may not choose to attend community or magnet schools using a voucher." 234 F.3d at 959. Certainly, no reasonable observer could fault Ohio for this state of affairs, as community and magnet schools are *free* and there is no need for anyone to "us[e] a voucher" to attend them.

d. It would be incongruous if a State's subjective motivation in enacting a facially neutral program could justify holding that the program has an unconstitutional "primary *effect*" of advancing religion. The disuse into which *Lemon*'s "secular legislative purpose" prong has fallen suggests a judicial recognition that courts are not well-situated to determine that a legislature was motivated by an impermissible purpose to promote religion when the legislature has stated a valid secular purpose. *See, e.g., Nyquist,* 413 U.S. at 773 ("[W]e need touch only briefly on the requirement of a 'secular legislative purpose.' As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests."). Indeed, this Court seemingly has attached special importance to the "primary effect" inquiry precisely because that inquiry avoids second-guessing a legislature's "recitation" of a secular purpose. *See id.* at 774 ("But the propriety of a legislature's purposes may not immunize from further scrutiny a law which . . . has a primary effect that advances religion . . . .").

Even if courts properly may examine a State's subjective motivation as part of the "primary effect" inquiry, nothing in the record here suggests that Ohio harbored any improper pro-religion motive when it enacted the Scholarship Program. As a result, to decide this case this Court need not foreclose the possibility that a court in another case could find that a facially neutral program was designed with a specific intent to promote religion and that the program failed the "primary effect" prong on that account. But such an inference of an improper legislative motive would require the strongest evidence.

The Sixth Circuit committed a serious error when it seized upon a post-hoc disparity between the number of participants attending religious and non-religious private schools to impugn Ohio's legislative motives. At the very least, the respect that the federal courts owe the States

requires taking a State at its word when it asserts a plausible non-religious motive or explanation for such a statistical disparity. *See Mueller,* 463 U.S. at 394-95 (noting this Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute"). After all, as Judge Ryan pointed out in dissent, the principle that a validly enacted statute is presumed to be constitutional "is not a mere literary figure for rote recitation in all appellate opinions addressing the constitutionality of legislative enactments," 234 F.3d at 967, but rather a recognition of the fact that state legislators, no less than federal judges, are sworn to uphold the Constitution. *See also, e.g., Wallace v. Jaffree,* 472 U.S. 38, 74 (1985) (O'Connor, J., concurring in the judgment) (stating that "the inquiry into the purpose of the legislature . . . should be deferential and limited," and that "a court has no license to psychoanalyze the legislators").[12] The importance of such federal judicial deference is only heightened in a domain such as education where the States traditionally have been sovereign. *See supra* at 4-5; *cf. Good News Club,* 121 S. Ct. at 2113-14 ("Moreover, any doubt on a question such as this should be resolved in a way that minimizes intrusion by the Federal Government into the operation of our public schools.") (quotation omitted).

The impropriety of the Sixth Circuit's condemnation of Ohio's legislative motives is demonstrated powerfully by comparing the record here to the record in *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 (2000). In *Santa Fe*, the

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[12] *Cf. Mitchell,* 530 U.S. at 863-64 (O'Connor, J., joined by Breyer, J., concurring in the judgment) ("To find that actual diversion will flourish, one must presume bad faith on the part of the religious school officials who report to the JPPSS monitors regarding the use of Chapter 2 aid. I disagree with the plurality and Justice Souter on this point and believe that it is entirely proper to presume that these school officials will act in good faith.").

Court found that the history and context of the "evolution of the current policy from the long-sanctioned office of 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation" demonstrated that the District's protestations of facial neutrality were too clever by half. *Id.* at 309. The District's former policies "unquestionably violated the Establishment Clause," *id.* at 315, and the record made clear that the District "intended to preserve the practice of prayer before football games" and viewed its newly-fashioned facially neutral policy "simply as a continuation of the previous policies." *Id.* at 309. Accordingly, the Court held that a reasonable observer "aware of the history and context of the community and forum," *id.* at 317 (quotation omitted), would understand that the District was attempting to promote religion behind a guise of facial neutrality.

The record in this case could not be more different. As explained above, the percentages that so troubled the court below reflect nothing more sinister than the pre-existing preponderance of religious private schools in Cleveland. Moreover, history and context demonstrate that the percentages within the Scholarship Program would be less disparate if only Ohio had refrained from preferring *non-religious* private schools by allowing them to exit the Scholarship Program in favor of the more generous community school program. Far from suggesting that Ohio is an Establishment Clause recidivist akin to the District in *Santa Fe*, the record here contains "not the slightest hint . . . that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate" in the Scholarship Program. 234 F.3d at 968 (Ryan, J., dissenting). To the contrary, the only reasonable conclusion on this record is that Ohio correctly recognized that Cleveland's low-income children were consigned to a public school system in a state of "total fiscal and administrative collapse," *Reed*, 934 F. Supp. at 1464, and resolved to "spend[ ] [its]

money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause." *Agostini*, 521 U.S. at 240.

* * * *

Ohio's innovative response to the crisis in public education in Cleveland was a commendable example of our experimental tradition of federalism. The Scholarship Program represents the best hope for thousands of disadvantaged children to obtain an education remotely comparable to the quality education that we are fortunate enough to take for granted. And the Scholarship Program represents the best hope, after many failures, to stimulate improvements in the Cleveland public schools for the benefit of all of Cleveland's children. This Court should reject the Sixth Circuit's unjustified attack on Ohio's legislative motives and should hold that the "primary effect" of the Scholarship Program is the secular effect of improving the education of Cleveland's children.

CONCLUSION

For the foregoing reasons, and those expressed by Petitioners, this Court should reverse the judgment below.

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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN,
SUPT. OF PUB. INSTR. OF OHIO, ET AL.,
Petitioners,

v.

DORIS SIMMONS-HARRIS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF BLACK ALLIANCE FOR EDUCATIONAL OPTIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a facially neutral program offering economically disadvantaged inner-city children a viable alternative to a failing public school system – through scholarships that those children may use at participating secular or religious private schools or suburban public schools – creates an establishment of religion because most of the schools that have registered for the program during its early stages are religiously affiliated.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 2

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE OHIO PILOT SCHOLARSHIP PROGRAM DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION UNDER THIS COURT'S CURRENT UNDERSTANDING OF THE EFFECTS TEST. 6

A. The Pilot Program Determines Eligibility for Benefits in a Neutral, Evenhanded Fashion Without Regard to Either the Religious Affiliation of the Participating Schools or the Religious Identity of the Families Who Use the Vouchers 8

B. The Pilot Program Does Not Result in Religious Indoctrination Attributable to the Government Because It Is a "Private Choice" Program in Which the Genuinely Independent Decisions of Individual Parents Determine the Distribution of Benefits 16

TABLE OF CONTENTS
(continued)

Page

II. THE OHIO PILOT SCHOLARSHIP PROGRAM IS NEEDED TO OFFER VIABLE ALTERNATIVES TO ECONOMICALLY DISADVANTAGED STUDENTS, AND TO PROMOTE HEALTHY COMPETITION AMONG CLEVELAND-AREA SCHOOLS. 21

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

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521 U.S. 203 (1997) ..... *passim*

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492 U.S. 573 (1989) 14

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121 S. Ct. 2093 (2001) 15

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578 N.W.2d 602 (Wis. 1998) 15

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465 U.S. 668 (1984) 14

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530 U.S. 793 (2000) ..... *passim*

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OHIO REV. CODE § 3313.978 ..... *passim*

OHIO REV. CODE § 3313.979 17

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State of Ohio 2000 District School Report Card for Cleveland City School District/Cuyahoga County.....29

State of Ohio 2001 District School Report Card for Cleveland City School District/Cuyahoga County.....29

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CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I, cl. 1.....*passim*

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF BLACK ALLIANCE FOR EDUCATIONAL OPTIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the Black Alliance for Educational Options as *amicus curiae* in support of petitioners, with the written consent of the parties.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Black Alliance for Educational Options, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent are filed with this brief.

INTEREST OF AMICUS

The Black Alliance for Educational Options ("BAEO") is a non-profit, intergenerational organization of educators, parents, students, community activists, public officials, religious leaders, and business people. BAEO is committed to improving the educational opportunities available to minority and low-income children throughout the United States. Low-income parents – principally blacks and Hispanics – have less access than middle- and upper-income parents to high-quality teachers and schools. Low-income parents are also less satisfied than middle- and upper-income parents with the schools that are available to their children. This lack of access to educational opportunities contributes to the widening gap between poor black children and whites on virtually all indicators of academic achievement. BAEO believes that the American ideal of equal opportunity is unattainable for economically disadvantaged black children so long as they continue to lag behind national averages.

BAEO's mission is to support parental choice as a means of empowering families and increasing educational options for black and other children living in depressed neighborhoods. For example, BAEO works to inform the general public about parental-choice initiatives; to educate black families about the various educational options available to them; to create, promote, and support efforts to enable black parents to exercise choice; and to heighten public awareness of efforts to reduce or limit educational options. BAEO partners with other minority group organizations to expand educational options and empower low-income parents, enabling those parents to choose the learning environments that are best for their children.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is not about religion, but about educational policy and, ultimately, politics. Prior to the Ohio legislature's creation of publicly funded school choice programs, the

Cleveland City School District ("CCSD") enjoyed a monopoly over the educational opportunities available to inner-city Cleveland children. The families remaining in the district were in effect a captive audience; they could not afford to exercise choice by moving to better neighborhoods or sending their children to private schools. As a result, the public schools had little incentive to make improvements, notwithstanding the fact that the public system failed year after year to attain even the most minimal academic standards. Like almost any monopoly, the CCSD became complacent. Like any monopoly, the district is understandably threatened by the introduction of competitive alternatives – such as those offered by the Pilot Project Scholarship Program ("the Pilot Program") at issue in this litigation – that would unsettle the status quo. The educational market in Cleveland has not behaved much differently than one would expect any other market for services to operate. The primary difference is that the educational opportunities at stake are infinitely more precious and critical if children in depressed neighborhoods are ever to escape a culture of poverty and defeated expectations.

Having lost their political battle in the Ohio legislature, respondent opponents of parental choice have turned to the courts. In the State Supreme Court, they succeeded in overturning the first version of the Pilot Program on a legislative technicality but were rebuffed on their Establishment Clause claim. After the Pilot Program was re-enacted free of the technical flaw, respondents tried again in the federal courts. This time, they succeeded. The Sixth Circuit held that Ohio's facially neutral school voucher program amounts to an "establishment" of religion despite the fact that the program's benefits are made available on a nondiscriminatory basis to a broad range of individuals and schools without regard to religious beliefs or affiliation. The program allows the participation of public and private, sectarian and nonsectarian schools, and its benefits are distributed through the vehicle of individual, private choice, exercised without influ-

ence from the State. Parents of economically disadvantaged children may apply the voucher to any participating school program, regardless of whether that school is religious or not, and regardless of the family's own religious affiliation or lack thereof.

The Sixth Circuit worked backward from the fact that to date no suburban public schools have registered for the program and only 10 (out of 56) private schools that have registered were secular. Essentially disregarding this Court's clear position that a disproportionate effect alone does not violate the Establishment Clause, the court of appeals hypothesized that the low number of secular schools participating in the program was due to the program's leveling of a financial "disincentive" blocking their participation. That speculation is unfounded and is wrong. There is no evidence to support the court of appeals' supposition as to why more private secular schools have thus far not registered for the program. One reason may be that some private schools are disinclined to admit students from disadvantaged backgrounds (and the Ohio program requires participating schools to take all eligible students for whom there is room). Another factor may be the State's attractive "community school" option which is open to private secular schools (but not private sectarian schools) and offers greater financial inducements than the voucher program. As for suburban public schools, the Sixth Circuit's conjecture is contradicted by the record, which establishes that those schools are offered not only the $2,500 voucher but also $4,294 in per pupil aid for which private schools are not eligible. Ironically, it is quite plausible that the reason suburban public schools have not participated really comes back to politics: those schools may either politically oppose vouchers on principle, or fear bringing inner-city children from disadvantaged backgrounds into their midst. Regardless of the true reason, there certainly is no financial hurdle imposed on private sectarian or suburban public schools that is not also faced by the schools

that have registered for the program, and the lower court's unfounded speculation cannot serve to support its ruling.

If the Sixth Circuit's decision is allowed to stand, numerous parental-choice programs across the country will be in legal jeopardy, casting a pall nationwide on the development of innovative approaches to the seemingly intractable problem of failing urban public schools. As a result, thousands of economically disadvantaged children in Cleveland and other cities will be forced to return to systems that should be considered unacceptable by any civilized standard. The inner-city public schools from which parental-choice beneficiaries have escaped (and others hope to escape) suffer from grossly substandard proficiency test scores, low attendance and graduation rates, and high dropout rates. Those schools are also plagued by violence and disciplinary problems. If forced to return to this failing system, students who are currently attending schools of choice would be at risk of losing the strides they have made in the program, including higher test scores and higher levels of parent satisfaction and confidence in their schools. Perhaps even more importantly, the CCSD and school districts like it would lose a critical incentive for self-improvement: competition. The proven experience of many school districts shows that the prospect of losing students to alternative programs such as the Pilot Program spurs public schools to improve in order to retain students. The net result is that both groups of students (those opting for parental-choice alternatives and those remaining in the public system) win: improvements in proficiency test scores and other measures of academic and cultural quality have been documented both among the students who use vouchers and among the peers they leave behind at the public schools.

Fortunately, there is no reason for this Court to invalidate the Pilot Program. The Sixth Circuit's holding that the program is an establishment of religion is based on speculation,

misunderstanding of the facts, and misapprehension of this Court's recent Establishment Clause precedents. Because it is clear from the record that this facially neutral, private-choice-driven program makes its benefits available without reference to religion and does not create any special financial disincentive for nonsectarian schools to participate, the program does not have the primary effect of advancing religion. That the Pilot Program operates in a context that includes a diverse mix of public, secular schools of choice such as community (charter) and magnet schools only confirms the conclusion that Cleveland families who have chosen private, religious schools through the voucher program have done so as a result of genuine, independent private choice without the slightest influence from the State. Thus, the decision of the Sixth Circuit should be reversed.

ARGUMENT

I. THE OHIO PILOT SCHOLARSHIP PROGRAM DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION UNDER THIS COURT'S CURRENT UNDERSTANDING OF THE EFFECTS TEST.

The central issue in this case is "whether the voucher program has the forbidden 'primary effect' of advancing religion." *Simmons-Harris v. Zelman*, 234 F.3d 945, 968 (6th Cir. 2000) (Ryan, J., concurring in part and dissenting in part).[2] The primary effect of the Pilot Program turns on two factors:

(1) whether the program is neutral and "defines its recipients" without "reference to religion," and

[2] Respondent agrees that the Pilot Program has a secular purpose. *See Simmons-Harris*, 234 F.3d at 967 (Ryan, J., concurring in part and dissenting in part).

(2) whether the program avoids any religious indoctrination attributable to the government.

Mitchell v. Helms, 530 U.S. 793, 808 (2000) (plurality) (summarizing holding of *Agostini v. Felton*, 521 U.S. 203, 234 (1997)).[3]

Because the Pilot Program is a neutral, private-choice-driven program, it satisfies both factors and does not have the primary effect of advancing religion. *See, e.g., Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 491 (1986) (Powell, J., concurring) ("[S]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the [effects test] because any aid to religion results from the private choices of individual beneficiaries.") (citing *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983)). The Pilot Program offers its benefits without reference to religion, and it distributes benefits through the genuinely independent, private choices of parents who knowingly select a religious or nonreligious school without the slightest influence from the State. The program's primary effect is not to advance religion, but to expand the range of educational options available to underprivileged children in the Cleveland area, and to enhance the capacity of parents to exercise genuinely free choice in guiding the educational decisions of their children.

[3] The Court has also "recast *Lemon*'s entanglement inquiry as . . . one criterion relevant to determining a statute's effect," *Mitchell*, 530 U.S. at 808, but in this case there is "no serious claim that the statute is constitutionally invalid solely because it fosters an 'excessive entanglement' between government and religion." *Simmons-Harris*, 234 F.3d at 967 (Ryan, J., concurring in part and dissenting in part).

A. The Pilot Program Determines Eligibility for Benefits in a Neutral, Evenhanded Fashion Without Regard to Either the Religious Affiliation of the Participating Schools or the Religious Identity of the Families Who Use the Vouchers.

The Pilot Program clearly satisfies this Court's neutrality test. The neutrality inquiry focuses on whether the program impermissibly "define[s] its recipients by reference to religion," *Agostini v. Felton*, 521 U.S. 203, 234 (1997), or whether instead "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is *made available* to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 231 (emphasis added). A program "that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983).

Under the Cleveland Pilot Program, eligible beneficiaries plainly are not "define[d] . . . by reference to religion." The program is neutral along two important axes. First, it is neutral with regard to the religious or nonreligious character of the schools that are allowed to participate. The program extends eligibility to private schools regardless of their sectarian or nonsectarian affiliation,[4] and it also extends eligibility to suburban public schools.[5] Second, the program is neutral with regard to the religious or nonreligious prefer-

[4] The program allows the participation of any private school – whether religious or nonreligious – that is located within the boundaries of the Cleveland school district and that satisfies the State's minimum secular educational standards. *See* OHIO REV. CODE § 3313.976(A)(1), (3).

[5] Public school districts adjacent to the Pilot Program district are eligible to participate in the program and "receive scholarship payments on behalf of parents." OHIO REV. CODE § 3313.976(C).

ence of the family that uses the voucher. The children's parents may apply the $2,500 vouchers at any participating private or suburban public school, religious or nonreligious. The program defines scholarship recipients not by reference to religion, but rather by reference to two nonreligious criteria: (1) the child must attend one of Cleveland's public schools; and (2) priority is given to children whose family income does not exceed 200 percent of the federally established poverty level. *See* OHIO REV. CODE § 3313.978(A). The statute explicitly forbids any of the participating schools, including religious ones, from applying a religious test or preference for admission. *See* OHIO REV. CODE § 3313.976(A)(4). As a result, students are free to attend schools outside their own religious affiliation, and evidence suggests that numerous students have done so.[6]

Notwithstanding the acknowledged facial neutrality of the statute, the Sixth Circuit held that the statute was not neutral. The court of appeals relied almost exclusively on this Court's 1973 decision in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), which invalidated a New York program providing tuition reimbursement *only* to parents whose children were enrolled in *private* schools. Although the statute was facially neutral with regard to religious and nonreligious private schools, the vast majority of the private schools were in fact religious, and the statute did not extend benefit eligibility to any family whose children attended public schools. In light of these facts, the *Nyquist* Court determined that "the effect of the aid is unmistakably to provide desired financial support for nonpublic,

[6] The religious diversity of the students participating in the program is impressive: "Forty percent were Baptist, 14 percent were other Protestants of various denominational affiliations, 25 percent were Catholic, 13 percent were affiliated with another religion, and 8 percent said they had no religious affiliation." Joint Appendix ("J.A.") 118a (Affidavit of Paul E. Peterson).

sectarian institutions." *Id.* at 783. According to the Sixth Circuit, *Nyquist* controls this case because here, as in *Nyquist*, "the great majority of schools benefited by these tuition dollars are sectarian." *Simmons-Harris*, 234 F.3d at 958. Under the Sixth Circuit's view, "[t]here is no neutral aid when that aid principally flows to religious institutions." *Id.* at 961.

The Sixth Circuit's reliance on *Nyquist* is misplaced. For one thing, in the years since *Nyquist*, this Court has explicitly and repeatedly rejected the idea that disproportionate effect alone justifies striking down a facially neutral statute. The focus when evaluating the neutrality of a statute is whether the statute's benefits are "*made available*" on a neutral basis, *Agostini*, 521 U.S. at 231 (emphasis added), not on how those benefits are ultimately distributed in any given year as between religious and nonreligious schools. In *Mueller*, for example, the fact that "96% of the children in private schools" attended religious schools, and that therefore "the bulk of deductions . . . will be claimed by parents of children in sectarian schools" was considered constitutionally irrelevant. 463 U.S. at 401. The Court explained that "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.*; *see also Agostini*, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 9 (1993) (noting that program in *Mueller* was constitutional "even though the vast majority of those deductions (perhaps over 90%) went to parents whose children attended sectarian schools"). Thus, the mere fact that "the great majority of schools benefited by these tuition dollars are sectarian," *Simmons-Harris*, 234 F.3d at 958, does not render the program unconstitutional.[7]

Moreover, the Sixth Circuit ignores the critical factual distinction between *Nyquist* and this case. In *Nyquist*, an important factor in invalidating the private school tuition reimbursements was the fact that, on the face of the statute, those reimbursements were *made available* exclusively to parents of children in private schools.[8] The *Nyquist* Court left open the question whether "public assistance (*e.g.*, scholarships) *made available generally* without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" would be valid. *Nyquist*, 413 U.S. at 782 n.38 (emphasis added).

That open question was answered in *Mueller*, where the Court upheld a statutory scheme allowing parents to take a tax deduction for the costs of tuition, books, and transportation. The Court distinguished *Nyquist* on the ground that the *Mueller* tax deduction on its face applied to "*all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectar-

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[7] One of the reasons that this Court has accorded little weight to the proportion of religious and nonreligious entities that benefit under any given statute is that those proportions are not static. For example, the Milwaukee parental choice program, which originally had a very high proportion of religious schools participating, recently "has seen dynamic growth in the number of nonsectarian schools participating in the program. The increase in the number of nonsectarian schools has been accompanied by a substantial growth in the number of students enrolled in nonsectarian schools: from 337 in 1990-91, to 786 in 1994-95, to 1,320 in 1995-96, to 2,215 in 1998-99, to 3,025 (of a total of 8,066) in this school year." J.A. 236a (Decl. of Howard Fuller ¶ 21). Howard Fuller is the Chair of the Board of *amicus* BAEO.

[8] *See Mueller*, 463 U.S. at 398 (fact that "public assistance amounting to tuition grants, was provided only to parents of children in *nonpublic* schools" "had *considerable* bearing on our decision striking down the New York statute at issue" in *Nyquist*) (emphasis added).

ian private schools." 463 U.S. at 397 (emphasis in original); *see also Zobrest*, 509 U.S. at 10 (aid made available "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the school the child attends" is valid under the Establishment Clause) (internal quotation marks omitted).

The Pilot Program similarly implicates the very question left open by *Nyquist* and subsequently answered by this Court in *Mueller* and *Zobrest*. Similar to the program approved in *Mueller*, and unlike the program invalidated in *Nyquist*, the Cleveland program makes voucher funds available on a nondiscriminatory basis not only to secular and religious private schools, but also to suburban public schools.[9] Because the Pilot Program is neutral on both scores (religious-nonreligious and public-private), it is valid despite the fact that many of its benefits thus far have flowed through the independent decisions of parents to religious schools.

The Sixth Circuit evaded the clear import of *Mueller* only by finding that the Pilot Program's neutrality vis-à-vis public and private schools was "illusory." *Simmons-Harris*, 234 F.3d at 959. The court of appeals reasoned that the program creates an impermissible financial "disincentive" for secular schools – both public and private – to participate. That finding is built entirely on speculation and is contradicted by evidence in the record.

The Sixth Circuit first conjectured that the reason no suburban public schools had registered was that, "[a]t a maximum of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program." *Id.* at 959. Contrary to the court of appeals' mistaken surmise, however, the Pilot Program

[9] Tutorial grants equal to the number of voucher-based scholarships are also made available for students who opt to remain in the Cleveland public schools. *See* OHIO REV. CODE § 3313.978(B). Grants are capped at $500 per student. *See id.* § 3313.978(C)(3).

enables public suburban schools to participate on terms that are considerably more favorable than the terms extended to private schools. Unlike private schools, the suburban public schools are eligible for the State's full per pupil allowance of approximately $4,294 per student in addition to the $2,500 voucher. *See* OHIO REV. CODE §§ 3317.03(I)(1), 3327.06, 3317.08(A)(1). If anything, the program favors suburban public schools; there certainly is no financial disincentive.[10] The record is silent as to why suburban public schools have chosen not to participate. Perhaps they oppose parental choice on principle. Perhaps they are reluctant to invite inner-city children from disadvantaged homes into their communities. Whatever their motive, they face no exclusion (as was present in *Nyquist*) or other structural barrier to their participation.

In similar fashion, the lower court also hypothesized that the disparity thus far in the number of religious versus nonreligious private schools that have registered for the Pilot Program resulted because "the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." *Simmons-Harris*, 234 F.3d at 959. The record, however, is devoid of evidence that nonreligious private schools face more financial difficulty under the program than do religious schools, or even that the proportion of religious schools among the 56 private schools that have registered for the program differs significantly from the proportion of religious schools among all private schools in Cleveland generally.

[10] A contrary finding may not be based on speculation alone. *Cf. Agostini*, 521 U.S. at 229 (rejecting speculation as basis for invalidating aid program under Establishment Clause).

The reality is that the State in fact has provided *stronger* incentives for secular private schools to participate in Cleveland's choice programs because only secular schools are eligible to participate in the "community school" program, which pays substantially greater tuition ($4,518 per pupil).[11] By viewing the State's voucher-based program in isolation – removed from the host of parental-choice options available, including community schools – the Sixth Circuit was able to treat private secular school participation in the community-school option as a strike against the voucher-based option. *See Simmons-Harris*, 234 F.3d at 959.

But surely an overall program that gives secular schools *greater* benefits than religious schools cannot be construed as advancing or endorsing religion. The court of appeals' error demonstrates the distortions that may result when the Establishment Clause analysis is improperly decontextualized.[12] When properly viewed in context, the Pilot Program

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[11] Several nonsectarian private schools have in fact departed from the voucher program in order to join the community school program, thus leaving a higher proportion of religious schools in the voucher-based program. *See* Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* 4 (Nov. 5, 1999) (paper for the Annual Meeting of the Association for Policy Analysis and Management in Washington, D.C., available at www.schoolchoiceinfo.org/research [hereinafter *Context of Parental Choice*]) ("The Hope schools, which have now been re-established as community schools, educated nearly 15% of all scholarship students in past years.").

[12] This Court often has emphasized the importance of evaluating a challenged state action in light of its overall context. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."); *County of Allegheny v. ACLU*, 492 U.S. 573, 613 (1989) (invalidating creche placed alone on steps of City Hall as endorsement of religion, but upholding menorah standing next to a Christmas tree and sign saluting liberty because the "necessary result of placing a menorah next to a Christmas tree is to create an 'overall holiday setting'" that does not advance any particular religion). Indeed, the "reasonable observer" test for impermissible endorsement, which relies on the same factors as the advancement inquiry, *see Agostini*, 521 U.S. at 235, is explicitly contextual. *See, e.g., Good News v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2106 (2001) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place].") (internal quotation marks omitted).

is just one element of a varied menu of parental educational choices by which the State has provided special funding for a number of alternative, nonreligious schools such as community schools and magnet schools, in addition to the voucher program. Only 16.5 percent of students now attending Cleveland schools of choice are attending religious schools. *See* Greene, *Context of Parental Choice*, *supra* note 11, at 105. Such an outcome can hardly be viewed as evidence of a program that is designed to advance or endorse religion. *Cf. Jackson v. Benson*, 578 N.W.2d 602, 614 n.9 (Wis. 1998) (upholding school choice program that "merely adds religious schools to a range of pre-existing educational choices available to [Milwaukee] children").

In sum, the Pilot Program clearly passes this Court's "neutrality" test. Far from creating a financial disincentive for secular schools to participate, the statute enables those schools to join the Cleveland choice programs on far more favorable terms than religious schools. The Pilot Program therefore falls within the category of "public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited" that was contemplated in *Nyquist*, *see* 413 U.S. at 782 n.38, and ultimately approved in *Mueller*. The mere fact that the benefits for one component of Ohio's multifaceted parental-choice programs – vouchers – have thus far been distributed primarily to families whose children attend religious schools hardly suffices to invalidate the statute.

B. The Pilot Program Does Not Result in Religious Indoctrination Attributable to the Government Because It Is a "Private Choice" Program in Which the Genuinely Independent Decisions of Individual Parents Determine the Distribution of Benefits.

The Pilot Program also passes the second important factor identified by this Court because the program does not result in any religious indoctrination that "could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809 (plurality) (citing *Agostini*, 521 U.S. at 226). This Court has held that benefits distributed, as these vouchers are, through the vehicle of genuinely independent private choices, are far less likely to violate the Establishment Clause than direct aid to religious institutions. The reason is that any advancement of religion occurring via the mechanism of private choice is not attributable to the State. *See, e.g.*, *Agostini*, 521 U.S. at 225-26.

Here, the Pilot Program clearly qualifies as a "private choice" program under the definition set forth in cases such as *Witters*, *Mueller*, and *Zobrest*.[13] As described, *supra*, par-

[13] In *Witters*, for example, this Court upheld a statute providing scholarships to any eligible disabled post-secondary student who spent the aid at an accredited educational institution, even a bible college. The Court found it "well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution." 474 U.S. at 486. Moreover, the *Witters* Court stated: "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488. Thus, the Court concluded, "it d[id] not seem appropriate to view any aid ultimately flowing [to the Christian college] as resulting from a *state* action sponsoring or subsidizing religion." *Id.*; *see also, e.g.*, *Mueller*, 463 U.S. at 399 (although "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children," the fact that the distribution of benefits resulted from "numerous private choices of individual parents" "reduced

ents may apply the scholarship at any participating school subject only to the availability of space in that school.[14] Schools are not permitted to discriminate against students on the basis of religion. Each scholarship is made "payable to the parents of the student entitled to the scholarship." *See* OHIO REV. CODE § 3313.979. The checks are sent to the school that the parents have selected, and the parents endorse the checks over to the school in order to pay tuition. *See Simmons-Harris*, 234 F.3d at 948. Thus, parents make an antecedent choice[15] and retain ultimate control over whether their children will attend a private school or remain in public school,[16] and if the former, over whether they will attend a secular or religious school. Scholarship funds reach a reli-

the Establishment Clause objections to which [the State's] action is subject"); *Zobrest*, 509 U.S. at 10 (interpreter's presence in a religious school was the "result of the private decision of individual parents," and "because the [statute] creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking").

[14] Once a student is selected for the program, the student's family applies to a participating private school of its own choice. *See* OHIO REV. CODE § 3313.978(A)(2)(a). If the number of applicants is greater than the available number of spaces at a particular school, the school gives priority to students enrolled during the prior year, siblings of students enrolled during the prior year, and students from low-income families, *see id.* § 3313.977(A)(1)(a)-(c), but any remaining spaces must be filled by lottery. *See id.* § 3313.977(A)(1)(d).

[15] The fact that parents have "the right and genuine opportunity . . . to choose not to give the aid," *Mitchell*, 530 U.S. at 902 (O'Connor, J., joined by Souter, J., concurring in the judgment), distinguishes this program from a more constitutionally suspect "per capita" aid program. *See id.*

[16] Parents who keep their children in public schools may seek tutorial assistance grants through the Pilot Program. *See* OHIO REV. CODE § 3313.978(B). They may also enroll their children in one of the many secular, public school alternatives available in Cleveland, including community (charter) and magnet schools.

gious school only because individual parents making private decisions selected that school from among numerous available options.

Yet, for the same reasons that the Sixth Circuit found the neutrality of the Pilot Program vis-à-vis secular schools to be "illusory," *id.* at 959, the court also opined that the "private choice" enabled by the statute could not be exercised in an authentic manner. In the court of appeals' view, "[t]he idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation on the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program." *Id.* at 960. The court concluded that "[t]he absence of any meaningful public school choice from the decision matrix yields a limited and restricted palette for parents which is solely caused by state legislative structuring." *Id.*; *see also id.* at 961 ("[N]or is there truly 'private choice' when the available choices resulting from the program design are predominantly religious.").

The Sixth Circuit's analysis is flawed in several respects. First, the court again erred by attributing to the State the suburban public schools' independent decision not to participate in the program. The court assumed that it was the program's design (*i.e.*, the size of the scholarship grants) that resulted in the fact that "no public schools from outside Cleveland have registered in the school voucher program, and there are no spaces available for children who wish to attend a suburban public school in place of a private school." 234 F.3d at 959. As discussed above, this factual premise of the court's claimed financial disincentive for public schools is nothing more than bald assertion, bereft of any record support.

Second, the record contains no evidence that the choices made by parents participating in the Pilot Program are influenced by the proportion of religious schools participating in the program. None of the schools are permitted to impose religious or other restrictions on admissions, *see* OHIO REV. CODE § 3313.976(A)(4), so the parents' choices are not constrained in that sense. Moreover, there is no evidence that anyone who applied to any participating school was denied admission, or that any parent seeking a secular education for his or her child was not able to obtain a spot at one of the ten nonreligious private schools that presently participate in the program. Once again, the Sixth Circuit impermissibly substitutes speculation for facts not in the record. *See Mitchell*, 530 U.S. at 858 (O'Connor, J., joined by Breyer, J., concurring in the judgment) ("[I]t would be inappropriate to presume inculcation of religion; rather, plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination.").

Third, the majority's failure to evaluate the voucher program in context resulted in an inaccurate picture of the breadth of choice available to Cleveland parents. Whereas only 3,761 students received voucher grants during the 1999-2000 school year, an additional 16,184 Cleveland students were enrolled in magnet schools and another 2,087 were enrolled in community schools. *See* Greene, *Context of Parental Choice*, *supra* note 11, at 105 (available at www.schoolchoiceinfo.org/research). As a result, only 16.5 percent of Cleveland schoolchildren attending schools of choice were enrolled in religiously affiliated schools. *See id.* Viewed in the proper context, therefore, it is clear that parents have far more secular options than religious ones among Cleveland schools of choice.[17]

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[17] Curiously, the court below again cited the relative attractiveness of the community school option as a reason why the voucher program should be invalidated, arguing that "state assistance is only available to those students who attend private schools," whereas "students may not

Finally, relying on its improper characterization of the Pilot Program as a "direct aid" program rather than a "private choice" program, the court of appeals applied the wrong legal standard in evaluating whether the statute resulted in impermissible governmental indoctrination. The Sixth Circuit held the Pilot Program invalid because it provides "no effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." *Simmons-Harris*, 234 F.3d at 958 (internal quotation marks omitted). But this Court plainly has "departed from the rule . . . that all government aid that directly assists the educational functions of religious schools is invalid." *Agostini*, 521 U.S. at 225. Such unrestricted assistance is permissible so long as the program is neutral and the assistance flows to the religious institution by virtue of independent private choices uninfluenced, as here, by the State. *See, e.g., id.* at 226; *Witters*, 474 U.S. at 487 (unrestricted funds to religious institution valid when those funds reached the institution under a neutral program and by virtue of "the genuinely independent and private choices of" individual recipients); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (standard governing "direct money payments to sectarian institutions" does not apply where "no public funds flow *directly* to [the religious group's] coffers") (emphasis added). Thus, the court of appeals' concern about the unrestricted nature of the $2,500 voucher is inapposite.[18]

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choose to attend community or magnet school using a voucher." *Simmons-Harris*, 234 F.3d at 959. Yet the fact that students may not use the voucher as such to attend a community school does not detract from the availability of the community school option among the range of educational alternatives available to Cleveland parents, of which the voucher program is but one.

[18] The voucher program arguably would be valid even if this were a "direct aid" program. *Cf. Mitchell*, 530 U.S. at 810 (plurality opinion) ("[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.") (citation omitted).

II. THE OHIO PILOT SCHOLARSHIP PROGRAM IS NEEDED TO OFFER VIABLE ALTERNATIVES TO ECONOMICALLY DISADVANTAGED STUDENTS, AND TO PROMOTE HEALTHY COMPETITION AMONG CLEVELAND-AREA SCHOOLS.

The Pilot Program invalidated by the Sixth Circuit in this case was adopted in the wake of an educational crisis so severe that the U.S. District Court for the Northern District of Ohio transferred control of the school district to the State of Ohio. *See Reed v. Rhodes*, 1995 U.S. Dist. Lexis 3814 (N.D. Ohio Mar. 3, 1995). The ongoing problems faced by the Cleveland City School District in the mid-1990s are by now all-too-familiar characteristics of our nation's inner-city educational systems. The difficulties ranged from extremely poor academic performance,[19] low graduation rates,[20] admin-

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[19] In a 1996 proficiency test of eighth-graders, "one of every three students statewide mastered all parts of the examination," whereas "fewer than one of every 10 in Cleveland did." *Proficiency Still Elusive: Test Results in Most Classrooms Are Simply Dismal, and Any Reform Must Aim at Reversing That Trend*, CLEVELAND PLAIN DEALER, Jul. 4, 1996, at 10B [hereinafter *Still Elusive*]. "In all, 13 of 21 [Cleveland] middle schools had overall passage rates of 5 percent or lower." *Id.* According to a 1996 audit of the Cleveland district, only 9 percent of the district's high school students passed all four sections of Ohio's ninth grade proficiency test. *See* Cleveland City School District Performance Audit (Mar. 16, 1996) [hereinafter 1996 Audit].

[20] "A study conducted by the Cleveland Public Schools demonstrates that only 26% of students who entered ninth grade in 1991 graduated on time and that only 7% of the students could pass the 12th grade proficiency examination upon graduation." J.A. 231a-232a (Decl. of Howard Fuller ¶ 10) (citing Cleveland Public Schools, *Getting the Job Done: A Blueprint to Improve Student Performance and Achieve Financial Stability* (Nov. 1995)). "Of those Cleveland students who managed

istrative problems,[21] and school violence. After taking control, the State acted quickly and creatively to remedy the situation by adopting a variety of innovative programs. Those initiatives included the Pilot Program.

The Pilot Program was designed to enable the most economically disadvantaged among the Cleveland students to opt out of the failing public system. First priority under the program goes to children whose family incomes are below or near the poverty line. *See* OHIO REV. CODE § 3313.978(A) (program must give preference to families with income below 200% of the poverty line). Sixty-eight percent of scholarship recipients are African-American, and 70 percent come from single-parent homes. *See* Paul E. Peterson, William G. Howell & Jay P. Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, Harvard Program on Education Policy and Governance (June 1999) (available at www.schoolchoiceinfo.org/research).

Economic disadvantage is typically accompanied in the United States by educational disadvantage, and Cleveland is no exception. Whereas wealthier families "choose" schools by moving to residential areas connected with high-quality schools or by enrolling their children in private schools,[22] the

to reach senior year, one of every four still failed to graduate." *Still Elusive*, *supra* note 19, at 10B.

[21] The State Auditor noted that the district was experiencing a "financial crisis that is perhaps unprecedented in the history of American education." 1996 Audit, *supra* note 19, at 1-1, 2-1.

[22] *See, e.g.*, Greene, *Context of Parental Choice*, *supra* note 11, at 12 n.13 ("According to the U.S. Department of Education 39% of students have exercised 'residential choice,' where access to desired schools influenced where the family lives."); J.A. 76a (Peterson Affidavit) ("Approximately 63 percent of American families with school-age children are making a choice when sending their child to school," including 39 percent who choose by residence, 11 percent who send their children to private school, and 13 percent who take advantage of alternative public school options such as magnet and charter schools).

urban poor have no such options. The vast majority of families with children in the Cleveland public schools cannot afford the housing costs in neighborhoods with better schools[23]; nor can they afford the tuition charged at private institutions. The poorest children remain in substandard schools while other families flee the district; the poor have no choice but to remain. And, unfortunately, a school system with a captive audience and no real competition has little incentive to make improvements. The Pilot Program was designed to alter that troubling dynamic by giving disadvantaged Cleveland youths some of the same options that more advantaged families already enjoy.

Preliminary evaluations of the Cleveland voucher program and of similar programs elsewhere suggest that choice programs are meeting their objectives. Choice programs have a substantial positive impact not only on the students and families who participate directly, but also on the public schools and the students who remain in the public system. The positive effects on voucher recipients themselves range from improved test scores,[24] enhanced parental satisfaction,[25]

[23] *See, e.g.*, J.A. 80a (Peterson Affidavit) (explaining that low-income families "often can afford a home or apartment only because it is located in a neighborhood where schools are perceived to be of low quality, a perception that depresses property values").

[24] Although empirical data on students in the Cleveland program are still preliminary, at least two studies have found significant academic benefits for parental-choice students. One found that "scholarship students in existing private schools had significantly higher test scores than public school students in language (45.0 versus 40.0) and science (40.0 versus 36.0). However, there were no statistically significant difference between these groups on any of the other scores." Kim K. Metcalf, *Evaluation of the Cleveland Scholarship and Tutoring Program, 1996-99*, at 15 (Sept. 1999), Indiana University (available at www.schoolchoiceinfo.org/research); *see also* J.A. 66a-72a (Affidavit of Kim Metcalf). Another report found that after two years Cleveland scholarship students at two of the choice schools had gained 7.5 national percentile rank (NPR) in reading and 15.6 NPR in math. *See* Paul E.

Peterson, William G. Howell & Jay P. Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, Harvard Program on Education Policy and Governance Working Paper (1998) [hereinafter *Cleveland After Two Years*] at table 12; *see also* Jay P. Greene, *A Survey of Results from Voucher Experiments: Where We Are and What We Know* 4-5, CIVIC REPORT, No. 11 (July 2000) (available at www.schoolchoiceinfo.org/research) [hereinafter *Survey of Results*] (discussing several studies concerning the Cleveland program).

Similar gains have been reported in the Milwaukee choice program and the privately funded school choice programs in Washington, D.C., Dayton, and New York. *See, e.g.*, Greene, *Survey of Results*, *supra* at 3 (finding gains of "11 normal curve equivalent (NCE) points in math and 6 NCE points in reading after three or four years of participation in the [Milwaukee] choice program") (citing Jay P. Greene, Paul E. Peterson & Jiangtao Du, *School Choice in Milwaukee: A Randomized Experiment*, LEARNING FROM SCHOOL CHOICE, at 345); *id.* at 5 (summarizing research showing that, "[a]fter one year of participation in the program, choice students in grades 2 through 5 in New York benefited by about 2 NPR in math and reading. Older students, in grades 4 and 5, gained four points in reading and six points in math") (citing Paul E. Peterson, David Myers & William G. Howell, *An Evaluation of the New York City: School Choice Scholarships Program: The First Year*, Harvard Program on Education Policy and Governance Working Paper (1998)); *id.* ("In D.C. African-American students in grades 2 through 5 gained 6.8 NPR in reading, but students in grades 6 through 8 lost 8.2 NPR in math.") (citing Patrick J. Wolf, William G. Howell & Paul E. Peterson, *School Choice in Washington, D.C.: An Evaluation After One Year*, Harvard Program on Education Policy and Governance Working Paper (2000), at table 17); *id.* ("In Dayton, African-American students gained 6.8 NPR in math but their gain in reading fell short of statistical significance, probably due to a modest sized sample.") (citing William G. Howell & Paul E. Peterson, *School Choice in Dayton, OH: An Evaluation After One* Year, Harvard Program on Education Policy and Governance Working Paper (2000), at table 17).

[25] One study of the Cleveland program found that "after two years of the program choice parents were significantly more satisfied with almost all aspects of their children's education than were the parents of a random sample of Cleveland public school parents. Nearly 50 percent of choice parents reported being very satisfied with the academic program, safety, discipline, and teaching of moral values in the private school," compared to only 30 percent of Cleveland public school parents who

decreasing incidence of disciplinary problems such as fighting and cheating,[26] and increasing racial and economic inte-

reported similar levels of satisfaction. *See* Greene, *Survey of Results*, *supra* note 24, at 2 (citing Paul E. Peterson, William G. Howell & Jay P. Greene, *Cleveland After Two Years*, *supra* note 24). Similarly dramatic improvements in parental satisfaction were also reported with the Milwaukee school choice program, *see* John F. Witte, *The Milwaukee Voucher Experiment*, 20 EDUC. EVALUATION & POL'Y ANALYSIS 237 (1999), and with privately funded school choice programs in Washington, D.C., Dayton, New York, and San Antonio. *See* Paul E. Peterson, Jay P. Greene, William G. Howell & William McCready, *Initial Findings from an Evaluation of School Choice Programs in Washington, D.C., and Dayton, Ohio*, Harvard Program on Education Policy and Governance Working Paper (1998); Paul E. Peterson, David Myers & William G. Howell, *An Evaluation of the New York City: School Choice Scholarships Program: The First Year*, Harvard Program on Education Policy and Governance Working Paper (1998); Paul E. Peterson, David Myers & William G. Howell, *An Evaluation of the Horizon Scholarship Program in the Edgewood Independent School District, San Antonio, Texas: The First Year*, Harvard Program on Education Policy and Governance Working Paper (1999).

Similar results are reported for the Children's Scholarship Fund (CSF), a privately funded, national scholarship fund that enables low-income families across the United States to send their children to a private school of their choosing: "After one-year of participation in the CSF programs in New York City, Washington, D.C., and Dayton, Ohio the average overall test score performance for African-American students who switched from public to private schools was 3.3 [NPR] higher than the performance of those who remained in public schools. After two years, their performance was 6.3 points higher. No gains or losses were found for students of other racial and/or ethnic groups." Paul E. Peterson & David E. Campbell, *An Evaluation of the Children's Scholarship Fund* (May 2001) (available at www.schoolchoiceinfo.org/research) [hereinafter *Children's Scholarship Fund*].

[26] The Children's Scholarship Fund research found that far fewer private school parents than public school parents rated the following problems as serious at their children's schools: fighting; cheating; stealing; gangs; racial conflict; and guns. *See* Peterson & Campbell, *Children's Scholarship Fund*, *supra* note 25, at 19.

gration.[27] Some evidence suggests that students who receive vouchers and attend a private school are more likely to hold the goal of obtaining a college degree,[28] and – if historical patterns in private schools continue – may be more likely to attain that goal.[29] Voucher programs may also encourage parents to become more involved in their children's educations, leading to better academic outcomes.[30]

It is especially noteworthy that the research conducted to date is uniformly positive or at least neutral regarding the

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[27] *See, e.g.*, Greene, *Survey of Results*, *supra* note 24, at 10 (summarizing research results showing that "[t]he amount of integration is not great in either [the public or private school] system, but it is markedly better in the choice program"); *see also* Howard Fuller & George Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools*, Marquette University, Current Education Issues, Number 2000-2, June 2000 (available at www.schoolchoiceinfo.org/research).

[28] *See, e.g.*, Peterson & Campbell, *Children's Scholarship Fund*, *supra* note 25, at 34 ("Forty-five percent of those attending private school anticipate finishing college and pursuing their educational studies further, while only 28 percent of public-school students have the same expectations.").

[29] *See* J.A. 109a (Peterson Affidavit) ("Even Professor John Witte, a voucher critic, agrees that studies of private schools 'indicate a substantial private school advantage in terms of completing high school and enrolling in college, both very important events in predicting future income and well-being. Moreover, . . . the effects were most pronounced for students with achievement test scores in the bottom half of the distribution.'").

[30] Research conducted in conjunction with the Milwaukee school choice program, for example, "shows that parents who exercise choice are more satisfied than public school parents and that they become more involved. For decades, educational research has linked parental involvement to improved academic outcomes. A study conducted by the Program on Education Policy and Governance shows significant gains in math and reading scores, gains that were they to continue could close the gap between minority and white achievement." J.A. 231a (Decl. of Howard Fuller ¶ 9).

effects of choice programs on participating students.[31] Effective, lasting change will undoubtedly take many years. As one commentator has pointed out, "[p]rivate schooling is not a magic bullet that transforms students over night. Elementary and secondary education is a long, painstaking process to which most people devote 13 years of their life." Peterson & Campbell, *Children's Scholarship Fund*, *supra* note 25, at 8. Even relatively small gains, if sustained year after year, would be sufficient to close much of the observed gap in proficiency test scores between the average black student and the average white student. *See id.* at 8-9.

The positive effects of choice programs on the public schools are also promising. Publicly funded voucher programs – including the Cleveland initiative – typically do not take money away from the public schools,[32] nor do they appear to siphon the best students.[33] Indeed, the Cleveland plan laudably requires participating schools to admit all eligible students for whom there is room. *See supra* note 14. Nevertheless, the existence of these alternative programs puts pressure on the public schools to improve their educational performance. Evidence shows that voucher programs, like other parental-choice programs, promote healthy compe-

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[31] *See, e.g.*, Greene, *Survey of Results*, *supra* note 24, at 13 ("[P]erhaps the most striking finding from the review of school choice research is the absence of evidence about how school choice harms students or society.").

[32] "In Cleveland, . . . the state essentially held the public schools harmless against any financial losses they might suffer from losing students to the voucher program." Greene, *Survey of Results*, *supra* note 24, at 7. In Milwaukee, "the data indicated that there was no unfair financial impact on the public schools. Per pupil spending increased because students who left public schools took with them less than total per pupil funding." J.A. 233a-234a (Decl. of Howard Fuller ¶ 16).

[33] *See, e.g.*, Greene, *Survey of Results*, *supra* note 24, at 6-8 (concluding that voucher programs such as those in Cleveland and Milwaukee do not "cream" the best students from the public schools).

tition that spurs the public schools to become better at what they do. Harvard economist Caroline Hoxby has observed a salutary effect on public schools that have to compete with schools of choice. *See* J.A. 62a-64a (Affidavit of Caroline M. Hoxby). Anecdotal evidence in Milwaukee suggests that the public school district became more responsive to parental concerns after the voucher program was implemented.[34] And a study of the Florida A-Plus Accountability and School Choice Program indicated that even the mere prospect of vouchers program was enough to prod public schools into dramatically improved performance.[35] In short, competition from voucher programs makes the public schools work harder to raise performance and avoid public criticism. Parental-choice programs thus introduce a desirable element of competition encouraging public schools truly to earn their public funding.

Invalidating the Pilot Program, on the other hand, would force thousands of economically disadvantaged children to return to the substandard conditions of Cleveland's inner-city

[34] *See, e.g.*, J.A. 234a (Decl. of Howard Fuller ¶ 17) ("The positive reaction of the public and private schools in Milwaukee shows that parental choice helps improve all schools. During the last year, the Milwaukee Public Schools have: 1) sought to encourage parents of young children to attend MPS by promising in radio ads that the district will hire private tutors if students are not able to read at grade level by third grade; 2) permitted a dozen schools to hire teachers outside the seniority system that stymies reform; 3) responded to longstanding requests by parents for more new schools that specialize in popular programs as Montessori.").

[35] *See generally* Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program*, Harvard Program on Education Policy and Governance (Feb. 2001) (available at www.schoolchoiceinfo.org/research); *see also* Carol Innerst, *Competing to Win: How Florida's A+ Plan Has Triggered Public School Reform* (April 2000) (available at www.schoolchoiceinfo.org/research) (summarizing improvements in public schools triggered by the A+ program).

public schools.[36] Those children would be not only at risk of losing the gains they have made on tangible measures such as proficiency test scores, but also would be robbed of the only chance many of them ever will have to exercise the same educational choices and freedoms that their wealthier counterparts take for granted. And the ramifications of invalidating the program would extend far beyond the boundaries of the Cleveland City School District. Similar programs nationwide also would face serious legal jeopardy: a chilling effect would descend on initiatives throughout the country that have been adopted in an effort to address the intractable problems associated with our nation's inner-city public schools. The loss of parental choice would concomitantly erode the incentives public schools need if they are to improve their educational offerings and their responsiveness to parental concerns.

Fortunately, no such jeopardy should occur as the Pilot Program's constitutionality is clear under this Court's precedents. Although many public schools undoubtedly would prefer to eliminate their newfound competition, they should not be permitted to do so through the vehicle of an Establishment Clause lawsuit. This neutral, private-choice-driven program – which has the purely secular purpose of helping to level the playing field for economically disadvantaged inner-

[36] Although the Cleveland schools have shown some improvement in the past two years, the district continues to lag behind on most indicators. In 1999, the State of Ohio reported that CCSD failed to meet even a single one of its 18 performance criteria for public schools. *See* State of Ohio 1999 District School Report Card for Cleveland City School District/Cuyahoga County. In 2000, CCSD also failed all 27 state performance standards. *See* State of Ohio 2000 District School Report Card for Cleveland City School District/Cuyahoga County. The graduation rate for CCSD students was 33 percent. *See id.* In 2001, CCSD managed to meet three of the 27 state standards, *see* State of Ohio 2001 District School Report Card for Cleveland City School District/Cuyahoga County, but even that progress would likely grind to a halt without the competition provided by alternative schools.

city youth and is free of any impermissible effect of endorsing religion – should be upheld.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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SUSAN TAVE ZELMAN, *et al.*, *Petitioners,*
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents*

HANNA PERKINS SCHOOL, *et al.*, *Petitioners,*
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents*

SENEL TAYLOR, *et al.*, *Petitioners,*
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, INC. AND FOCUS ON THE FAMILY, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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22 pp

TABLE OF CONTENTS*

Page

TABLE OF AUTHORITIES iii
INTEREST OF AMICI 1
SUMMARY OF ARGUMENT 3
ARGUMENT 5
IN ACCORD WITH THIS COURT'S DECISION IN *AGOSTINI* AND WITH THE CONCURRENCE BY JUSTICE O'CONNOR IN *MITCHELL*, THE JUDGMENT BELOW MUST BE REVERSED. 5
A. The Ohio Voucher Program Is Governed By The Scrutiny Called For by Justice O'Connor's Concurrence in *Mitchell* 5
B. The Ohio Voucher Program Satisfies the Constitutional Standards of the *Mitchell* Concurrence and *Agostini* 8
1. *The Ohio voucher program was not enacted for the purpose of advancing religion.* 9
2. *The Ohio voucher program does not have the effect of advancing religion.* 9
a. The Ohio voucher program does not result in government indoctrination of religion 9
b. The Ohio voucher program does not define benefit recipients by reference to religion 13
c. The Ohio voucher program does not create excessive entanglement between government and religion. 14

---

*. This brief is filed with the consent of the parties. Letters indicating the consent of counsel of record for the parties are being filed together with this brief.

Page

3. *The Ohio voucher program does not endorse religion* 14

CONCLUSION 17

Page(s)

Cases

Agostini v. Felton, 521 U.S. 203 (1997) ..... 5, 8, *passim*
Board of Educ. v. Grumet, 512 U.S. 687 (1994) 1
Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) 1
Bowen v. Kendrick, 487 U.S. 589 (1988) 15, 16
Boy Scouts of America v. Dale, 530 U.S. 640 (2000) 1
Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 1
Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 1
Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) 1
Denver Area Educ. Telcoms. Consortium v. FCC, 518 U.S. 727 (1996) 1
Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093 (2001) 17
Gregg v. Georgia, 428 U.S. 153 (1976) 6
International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) 1
Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 1, 2
Lee v. ISKCON, 505 U.S. 672 (1992) 1
Lee v. Weisman, 505 U.S. 577 (1992) 1
Madsen v. Women's Health Ctr., 512 U.S. 753 (1994) 2
Marks v. United States, 428 U.S. 188 (1977) 6
Mitchell v. Helms, 530 U.S. 793 (2000) ..... 5, *passim*
Mueller v. Allen, 463 U.S. 388 (1983) 10, 12

TABLE OF AUTHORITIES–cont'd

Page(s)

National Organization for Women v. Scheidler, 510 U.S. 249 (1994) 1
Natl. Interfaith Cable v. FCC, 512 U.S. 1230 (1994) 2
Planned Parenthood v. Casey, 505 U.S. 833 (1992) 2
Reno v. ACLU, 520 U.S. 1113 (1997) 2
Romer v. Evans, 517 U.S. 620 (1996) 2
Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 2, 17
Rust v. Sullivan, 500 U.S. 173 (1991) 2
Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) ..... 4, *passim*
Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) 9, 14
Troxel v. Granville, 530 U.S. 57 (2000) 2
United States v. Kokinda, 497 U.S. 720 (1990) 1
Webster v. Reproductive Health Serv., 492 U.S. 490 (1989) 2
Westside Comm. Schools. v. Mergens, 496 U.S. 226 (1990) 1, 17
Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 10, 12, 15-16
Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) 10

INTEREST OF AMICI[1]

The American Center for Law and Justice (ACLJ) is a nonprofit public interest law firm and education organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have briefed and argued, or presented the views of amici curiae, in numerous cases before this Court on these issues.[2]

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1. No counsel representing a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation and submission of this brief.

2. Counsel for amici curiae have participated in the presentation of numerous cases in this Court, including: *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (42 U.S.C. § 1985(3)); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (Free Speech Clause); *Lee v. ISKCON*, 505 U.S. 672 (1992); *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994) (18 U.S.C. §§ 1961-68); *United States v. Kokinda*, 497 U.S. 720 (1990) (Free Speech Clause and 39 C.F.R. § 232.1(h)(1)).

In addition, counsel for amici curiae have represented groups and individuals as amici curiae in numerous cases, including: *Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (Establishment Clause); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (First Amendment Freedom of Association); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Free Speech and Establishment Clauses); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (Fourteenth Amendment); *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727 (1996) (Cable Television Consumer Protection and Competition Act of 1992); *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (Free Speech Clause); *Lee v. Weisman*, 505 U.S. 577 (1992)

Focus on the Family is a California nonprofit religious corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations.[3] Dr. Dobson hosts and Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada, and around the world. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month.

The proper resolution of this case is a matter of substantial organizational concern to the American Center for Law and

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(Establishment Clause); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (Free Speech Clause); *Natl. Interfaith Cable v. FCC*, 512 U.S. 1230 (1994) (Establishment Clause and the Cable Television Consumer Protection and Competition Act of 1992, §§ 4 and 5); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Fourteenth Amendment); *Reno v. ACLU*, 520 U.S. 1113 (1997) (Communications Decency Act); *Romer v. Evans*, 517 U.S. 620 (1996) (Equal Protection Clause); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (Free Speech and Establishment Clauses); *Rust v. Sullivan*, 500 U.S. 173 (1991) (42 U.S.C. §§ 300-300a-6 and 42 C.F.R. §§ 59.8-59.10); *Troxel v. Granville*, 530 U.S. 57 (2000) (Fourteenth Amendment); *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (Fourteenth Amendment).

3. Dr. Dobson hosted a six-part film series, entitled "Turn Your Heart Toward Home," the display of which in a public school facility was at issue in a prior decision of this Court. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 388 nn. 2-3 (1993).

Justice and to Focus on the Family because of their shared commitment to American families. These amici recognize that the primary responsibility for directing and controlling the upbringing and education of children belongs to the parents and guardians of those children. That responsibility is paired with the right of parents to select the schools in which their children will be educated. Choice in schooling is necessary for the right to direct and control the education of a child to have any substantive meaning. For that right to be meaningful, and so that it may be maximized, it is entirely appropriate for the States to establish appropriate mechanisms to assist parents in obtaining a meaningful slate of choices in schooling for their children.

In the view of these amici, the Ohio voucher program is an appropriate means to the end of meaningful parental choice in education. All that is done by a voucher system of the kind enacted in Ohio is that the playing field begins to be leveled. Ohio neither purposed to violate the Establishment Clause, nor does the Ohio voucher program have the primary effect of doing so, or of endorsing religion. Nonetheless, the appeals court misinterpreted this Court's Establishment Clause cases in reaching the conclusion that the Ohio program was unconstitutional. School voucher systems that facilitate meaningful parental choice in schooling, through assistance in funding those parental decisions, neither violate the Establishment Clause nor contradict this Court's jurisprudence regarding the Clause.

SUMMARY OF ARGUMENT

The Cleveland school district suffered from such serious mismanagement in providing an acceptable academic education

that it was taken from the control of local elected officials and placed under the direct control of Ohio's State Superintendent of Public Instruction. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000). Among those injured by that mismanagement are the students attending Cleveland schools whose families have such limited financial resources as to make it virtually hopeless that some alternative to the failed Cleveland schools will be available to them. Given the dire circumstances of such students, and the crisis created by the patterned mismanagement of a large urban school district, the State of Ohio responded quite reasonably and thoughtfully.

Ohio enacted a pilot program of vouchers to allow the children of low-income families in Cleveland to escape the deprivations resulting from the district's mismanagement. Under the program now under consideration in this Court, students and families can select from a list of participating schools. Vouchers provided for under the program are sent to the schools *chosen by the families*. In turn, the families go to the schools and endorse the voucher to validate it. Schools eligible to register for and participate in the program include private schools – both secular and religious – located within the Cleveland school district, and public schools in the school districts adjacent to Cleveland.

In the face of this eminently reasonable response to a crisis caused by a failed public schooling system, the Respondents and the court below have asserted that the Ohio voucher program has the primary effect of establishing religion because it accomplishes an actual diversion of government funds to private religious institutions. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 960-61 (6th Cir. 2000). The Court of Appeals purported to apply the reasoning of Justice O'Connor's separate

concurrence in *Mitchell v. Helms*, 530 U.S. 793, 836 (2000) (O'Connor, J, with Breyer, J., concurring in the judgment), *see Simmons-Harris*, 234 F.3d at 958, which, in turn, adopts the rationale in *Agostini v. Felton*, 521 U.S. 203 (1997). The court below, however, failed to make the analysis called for in *Agostini* and in Justice O'Connor's *Mitchell* concurrence. Had the court done so, it would have concluded that the Ohio voucher program survives constitutional scrutiny under the Establishment Clause.

First, the Respondents concede that the purpose for the program is secular. Second, they also concede that there is no excessive entanglement with religion. Finally, as we explain below, the primary effect of the Ohio voucher program is to provide needed assistance to students doubly handicapped by living in low-income circumstances and within the boundaries of a failed school district. Although the court below found a constitutional violation in this plan, this Court should reverse the decision below and uphold the voucher program at issue

ARGUMENT

IN ACCORD WITH THIS COURT'S DECISION IN *AGOSTINI* AND WITH THE CONCURRENCE BY JUSTICE O'CONNOR IN *MITCHELL*, THE JUDGMENT BELOW MUST BE REVERSED.

A. The Ohio Voucher Program Is Governed By The Scrutiny Called For by Justice O'Connor's Concurrence in *Mitchell*

This Court has explained, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may

be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 428 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). In light of that instruction, the appeals court decided the case below by invoking the reasoning offered in the concurring opinion of Justice O'Connor in *Mitchell v. Helms*, 530 U.S. 793, 836 (2000) (O'Connor, J, with Breyer, J., concurring in the judgment). The court below looked to that opinion in *Mitchell* because it was the concurrence of Justices O'Connor and Breyer in the judgment, expressed in that concurring opinion, that resulted in a decision by a majority of the Justices to reverse the judgment in *Mitchell*. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 958 (6th Cir. 2000).

The problem, however, is that the court erred in its application of the rationale offered by Justice O'Connor. Tellingly, the panel below fails to bring to bear on this controversy the principal points of analysis relied on by Justice O'Connor in her concurrence in *Mitchell*. But, because the court below claimed that it was applying Justice O'Connor's methodology in deciding that the Ohio voucher program violated the Establishment Clause, it is necessary to demonstrate that the assertion is quite flawed.

In *Mitchell v. Helms*, Justice O'Connor rejected the decisional approach taken by the plurality because, in Justice O'Connor's view, the plurality "announce[d] a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to school-aid programs." 530 U.S. at 837. To Justice O'Connor, "[r]educed to its essentials, the . . . rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on

a neutral basis and the aid is secular in content." *Id.*

Particularly troubling to Justice O'Connor were two features of the plurality opinion. First, "the plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs." *Id.* Second, "the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case." *Id.*

While it troubled her that the plurality adopted a near absolute principle of neutrality as the sole test for Establishment Clause sufficiency, Justice O'Connor nonetheless acknowledged in *Mitchell* that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges." *Id.* (citing cases). In addition, while the plurality expressed a willingness to tolerate diversion of government school-aid to the religious purposes of sectarian schools, Justice O'Connor concluded that the Court's jurisprudence on this issue allowed for "some government funding of *secular* functions performed by sectarian organizations," but "provide no precedent for the use of public funds to finance religious activities." *Id.* at 840 (emphasis added). In Justice O'Connor's view, the plurality missed a salient feature of previous decisions in which aid may have been diverted (or divertible), namely, that the aid went directly to individuals, and only secondarily, as a result of the individual choices of aid recipients, to private and religious institutions. *Id.* at 841 (discussing cases).

Ultimately, Justice O'Connor concluded that the proper rule for decision in *Mitchell* was the one announced in *Agostini v.*

Felton, 521 U.S. 203, 222-23, 234, 235 (1997). In *Agostini*, this Court highlighted the governing standards for deciding Establishment Clause challenges to school-aid programs:

> [T]he general principles we use to evaluate whether government aid violates the Establishment Clause have not changed . . . . [W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. Likewise, we continue to explore whether the aid has the 'effect' of advancing or inhibiting religion. What has changed . . . is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

Agostini, 522 U.S. at 222-23 (citations omitted); *see also Mitchell*, 530 U.S. at 845. Under Justice O'Connor's rationale, *Agostini* governs the decision of this case.

Consequently, this Court must ask whether the government acted to advance or inhibit religion, whether the government aid program had the effect of doing so, and whether the government program endorses religion. 530 U.S. at 844-45.

B. The Ohio Voucher Program Satisfies the Constitutional Standards of the *Mitchell* Concurrence and *Agostini*

The Court of Appeals failed to make a faithful and reasoned application of the principles outlined in *Agostini* and in the *Mitchell* concurrence. Beyond barely stating the intention to apply the rationale of those two opinions, there is little similarity between the decision below and those two opinions. As demonstrated below, the application of the factors

considered relevant by Justice O'Connor in *Mitchell*, and upon which this Court decided *Agostini*, leads ineluctably to the conclusion that the Ohio voucher program is constitutional.

(1) *The Ohio voucher program was not enacted for the purpose of advancing religion.*

The Ohio Legislature did not adopt the voucher program at issue here for the purpose of advancing religion. Respondents have never contended otherwise. This point is uncontradicted. As the district court explained, "[a]t the outset, it is important to note that Plaintiffs do not challenge the secular purpose of the Voucher Program." *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 844 n.6 (N.D. Ohio 1999).

(2) *The Ohio voucher program does not have the effect of advancing religion.*

Both *Agostini* and the *Mitchell* concurrence reason that this Court, in deciding whether aid has the effect of advancing or inhibiting religion, will look to three considerations: (1) does the aid result in government indoctrination of religion; (2) does the aid program define recipients by reference to religion; and, (3) does the program create excessive entanglement between government and religion. *Id.* at 845.

(a) The Ohio voucher program does not result in government indoctrination of religion

To determine whether the vouchers supplied in the Ohio voucher program result in government indoctrination of religion, several relevant factors may be considered. *See Mitchell*, 530 U.S. at 846-48 (concurrence).

First, the aid is allocated according neutral, secular criteria.

As the court below explained:

> The program provides scholarships to children residing within the applicable district in grades kindergarten through eighth grade. The program gives preference to students from low-income families, defining them as those whose families' income is less than 200% of the poverty line. Scholarships may be awarded to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement. Over sixty percent of the children receiving scholarships in the program are from families with incomes at or below the poverty line.

234 F.3d at 948 (citations and internal quotation marks omitted).

Second, in the same way that the Title I instructors were provided to students in both the public and private schools of New York City, the vouchers here are provided to the students and their families without regard to the choice of school that they make within the program. *Agostini*, 521 U.S. at 226; *Mitchell*, 530 U.S. at 848.[4] Under the Ohio program, private schools – both secular and religious – located within the

4. *Cf. Mueller v. Allen*, 463 U.S. 388 (1983) (no Establishment Clause violation in statute authorizing tax deduction for educational expenses without regard to parental choice of public or private schools); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (no Establishment Clause violation when State's funds were used by visually impaired student to study at religious school); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (no Establishment Clause violation in providing sign language interpreter to hearing impaired student without regard to parental choice of public or private schools).

Cleveland school district that "meet the State's education standards" are eligible to be designated as participants, 234 F.3d at 948, as are "[p]ublic schools in districts adjacent to the district in which the voucher program is implemented . . . ." *Id.* at 949.[5]

5. The court below concluded that the inability of participating students and their families to use their vouchers to attend public schools made a signal difference between this case and *Agostini*. *See Simmons-Harris*, 234 F.3d at 959 ("The alleged choice afforded both public and private school participants in this program is illusory in that the program's design does not result in the participation of the adjacent public schools from outside the Cleveland school district"). The appeals court misapprehends, however, the governing principle. The Ohio voucher program invites and makes possible the participation of private, secular schools, private religious schools, and public schools. 234 F.3d at 948-49. But, the appeals court noted, the public schools eligible to participate have declined, so far, to do so. The court below made that refusal of those schools to participate in the program a deciding factor of constitutional significance in striking down the voucher program. So, as the Court of Appeals reasoned it, the unexplained inability or unwillingness of public schools to participate in the program, despite their eligibility to do so, made the State's decision to create a religion-neutral program into an illegitimate establishment of religion.

Proponents of the status quo ante in education and in education funding have powerful incentives to discourage public school cooperation in programs testing the viability and utility of vouchers. These proponents view empowering parental choice in education as threatening one day to challenge the *de facto* primacy of public schools. That some eligible schools choose not to participate in an education reform program may suggest more about the politics of certain recalcitrant public school officials than it does about the Establishment Clause.

Third, although State education aid dollars actually will reach the "coffers" of private, religious schools under the Ohio voucher program, that result, as in *Witters*, will occur only because of the truly independent choices of private individuals (namely the low-income or other families that receive vouchers under the program). As the appeals court explained:

> Each scholarship for children attending a private school is payable to the parents of the student entitled to the scholarship. Scholarship checks are mailed to the school selected by the parents, where the parents are required to endorse the checks over to the school in order to pay tuition.

Simmons-Harris, 234 F.3d at 948 (citation omitted). This "funding" is, in principle, no different than a refundable tax credit that parents may use at the educational institution of their choice. *Cf. Mueller*.

Taken together, these three factors amply demonstrate that there is neither any government indoctrination of religion presented by the Ohio voucher program, nor any cognizable danger of such indoctrination under the program. In this respect, Justice O'Connor's recapitulation of *Agostini* is instructive. In *Agostini*, this Court, rather than presuming that a "symbolic union" arose when government teachers entered onto the grounds of parochial schools, concluded instead "that in the absence of evidence showing that teachers were actually using the Title I aid to inculcate religion, we would presume that the instructors would comply with the program's secular restrictions." *Mitchell*, 530 U.S. at 847; *Agostini*, 521 U.S. 223-24, 226-27.

Moreover, unlike the Title I program at stake in *Agostini*, the Ohio voucher program includes an additional feature that makes government indoctrination unlikely. In the Title I program, *public school* remedial teachers visited public and private schools to conduct their federally-funded remedial instruction programs. Because the public school teachers actually taught the instructional materials, there was a risk – perceived or real – that they might become involved in religious indoctrination. Here, however, no public school teachers are dispatched to religious schools to carry out instructional functions. For this reason, the opportunity for such teachers to engage in government indoctrination of religion is eliminated.

(b) The Ohio voucher program does not define benefit recipients by reference to religion

As noted above, the Ohio voucher program does not define recipients of vouchers by reference to religion. Instead, as the Court of Appeals recognized, the Ohio program defines recipients according to two, distinctly nonreligious, points of reference. 234 F.3d at 948. First, participation is limited to students and families in school districts that, by reason of their mismanagement, have been placed under the direct supervision of the State Superintendent of Schools.[6] Second, the Ohio

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6. 234 F.3d at 948 ("In 1995, Ohio's General Assembly adopted the Ohio Pilot Project Scholarship Program . . . in response to an order by the United States District Court that placed the Cleveland School District under the direct management and supervision of the State Superintendent of Public Instruction due to mismanagement by the local school board. The voucher program covers any state school district that has been the subject of a federal court order requiring supervision and operational management of the district by the state

voucher program defines recipients in terms of family income. *Id.* Specifically, the program is available, in the first instance, to students from "low-income" families (families with combined incomes up to twice the federally defined poverty line). Other families are eligible to participate only after all students from low-income families have been accommodated. *Id.* Neither failed management of a school district nor income level remotely resembles a religious referent.

(c) The Ohio voucher program does not create excessive entanglement between government and religion.

The Ohio voucher program does not create excessive entanglement between government and religion. Nor have Respondents contended otherwise. As the district court explained, "there has been no challenge that it creates an excessive entanglement between church and state." *Simmons-Harris*, 72 F. Supp. 3d at 864.

(3) *The Ohio voucher program does not endorse religion.*

In *Agostini*, after analyzing the three primary criteria also adopted by Justice O'Connor in her *Mitchell* concurrence, the Court further concluded that the Title I program did not constitute an impermissible endorsement of religion:

> New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion . . . . We therefore hold that a federally funded program providing supplemental, remedial instruction to

superintendent") (citation and internal quotation marks omitted).

> disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. *The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion.*

21 U.S. at 234-35 (emphasis added). In particular, this Court looked to its prior decisions in two cases in illuminating the absence of endorsement in the Title I program. *See id.* (citing *Witters v. Washington State Dep't of Serv. for the Blind*, 474 U.S. 481, 488-489 (1986); *Bowen v. Kendrick*, 487 U.S. 589, 613-14 (1988)).

Under the Ohio voucher program, schools eligible to participate include *all* private schools, whether religious or not, in the Cleveland school district, and also the public schools of school districts adjacent to the Cleveland district. 234 F.3d at 948-49. The families and students that are selected (using religion-neutral criteria) decide for themselves the participating school to which they will send their voucher and their child. Thus, the Ohio voucher program is much like the rehabilitation training and assistance at issue in *Witters*.

In *Agostini*, 521 U.S. at 235, this Court explained that no endorsement resulted from the program at issue in *Witters*: "'The mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion.'" 521 U.S. at 235 (quoting *Witters*, 474 U.S. at 488-

89). In effect, the private choice of the intervening actor removes any attribution of the religious selection to government actors, thus eliminating any supposed endorsement that might otherwise follow government funds to religious institutions. Here, the very same sort of private intervening decision alleviates any apparent endorsement that might otherwise be alleged to arise from the Ohio voucher program.

Under the Ohio voucher program, state funds are made available *neutrally* for the education of students from low-income families in the affected school district. The neutrality of the program is patent. No provision of the program gives preference in priority or funding to religious schools or to the choice by beneficiary families of such schools. In fact, a religious school's mere eligibility to participate does not guarantee the matriculation of even a single student whose voucher will pay for schooling. If the State of Ohio only permitted parochial schools to participate, that circumstance would certainly present a case of "symbolic union" of state and religion. But here there is no lurking danger of a perceived endorsement resulting from a "symbolic union" between private religious schools and Government in the Ohio voucher program. *See Agostini*, 521 U.S. at 235 (citing *Bowen*, 487 U.S. at 613-14).

Because the Ohio voucher program avoids any "symbolic union" between religion and government, and because the private, intervening choice of an individual student and his family is the sole factor in determining whether a voucher will go to a secular or a religious school, no danger of perceived endorsement exists. Indeed, the discriminating *exclusion* of religious schools, and only religious schools, from participation

in the program would send a message of hostility inconsistent with the Establishment Clause. *See Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2106 (2001); *Westside Comm. Schools. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 844-46 (1995).

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 2001

ZELMAN, ET AL / HANNA PERKINS SCHOOL, ET AL./
TAYLOR, SENEL, ET AL.
Petitioners,

v.

SIMMONS-HARRIS, ET AL
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF PETITIONERS

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36 pp

QUESTION PRESENTED

Does the Establishment Clause of the First Amendment prohibit state aid to religious schools under a broad based parental choice, voucher plan?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The establishment clause was intended to prevent the establishment of a national church, and reserve matters of religion to the discretion of each State. 2

II. Because the establishment clause was intended to protect the sovereignty of local governments, the attempt to incorporate the establishment clause against States is logically incoherent. 7

A. The "selective incorporation" of the establishment clause, makes no sense; the claim that Dis-Establishment is "inherent in the idea of ordered liberty," is negated by the fact that the establishment clause has often been found to clash with religious liberty. 13

B. Recent Decisions have tended to ameliorate the situation by tying establishment challenges more directly to religious liberty and government coercion 14

III. The logical incoherence of the establishment "incorporation" has resulted in case law which this

Court has described as resulting in "considerable internal inconsistency" (*Walz v Tax Comm.*). 17

IV. The establishment clause has been used to raise the federal courts to the level of a "national school board" despite the fact that this Court has repeatedly characterized education as a constitutional function pre-eminently local – and thus runs afoul of the Tenth Amendment. 21

V. The Circuit Court's ruling also interferes with the religious liberty of parents to direct the religious education of their children. 24

CONCLUSION 29

Table of Authorities

page

CASES

Abingdon School Dist. v. Schemp, 374 US 203 (1963) 5, 15

Allegheny County v. ACLU, 492 US 573 (1989) 7, 10, 16, 19, 28-9

Cantwell v. Conn., 210 US 396 (1940) 8

City of Boerne v. Flores, 95-2074 (1997) 24

Cook v. Hudon, 429 US 165 (1976) 24-5

Engel v. Vitale, 370 US 421 (1962) 9, 15

Everson v. Board of Education, 330 U.S. 1 (1947) 3, 5, 7,8 -10, 22

Lynch v. Donnelly, 465 US 668 (1984) 7, 20

McCollum v. Board of Ed., 303 US 203 (1948) 5, 10, 11, 22-3

McGowan v. Maryland, 366 US 420 (1961) 9

Meyer v. Neb., 262 US 390 (1923) 22, 26

Pierce v. Soc of Sisters, 268 US 510 (1923) 26-7

Reubin Quick Bear v. Leupp, 210 US 50 (1908) 13-14, 25

San Antonio Sch. Dist v. Rodriguez 411 US 1, (1973) 21

Santa Fe School Dist. v. Doe, 99-62 (2000) 15-17

Wallace v. Jaffree, 472 US 38 (1985) 6, 18-20, 30

Walz v. Tax Com. of NY 397 US 664 (1972) 10,19

Wisc. v. Yoder 406 US 205 (1972) 25

HISTORICAL SOURCES

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— *Constitutional Choices.* 17

INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state, local and tribal officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsels to the petitioners, and counsel to the respondents, have consented to the filing of this *amicus* brief. Consent letters are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

In *Everson v. Board of Education* (330 U.S. 1 (1947)) the majority opinion declared that "No tax in any amount, large or small, can be levied to support any religious activities or institutions." That statement, if taken literally and carried to its logical conclusion, would prohibit any government aid to religious schools. However, that pronouncement of Justice Black in *Everson*, has been undermine and ignored in subsequent decisions of this Court.

Moreover, members of this Court have repeatedly noted that the *Everson* decision is based on a mistaken reading of the First Amendment, and has resulted in a confusing and conflicting set of precedents.

We believe that in order to review the Constitutionality of state aid to religious schools, the Court should review the entire doctrine of "separation of church and state" (or more properly the "selective incorporation" of the

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

establishment clause of the First Amendment) first embraced by the majority opinion in *Everson*. We believe a wholesale re-evaluation is necessary in the current case because this Court's Establishment Clause jurisprudence has resulted in such a wide range of seemingly contradictory decisions.

Neither the First Amendment nor the Fourteenth Amendment was ever intended to prohibit government support for religion.

Moreover, the attempt to "incorporate" secularism against the states (whose independence the First Amendment was designed to protect), was adopted by the *Everson* decision with virtually no reflection upon historical or legal antecedent, and actually resulted in a doctrine in conflict with free exercise of religion and conflict with the Tenth Amendment which reserved control of education to the states.

In the current case, the parents' right to freely oversee the religious education of their children (a right recognized in *Pierce v. Society of Sisters*, (268 US 510, (1925)) has been attacked under the auspices of the establishment clause.

The internal inconsistencies and constant interference in local schooling necessitates that this Court review its establishment clause jurisprudence in toto, and suggests the need to explicitly overrule the *Everson* doctrine and its progeny.

ARGUMENT

I. The establishment clause was intended to prevent the establishment of a national church, and reserve matters of religion to the discretion of each State.

In creating the doctrine that the establishment clause was intended to create a separation of religion and government the *Everson* opinion declared, "it is not inappropriate briefly to review the background and environment of the period in which that constitutional

language was fashioned and adopted." Yet apart from selective consideration of the "environment of the period" *Everson* did not examine the language or history of the establishment clause at all.

As distinguished Harvard professor Mary Anne Glendon has written

> With little or no support from text, history, or tradition, the members of the Everson Court braided into the Religion Clause the notions that the establishment provision was meant to create a "wall of separation" between religion and government, that it was broadly construed to prohibit all government aid to religion, and that government was required to be strictly neutral as between religion and nonreligion. The Court thus lent its prestige and sponsorship to a controversial secularizing program without even acknowledging what in hindsight seem obvious and serious interpretive problems.[2]

Everson's claim that the establishment clause should be applied to the states through selective incorporation was an almost completely gratuitous claim based on little more than Madison and Jefferson's opposition to an established church in Virginia, and Jefferson's passing use of the metaphor "wall of separation" Any attempt to examine how Madison and Jefferson understood the First Amendment would have clarified that they, like all scholars of the earlier 19th century, viewed the establishment clause as preserving state supremacy over religion.

As Jefferson wrote in his Kentucky Resolution:

no power over the freedom of religion, freedom of

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[2] Glendon and Yanes, *Structural Free Exercise* (90 Mich. Law Rev., 1991), 485.

speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, *all lawful powers respecting the same did of right remain, and were reserved to the states,* or to the people; that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed; and thus also *they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same.* . . . in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," thereby guarding in the same sentence, and under the same words, the *freedom of religion*, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, and defamations, *equally with heresy and false religion, are withheld from the cognizance of federal tribunals.* [emphasis added].

Similarly Justice Story in his influential *Commentaries on the Constitution* was just as plain in writing that the First Amendment meant "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions."

The historical interpretation of the establishment clause offered in *Everson* is so clearly wrong,[3] such a complete rejection of prior precedent, and had been so thoroughly discredited by legal and historical commentary before (and since) the decision, that it is hard to regard the argument offered in *Everson* as anything but a deliberate falsification, unworthy of this great Court.

That historical falsification has been noted at various times by members of this Court. Justice Reed a year after *Everson*, dissenting in *McCollum v Board of Ed.* (303 US 203), exposed the fabrication of the attributing complete separation to Jefferson and Madison. Among other things Justice Reed noted that as Rector of the University of Virginia, when asked to comment on the question of the constitutional limitation upon religious education in public schools Jefferson wrote:

> It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation.[4]

In his dissent in *Abington School Dist v. Schemp* 374 US 203 (1963) Justice Stewart pointed out

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[3] Laurence Tribe has acknowledged that the original purpose of the establishment clause was "to protect state religious establishments" (*American Const. Law*, 2nd Ed, (1988)), 1161.

[4] *The Writings of Thomas Jefferson* (Memorial edition, 1904), 414.

> [T]he establishment clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would be unable to interfere with existing state establishments. . . . It is not without irony that a constitutional provision evidently designed to leave the states free to go their own way should now have become a restriction on their autonomy.

Chief Justice (then Justice) Rehnquist examined the historical record at some length in his dissent in *Wallace v. Jaffree* (472 US 38, at 98) concluding:

> It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court's opinion in Everson - while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty - is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights. . . . On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history. And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; stare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history.

So the Chief Justice concluded that "Whether due to its lack of historical support or its practical unworkability, the *Everson* 'wall' has proved all but useless as a guide to sound constitutional adjudication." Justice Kennedy has even accused the Court in establishment cases of "an Orwellian rewriting of history" (*Allegheny County v. ACLU* (1989)). The *Everson* "wall" is an historical fiction, if not deliberate falsification. Any sound resolution of the current case should begin by recognizing that fact.[5]

II. Because the establishment clause was intended to protect the sovereignty of local governments, the attempt to incorporate the establishment clause against States is logically incoherent.

If *Everson* presented little or no evidence in support of its novel (and demonstrably incorrect) interpretation of the original First Amendment, the move from that understanding to "incorporation" by the Fourteenth Amendment was even more problematic. With no historical analysis or relevant precedents *Everson* simply declared:

> The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the

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[5] Some of the majority decisions of the Court have also suggested something similar. In *Lynch v. Donnelly*, 465 U.S. 668 (1984) The Court acknowledged "the [wall] metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."

> states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause.

Actually, there was every reason to treat the establishment clause and the religious liberty clause as completely different, but the *Everson* opinion glossed over all differences between the two clauses by simply asserting that "[t]here is every reason to give the same application."

The selective incorporation of the religious liberty clause created a few years earlier in *Cantwell v Connecticut* (210 US 396 (1940)) offered a rationale which seems especially difficult to apply to the establishment clause (even on the Court's historical re-interpretation of that clause). *Cantwell* declared:

> We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the *liberties* guaranteed by the First Amendment [emphasis added].

Even setting aside the question of whether the Fourteenth Amendment was intended to have (or should have) incorporated the free exercise clause, the establishment clause is of a wholly different nature. The establishment clause unlike the free exercise clause, does not refer to an individual freedom.

The Court has accepted that the free exercise clause and the establishment clause mean different things. The free exercise clause requires a showing of attacking a person's religious freedom, while the establishment clause does not.

Quite specifically in *McGown v. Maryland* (366 U.S. 420 (1961)) challenging Sunday closing laws in Maryland the Court declared:

> appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. . . . appellants do not specifically allege that the statutes infringe upon the religious beliefs of the department store's present or prospective patrons.
>
> Secondly, appellants contend that the statutes violate the guarantee of separation of church and state in that the statutes are laws respecting an establishment of religion contrary to the First Amendment, made applicable to the States by the Fourteenth Amendment. *If the purpose of the "establishment" clause was only to insure protection for the "free exercise" of religion,* then what we have said above concerning appellants' standing to raise the "free exercise" contention would appear to be true here. However, the writings of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.[6]

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[6] Emphasis added. Many similar statements could be cited, see for example, *Engel v. Vitale*, 370 U.S., at 430: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion." At times the Court has suggested that the establishment clause is ultimately intended to protect religious liberty, but if so, then

As Black originally pronounced in *Everson* "we have staked the very existence of our country on the faith that complete separation between the state and religion is *best for the state* and best for religion" (330 U.S. at 59) [emph added].

In *McCollum* the majority declared that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." Statements such as these demonstrate that certain opinions of the Court (particularly in the first two decades following *Everson*) advanced the establishment clause as stating a principle of good government, and suggests that certain members of the Court viewed the establishment clause as protecting the state from the corrupting influence of religious entanglement.

Moreover, if the establishment clause were nothing more than a way to protect religious freedom then there could be no conflicts (as the Court has clearly noted that there are). In *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970) the Court declared that "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[7]

So the Court has long considered the purpose of the establishment clause to be something other than (or at least, something more than) protecting religious liberty, and in fact,

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how is it different from the religious liberty clause?

[7] Justices Kennedy and O'Connor have both echoed this. Kennedy in his dissent in *Allegheny* write: "Taken to its logical extreme, some of the language [in establishment cases] would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause."

admitted that the establishment clause often seemed to reduce religious liberty.

Indeed, in the current case, the establishment clause is being used to attack the freedom of parents to send their children to religious schools. There is not even a suggestion by the Appeals Court that the plaintiffs in the case have had their religious freedom diminished in any way by the fact that some parents were able to use tax dollars to choose schools of their preference.[8] Nor does the Appeals Court ever suggest that the program in any way infringes on any sort of religious freedom. The Circuit Court's opinion is based entirely on its assertion that "states and school boards cannot infringe upon the necessary separation between church and state."

Yet if the establishment clause does not involve protecting the individual liberty of any person, (but is rather to protect the government from religious entanglement) then on what basis can it possibly fall under the Fourteenth Amendment provision that no states shall "deprive any person of liberty without due process"? No one has been deprived of liberty by the Ohio statute.

As Edward Corwin has written:

> So far as the Fourteenth Amendment is concerned, states are entirely free to establish religions, provided they do not deprive anyone of religious liberty. It is only liberty that the Fourteenth Amendment protects. And in this connection it should not be overlooked that contemporary England manages to maintain as complete freedom of religion as exists in this country

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[8] As Justice Reed noted in his dissent in *McCollum*, "It seems obvious that the action of the School Board in permitting religious education in certain grades of the schools by all faiths did not prohibit the free exercise of religion."

alongside an establishment of religion.[9]

Moreover, the Harvard Law Review noted in 1992: "structural differences between the various 'rights' protected by the Bill of Rights may be discerned. Although most of its provisions are meant to protect substantive individual rights, such as the right to free speech, the Establishment Clause is not."[10]

Additionally, Akil Reed Amar has demonstrated, even the most ardent supporters of complete incorporation prior to *Everson* did not see the establishment clause as a candidate for incorporation as something different from protecting religious freedom. Amar points out that Justice Harlan in arguing for incorporation in his dissent in *Maxwell v. Dow* "in canvassing the rights and freedoms of the first amendment, Harlan quoted or paraphrased each of its clauses *except establishment*." Raising serious questions about the incorporation of the establishment clause Amar (who is otherwise a proponent of incorporation) points out: "To infringe upon the free exercise of religion is necessary to invade rights of property and bodily injury, but perhaps not all establishment would do so. Would a simple legislative declaration that 'Utah is a Mormon state' infringe classic common law rights of liberty or property?" (*The Bill of Rights*, 229).

Since the Court has otherwise announced that the criteria for the selective incorporation of parts of the Bill of Rights is that the thing protected is "implicit in the concept of ordered liberty" the establishment clause is a remarkably poor candidate for incorporation.

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[9] Corwin, Supreme Court as National School Board (*Law and Contemp. Problems*, (1949) is. 3, vol 14, p. 19).

[10] Rethinking the Incorporation of the Establishment Clause, NOTES section, 105, Harv. Law Rev. (1992), 1704.

A. The "selective incorporation" of the establishment clause, further makes no sense in terms of freedom "inherent in the idea of ordered liberty," since the establishment clause has often been found to clash with religious liberty.

Black's assertion in *Everson* that "There is every reason to give the same application" to the establishment clause as the free exercise clause also failed to consider previous decisions of the Court that were contradicted by *Everson*, without so much as a sidelong glance. The closest precedent to the current case is actually *Quick Bear v Leupp* (210 US 50 (1908)) which declared that the establishment clause was no barrier to religious schools being paid for out of trust money provided by the federal government to tribal government. Of course, implicit in the decision is that the establishment clause did not even apply to tribal government, which was perfectly free to use tribal money to support religious education. In that respect *Quick Bear* is almost an exact parallel to the current Ohio case. The Court declared in *Quick Bear*:

> we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof. The court of appeals well said:
> "The 'treaty' and 'trust' moneys are the only moneys that the Indians can lay claim to as matter of right; the only sums on which they are entitled to rely as theirs for education; and while these moneys are not delivered to them in hand, yet the money must not only be provided, but be expended, for their benefit,

> and in part for their education; it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians."[11]

It is impossible to square this decision with the complete separation thesis posited by *Everson* and *Lemon*. Yet *Everson* implicitly overturned *Quick Bear* (and indeed reversed at least 75 years of Constitutional jurisprudence) without even bothering to acknowledge the radical departure the decision incorporated.

Moreover, as the Court acknowledged in *Quick Bear*, adopting the secularist position advocated by plaintiffs would have resulted in a position which was "to prohibit the free exercise of religion." Yet it is virtually the same position prohibiting parents from receiving religious education for their children which the Court once called an infringement of free exercise, that the Court is asked to adopt today under the banner of "establishment."

B. Recent Decisions have tended to ameliorate the situation by tying establishment challenges more directly to religious liberty and government coercion.

While many decisions noted above clearly held that "establishment" and "free exercise" were two different and independent values, more recent decisions have indicated that

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[11] 210 US at 81. It is significant that preventing the tribe from paying for religious education the Court explicitly called an act that would "prohibit the free exercise of religion among the Indians" regardless of the fact that parents could still provide religious instruction outside of school (see below p. 25).

the ultimate purpose of the establishment clause is to protect freedom of religion. The Court seems to be moving towards framing establishment challenges in terms of religious liberty. Last term in *Santa Fe* the Court declared "[R]eligious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer" because, the majority found that:

> The Court's analysis is guided by the principles endorsed in *Lee v. Weisman*, 505 U. S. 577. There, in concluding that a prayer delivered by a rabbi at a graduation ceremony violated the Establishment Clause, the Court held that, at a minimum, the Constitution guarantees that government may not *coerce* anyone to support or participate in religion or its exercise." [emphasis added]

The Opinion also noted, "we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of *coercing* those present to participate in an act of religious worship."

Thus the majority in citing *coercion* was able to frame the problem in terms of religious liberty rather than in terms of separation. The *Santa Fe* decision seemed to indicate that the element of coercion involved was a central factor making student led prayer impermissible.[12] This seems to have been a step back from the assertion in *Engel* that "The Establishment Clause, unlike the Free Exercise Clause, does

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[12] The Court has long held coercion to be central to *free exercise* complaints: "[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion," *Abington School District v. Schempp*, 374 U.S. 203, at 223.

not depend upon any showing of direct governmental compulsion" (370 US at 430).

This is apparently the position advocated by Justice Kennedy in 1989. In his dissent in *Allegheny* he identified coercion as essential proper interpretation of the establishment clause:

> it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing. It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. Forbidden involvements include compelling or coercing participation or attendance at a religious activity. The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object. . . . Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.

We believe the emphasis on coercion is a move in the right direction. This Court could help clear up much of the conflict and confusion surrounding religion cases by interpreting the establishment clause as supportive of religious freedom, rather than separation as an end in itself, or as protecting government *from* religion. This would entail viewing the establishment clause as prohibiting government coercion of an individual to participate in state sponsored

religious exercises, but would not entail a prohibition on all government support for religion in general.

We believe at very least (if not outright rejecting the "wall of separation") this Court should set up as a rule that protecting freedom of religion must be the guiding principle in First Amendment cases. Plaintiffs would then need to demonstrate how a particular state policy damaged religious liberty, rather than merely asserting that some state policy gives the appearance of supporting religion. Indeed, we believe the Court should reject the view that government must be neutral towards religion, and acknowledge that "supporting religion" is a perfectly appropriate state function, so long as it does not coerce anyone into participating in religious ceremonies.

In cases such as the Ohio school program, where no diminution of religious freedom has even been alleged, and where there is no "compulsion" (such as the Court found in *Santa Fe*) the Court should uphold such practices.

C. The logical incoherence of the establishment "incorporation" has resulted in case law which this Court has described as resulting in "considerable internal inconsistency."

If the Court in *Santa Fe* was attempting to clarify establishment clause precedent by tying it more directly to liberty and government coercion, it has at least thus far failed to make clear any established principles.

Law review articles by the dozen have noted the incoherence and inconsistency of the Court's various establishment clause decisions. No less an authority than Laurence Tribe has written that some of the Court's establishment decisions seem "almost totally whimsical" (Tribe, *Constitutional Choices*, 104). Glendon and Yanes

have written that the Court's establishment jurisprudence "has been described on all sides, and even by the Justices themselves, as unprincipled, incoherent and unworkable" (Struct. Free Ex., 478).

Chief Justice Rehnquist has also noted the obvious contradictions in *Wallace*:

> For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class.

Perhaps most absurdly, as Justice Kennedy has noted, the Court has found that the "placement of a government-owned creche on private land is lawful while placement of a privately owned creche on public land is not" (dissent in *Allegheny v. ACLU*).

As the Chief Justice went on to explain (at 106):

> If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it. The "crucible of litigation," has produced only consistent unpredictability, and today's effort is just a continuation of "the sisyphean task of trying to patch together the `blurred, indistinct and variable barrier' described in Lemon v. Kurtzman." Regan, at 671 (STEVENS, J., dissenting). We have done much straining since 1947, but still we admit that we can only "dimly perceive" the Everson wall. Our perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor.

In *Walz* (397 U.S. 664 (1970)) the majority declared,

"In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clause."

Similarly Justice Kennedy has called parts of the Court's establishment jurisprudence "flawed in its fundamentals and unworkable in practice" (*Allegheny*).

Justice O'Connor has also noted the problems with the separation thesis. In her concurring opinion in *Wallace* (at 82) she declared:

> It is obvious that either of the two Religion Clauses, "if expanded to a logical extreme, would tend to clash with the other." *Walz*. The Court has long exacerbated the conflict by calling for government "neutrality" toward religion. It is difficult to square any notion of "complete neutrality," with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion.

Justice O'Connor has quite properly called for a revision of the *Lemon* test, writing:

> the Lemon test has proved problematic. The required inquiry into "entanglement" has been modified and questioned, see Mueller v. Allen, (1983), and in one case we have upheld state action against an Establishment Clause challenge without applying the Lemon test at all. Marsh v. Chambers, (1983). The author of Lemon himself apparently questions the test's general applicability. See Lynch v. Donnelly,

(1984). . . . I am not ready to abandon all aspects of the Lemon test. I do believe, however, that the standards announced in Lemon should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional "signpost," Hunt v. McNair, (1973), to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems."[13]

Justice O'Connor offered good advice, and we believe that after an additional 16 years it has become even more clear that any interpretation "grounded in the history and language of the first amendment" must recognize that neither the framers of the First Amendment nor the rather less gifted framers of the Fourteenth Amendment ever imagined that the establishment clause would ever be applied against the states.

The attempt to incorporate it has led to nothing but confusion and uncertainty. We suggestion for this Court to take the present opportunity to explicitly reject the "wall of separation" metaphor, and acknowledge that nothing in the Constitution prohibits all aid to religious institutions.

D. The establishment clause has been used to raise the

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[13] *Wallace* at 68. In her concurring opinion in *Lynch* Justice O'Connor also noted "It has never been entirely clear, however, how the three parts of the [Lemon] test relate to the principles enshrined in the Establishment Clause."

federal courts to the level of a "national school board" despite the fact that this Court has repeatedly characterized education as a constitutional function pre-eminently local – thus running afoul of the Tenth Amendment

Education n this country has long been considered a function pre-eminently local. This Court has several times announced the importance of local control of education. For example, in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) at a time when the Tenth Amendment was not held in as high esteem by the Court as it is today, the Court declared:

> The merit of local control was recognized last Term in both the majority and dissenting opinions in Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). MR. JUSTICE STEWART stated there that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." Id., at 469. THE CHIEF JUSTICE, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." Id., at 478.
>
> ... Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments." No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public

> education. . . . the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

We believe these are wise words. The Cleveland voucher program is an experiment in educational reform which should be applauded by advocates of diversity and experimentation. Local attempts to address problems through experimentation should not be straightjacketed by this Court, particularly in an area as uniquely local as education.

Unfortunately, in recent years, federal courts have gotten involved in micro-managing local schools. Prior to 1947 there were very few federal cases involving local schools; and prior to the *Meyer* (262 US 390) Court's discovery in 1923 that the freedom "to acquire useful knowledge, to marry, establish a home and bring up children" were fundamental rights protected by the Fourteenth Amendment there were virtually none. Since the *Everson* decision, however, there has been a virtual explosion of federal court cases micro-managing almost every aspect of local schools, not limited to school prayer and moments of silence but even extending to what courses can be taught, what words it is permissible for a teacher or student to say in class, what books can be used, and what type of art work can be hung on school walls.

While it would be wrong to attribute all of this litigiousness to *Everson*, the establishment line of cases has presented an open invitation for federal courts to interfere in local decisions. As Justice Jackson wrote in his concurring opinion in *McCollum*:

> A Federal Court may interfere with local school authorities only when they invade either a personal

> liberty or a property right protected by the Federal Constitution. . . . The relief demanded in this case is the extraordinary writ of mandamus to tell the local Board of Education what it must do. To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits. ...
>
> The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school boards of the nation, 'to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching to religious education in all public schools,' is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation (333 US at 237).

Justice Jackson's predictions have proven only too correct. This Court in recent years has rediscovered a respect for the Tenth Amendment and the importance and value of state sovereignty. Education is clearly an area of law "reserved to the States or to the people."

In *City of Boerne* (95-2074 (1997)) Justice Kennedy declared that Congress's attempt to protect religious freedom "is not a proper exercise of Congress' §§5 enforcement power because it contradicts vital principles necessary to maintain separation of powers and the federal state balance." Among other problems the Court noted that,

> Its sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. ... Any law is subject to challenge at any time by any individual who claims a substantial burden on his or her free exercise of religion.

One could well argue that some of the Court's establishment clause cases have done exactly the same thing, it has contradicted the separation of powers and the federal state balance by bringing into judicial review educational decisions which would otherwise be considered reserved to local school boards. The shear volume of establishment cases has proved that the "blurred, indistinct, and variable" wall which is only "dimly perceived" has guaranteed "its intrusion at every level of government" at any time by any individual who claims an action by local government has not even injured him, but has merely made him feel like an outsider because an action could conceivably have religious significance.

E. The Circuit Court's ruling also interferes with the religious liberty of parents to direct the religious education of their children.

In *Cook v. Hudon*, 429 U.S. 165 (1976) this Court declared "Few familial decisions are as immune from

governmental interference as parents' choice of a school for their children, so long as the school chosen otherwise meets the educational standards imposed by the State." Yet this Court is asked to interfere precisely in the parents' choice of a school for their children. In *Wisconsin v Yoder* this Court declared that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." The Ohio law is an attempt to give substance and support to these rights of parents to direct the upbringing of their children, while the effect of the Sixth Circuit decision is to negate it.

It has been argued that forcing students to attend secular schools does not interfere with freedom of religion because parents are free to educate their children as they see fit outside of school.[14] As we have noted earlier, the Court implicitly rejected that argument in *Quick Bear*. Moreover, that argument depends upon the assumption that no one's religion *requires* religious education in school. The Catholic Church (the single largest church in the United States) teaches precisely this.

The Canon Law of the Church which binds all Catholics, provides that (Canon 798): "Parents are to send their children to those schools which will provide for their catholic education." The *Catechism of the Catholic Church* section 2229 declares:

> As those first responsible for the education of their children, parents have the right to choose a school for them which corresponds to their own convictions. This right is fundamental. As far as possible *parents*

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[14] Obviously, for example, no one would argue that prohibiting Moslem girls from wearing veils was not an infringement on religious liberty because they are still free to wear veils at home.

have the duty of choosing schools that will best help them in their task as Christian educators.

The Catholic Church allows exceptions to this requirement where local circumstances make it virtually impossible, but it remains a central teaching of the Catholic Church that Catholics should be educated in Catholic schools. The allowance for Catholics under adverse circumstances to avoid sending Catholic children to Catholic schools does resolve the freedom of religion problem, any more than the fact that individual Catholics would be excused from their obligation to attend Mass on Sunday if government prohibition made it too dangerous. Similarly, the fact that Catholic parents can teach religion at other times, besides in elementary school, does not negate the interference in their exercise of religion, since the Catholic religion requires religious content permeate elementary school teaching.

In *Meyer v. Nebraska* (262 US 390 (1923)), the Court rejected the very same argument that prohibiting teaching foreign language in schools did not really inhibit the freedom of parents since they were still free to instruct their children in a foreign language at home.

The Court in *Pierce* said it was a violation of basic Constitutional rights for a state to make it difficult for parents to send their children to parochial schools. It is significant that in the *Pierce* case, the Oregon statute did not completely prohibit parents from sending students to religious schools. The Oregon statute did allow numerous exceptions (Pierce 268 U.S. 510 at 531), yet the Court in *Pierce* ruled:

> we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state

> to standardize its children by forcing them to accept instruction from public teachers only.

The Sixth Circuit ruling that all publically funded education must be secular, is similar to the Oregon statute in that it does not completely prohibit (for example) Catholic parents from following the dictates of their religion and sending their children to Catholic schools, but it makes it a practical impossibility for upwards of 90% of them, and clearly "interferes with" their ability to follow the prescriptions of their church.[15]

We are sensible to the argument that while people (such as Catholics) may feel they have a religious obligation to send their children to a Catholic school, or to attend church on Sunday, that in no way entitles them to the assistance of the government to do so. That certainly is true, they are entitled to no special assistance simply because they believe they have a religious obligation. However, many local governments, for example, run shuttle bus services for the elderly and disabled. A disabled person can schedule a pickup and drop off to go places. What if a local government announced that the disabled program would take a disabled person anywhere except to a religious event? That would be singling out people of faith for discriminatory treatment. That would certainly not be neutrality towards religion. That would be interfering in a person's freedom of religion.

A government service which is generally available to anyone except religious people in the performance of their religious duties would clearly be discriminatory (even

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[15] 90% of Catholics would not send their children to non-Catholic schools were it not for state policies which (at very least) encourage parents to use secular schools, plus a fairly high level of school tax which results in millions of middle class families being unable to afford private religious schools.

Everson acknowledged that). In the Ohio school case, the same scenario applies. A voucher program which is available to send children to any accredited school *except* a religious school, is not neutral towards religion, but discriminates against religion, and interferes with a parent's free exercise.

This point was made by Justice Kennedy in his dissent in *Allegheny* where he noted, "In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality."

Of course, the public transportation analogy with public schools is not a close parallel. To more properly parallel the situation with public schools, we would need to imagine a special transportation tax (the equivalent of a school tax) which would result in a tax of several thousand dollars a year, a huge government transportation system which would serve almost everyone, and result in the fact that more than 90% of the public could no longer afford private transportation at all. Once government policy had made the vast majority of the public dependant on government transportation, it would then announce that the government would not provide transportation to or from any religious event. It would be difficult to characterize such a hypothetical action by a government as anything but "interfering with religious freedom."

We have suggested that the establishment clause ought to be interpreted as supportive of free exercise not as contradicting it or undermining it. We again suggest that even the most far fetched incorporation of the First Amendment has got to give priority to free exercise over "separation."

CONCLUSION

As Pepperdine University Professor F. LaGard Smith has declared:

> Articles and notes in one respected law review article after another are making the same point. The Clause's incorporation is logically incoherent. If the Court wants a way out of the morass of church-state cases, there is a clear path. It must simply go back to square one, and frankly acknowledge that the incorporation of the Establishment Clause was a terrible call.[16]

The establishment clause cases addressed by this court over the years have involved the court in numerous areas which should have been left to local officials or state legislatures to resolve.

Certain establishment clause decisions have in effect raised the federal courts to a national school board (or indeed as Justice Kennedy has quipped in *Allegheny* "a national theology board"). Yet one need not stop there. One could add "national art board" and "national music board" as federal courts have been called on to decide if certain religious art and music, was sufficiently artistic to justify study in public schools.

Some of the Court's pronouncements on establishment have clearly been "too sweeping" (*Walz*), and are in serious need of re-evaluation and reformulation. Members this Court have repeatedly called into question adherence to the entire "wall of separation" metaphor. Justice Kennedy has written that "Substantial revision of our Establishment Clause doctrine may be in order" (*Allegheny*).

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[16] *ACLU: The Devil's Advocate* (1996), 173.

Perhaps the case was best made by the Chief Justice when he wrote:

> Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." . . . Whether due to its lack of historical support or its practical unworkability, the Everson "wall" has proved all but useless as a guide to sound constitutional adjudication.

Everson's wall doctrine to the contrary, nothing in the history or text of the First or Fourteenth Amendments prohibits a state from broadly supporting religious institutions, the Court would do well to affirm that principle and overturn the Sixth Circuit decision.

Respectfully Submitted.
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REC'D TEAM 11

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Nos. 00-1751, 00-1777 & 01-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, *et al.*, *Petitioners*,
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

HANNA PERKINS SCHOOL, *et al.*, *Petitioners*,
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

SENEL HERMAN TAYLOR, *et al.*, *Petitioners*,
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE CENTER FOR INDIVIDUAL FREEDOM, CATO INSTITUTE, MILTON AND ROSE D. FRIEDMAN FOUNDATION, AND GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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24 pp

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. GENUINE PRIVATE CHOICE BETWEEN THE SECULAR AND THE RELIGIOUS SATISFIES THE ESTABLISHMENT CLAUSE. 6

II. VOUCHERS MUST BE EVALUATED WITHIN THE FULL CONTEXT OF STATE-FUNDED EDUCATIONAL OPTIONS. 8

III. PARENTS HAVE GENUINE CHOICE BETWEEN RELIGIOUS AND NONRELIGIOUS SCHOOLS. 12

IV. SCHOOLS HAVE NONDISCRIMINATORY ACCESS TO THE OHIO VOUCHER PROGRAM. 15

CONCLUSION 21

TABLE OF AUTHORITIES

Pages

Cases

Agostini v. *Felton*, 521 U.S. 203 (1997) ..... passim

Arlington Heights v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) 15

Good News Club v. *Milford Central School*, -- U.S. --, 121 S. Ct. 2093 (2001) 11

Mitchell v. *Helms*, 500 U.S. 739 (2001) 7

Mueller v. *Allen*, 463 U.S. 388 (1983) 10, 14

Rosenberger v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) 11

Simmons-Harris v. *Zelman*, 234 F.3d 945 (CA6 2000). passim

Washington v. *Davis*, 426 U.S. 229 (1976) 14, 15

Witters v. *Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) 6, 7

Zobrest v. *Catalina Foothills School Dist.*, 509 U.S. 1 (1993) 6

Other Authorities

Petition for a Writ of Certiorari, *Taylor* v. *Simmons-Harris*, No. 00-1779 (May 25, 2001) 9, 14

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTEREST OF AMICI CURIAE[1]

The Center for Individual Freedom is a nonpartisan, nonprofit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free speech rights, property rights, privacy rights, freedom of association and religious freedoms. Of particular importance to the Center in this case are constitutional protections for the free exer-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

cise of religious choice, and the constitutional requirement of the religion-neutral provision of public benefits, including publicly funded education.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case raises squarely issues of increased choice in the educational marketplace and the interaction of First Amendment Establishment Clause and Free Exercise values and thus is of central interest to Cato and the Center.

The Milton and Rose D. Friedman Foundation, established in 1996, is dedicated to promoting public understanding of the need for major reform in K-12 education, specifically highlighting the role that competition through educational choice plays in achieving that reform. For nearly 50 years, Milton and Rose Friedman have argued that in order to improve substantially the quality of education in America all parents need to have a truly free choice of the schools that their children attend. Through its publications, research, and public information campaigns, the Friedman Foundation seeks to advance this vision of individual liberty via free educational markets. As the instant case raises squarely the rights of low-income parents in Cleveland to make a free choice of schools, including religious schools, it is of critical interest to the Milton and Rose D. Friedman Foundation.

The Goldwater Institute, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of free market public policy. Through its research papers, editorials, and policy briefings, the Institute advocates public policy founded upon the principles of limited government, economic freedom and individual responsibility. Central to the mission of the Goldwater Institute is studying and promoting school choice options for parents. The instant case raises squarely the issue of whether a program designed to rescue economically disadvantaged students from a failing public school system by providing scholarships that parents may use to choose private, religious or public schools violates the First Amendment and thus is of vital interest to the Goldwater Institute.

SUMMARY OF ARGUMENT

1. When evaluating facially neutral laws that allow benefits to flow on equal terms to secular and religious institutions and that do not create excessive government entanglement with religion, the touchstone of Establishment Clause analysis should be whether the flow of benefits is mediated by genuinely independent private choice. Such private choice breaks the nexus between government decisionmaking and any benefits to religious institutions that may result as a secondary consequence of private decisions on how to use government benefits.

2. In order to determine whether the Ohio voucher program allows for genuinely independent private choice, it must be evaluated in the context of the full range of publicly funded educational alternatives available to the parents of Cleveland schoolchildren. Consideration of publicly funded secular alternatives such as public schools with tutoring, magnet schools, and community schools places context around any decision by a parent to select a religious school participating in the voucher program and demonstrates the independence of that choice by showing that numerous secu-

lar alternatives were available to that parent on equal or better terms. Such competing secular alternatives also provide a baseline from which to measure whether the voucher program is affirmatively advancing or endorsing religious schooling, or instead simply moving it closer to equal treatment with secular educational options. In questions regarding the existence of choice and alleged favoritism, an accurate and complete context is essential.

3. The numerous publicly funded secular options available to Cleveland parents for educating their children establish that their choices under the voucher program are genuinely independent of any pressure to favor religion. If anything, parents are provided precisely the opposite incentives, through programs that provide greater funding for secular educational alternatives than the funding provided under the voucher program. That many of the parents participating in the voucher program have selected religious schools for their children merely reflects their private decisions and does not cause the program to violate the Establishment Clause.

4. The school participation and other criteria defining the voucher program do not discriminate in favor of religious schools. Those criteria are facially neutral and serve valid public goals concerning the affordability of educational options under the voucher program and the desire to enhance the return on government funds by requiring participating schools to limit the tuition they will charge voucher students as a means of having them contribute to the expense of educating those students. Neither a high percentage of participating religious schools nor a high percentage of voucher students attending such schools supports the inference that the criteria for the program are non-neutral. Those outcomes are a function of the private choices of educational institutions as well as of Cleveland parents selecting such schools. The suggestion that the low dollar amount of the vouchers and the tuition cap on participating schools favors religious schools with supposedly lower costs and greater resources than secular

schools misunderstands the economics of education and rests on speculative facts. The supposed bias of a government program that validly encourages private contributions to the public goal of education is no more than one that may favor wealthy institutions in general, without regard to their religious or secular identity. The low funding amounts in the voucher program in fact treat religious institutions worse than private secular institutions, which are eligible to participate in better-funded programs that compete with vouchers in providing publicly funded educational alternatives for Cleveland students. The voucher program thus merely adds a small improvement over the complete lack of such funding and is a first step in the direction of neutrality, not a violation of the Establishment Clause.

ARGUMENT

The central issue in this appeal is whether and to what extent school selection by parents under the Ohio voucher program is a product of genuinely independent private choice. State creation of such private choice does not offend the Establishment Clause regardless of whether the individual exercise of such choice results in greater or lesser attendance at religiously oriented schools. As in so many areas of constitutional law, ranging from free speech to equal protection, the fundamental requirement is an equality of opportunity, not a pre-ordained outcome. Where private choice is exercised in the face of such opportunity, the nexus between government support and the ensuing results is broken and the final distribution of the results of such choices cannot be attributed to the government.

I. GENUINE PRIVATE CHOICE BETWEEN THE SECULAR AND THE RELIGIOUS SATISFIES THE ESTABLISHMENT CLAUSE.

As the court of appeals recognized, this case hinges upon whether the Ohio voucher program has the principal or primary effect of advancing or inhibiting religion. *Simmons-Harris* v. *Zelman*, 234 F.3d 945, 951 (CA6 2000); *id.* at 966 (Ryan, J, concurring in part and dissenting in part). In this case the "primary effect" issue turns mainly on whether any state funds ultimately reaching religious schools flow to them "'only as a result of the genuinely independent and private choices of aid recipients.'" *Simmons-Harris*, 234 F.3d at 955 (*quoting Witters* v. *Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 488 (1986)); *see also*, *Agostini* v. *Felton*, 521 U.S. 203, 225-26 (1997) (direct aid to religious schools valid where money flows to schools as a result of "'genuinely independent and private choices of' individuals").

Private choice is critical to Establishment Clause analysis because it breaks the nexus between the government support and the ensuing results. In *Witters*, for example, this Court upheld the use of a vocational tuition grant by a person who chose to attend a Christian college to become a pastor, missionary, or youth director. 474 U.S. at 487. Because it was the *student's* educational choice to seek sectarian education with the funds made available to him, there was no Establishment Clause violation. That choice made the tuition payment "no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution." *Agostini*, 521 U.S. at 226 (discussing *Witters*). Likewise in *Zobrest* v. *Catalina Foothills School District*, even though the state-provided sign language interpreter would be translating expressly religious instruction at a religious high school, the interpreter's activity was the "result of the private decision of individual parents" and could not be "attributed to state decisionmaking." 509 U.S. 1, 10 (1993).

Interjecting private choice between the government decision to subsidize education for a class of students and the final parental decisions of which schools their children will attend, eliminates both the perception and the reality of any *government* decision to advance or inhibit any religious educational option. The government merely supports educational choice. The ensuing choices that result are then attributable to the parents and students, not to the government.

The private locus of decisionmaking is important to Establishment Clause analysis because it constrains the government's ability to use its program for improper purposes. *Mitchell* v. *Helms*, 500 U.S. 739, 810 (2001) (Thomas, J., plurality) ("if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment"). A multitude of private choices regarding which schools students will attend is the antithesis of monolithic government support for a favored religion that the Establishment Clause was meant to guard against. Private decisionmaking also shifts the "attribution" of any decision to pay religious school tuition to the parents choosing that school for their child, and away from the government. Such shifted attribution reflects the reality of the decisionmaking and furthers the additional Establishment Clause goal that government not engage in symbolic endorsement of or opposition to religion. *Witters*, 474 U.S. at 493 ("The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief.").

In cases involving intervening private choice and where there is no issue of entanglement, the only remaining Establishment Clause analysis is whether those decisions that the government does make – eligibility criteria for students and schools and other parameters of government educational

funding – themselves discriminate in favor of or against religion. *Agostini*, 521 U.S. at 231 (an incentive for religious indoctrination "is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion."). But where the criteria defining the available choices of publicly funded education are neutral toward religion, parents' choice of a religious school for their child is the result of a "genuinely independent" private choice and there is no Establishment Clause violation.

II. VOUCHERS MUST BE EVALUATED WITHIN THE FULL CONTEXT OF STATE-FUNDED EDUCATIONAL OPTIONS.

In considering whether genuinely independent private choice existed in this case, the Sixth Circuit looked only to the choices provided parents by the voucher program itself, and ignored the variety of other state-funded educational options that also were open to parents eligible for the voucher program. 234 F.3d at 958 (refusing to examine entire context of Ohio education and other options available to Cleveland parents). But it is impossible to evaluate the genuineness or independence of educational choices being made by parents in Cleveland without looking at the full range of state-funded options from which such parents are choosing.

When considering where to send their children to school, Cleveland parents have a variety of state-funded educational options. Most obvious (though perhaps least desirable) is the local public school option. Parents selecting that option effectively direct over $7000 per pupil of state funds to the secular education of their children, and may obtain additional voucher program funds for supplemental private tutoring of their children. Parents whose children qualify also may elect to send their children to public magnet schools, again directing over $7000 dollars per pupil of state funds to a secular

educational alternative. Petition for a Writ of Certiorari, *Taylor* v. *Simmons-Harris*, No. 00-1779, at 4 (May 25, 2001) ("Taylor Pet."). Over 16,000 Cleveland students attended magnet schools during the 1999-2000 school year. *Id.*

Parents dissatisfied with traditional public school options may instead elect to send their children to publicly funded Community Schools (often called "charter schools"), which provide greater educational autonomy. Students at Community Schools receive the benefit of over $4500 of state support, and over 2000 Cleveland students took advantage of this option in the 1999-2000 school year. *Id.* Interestingly, private secular schools are eligible to convert to Community Schools, and a number of schools in Cleveland made such a conversion. *Id.* at 19. Religious schools are not eligible to become part of the Community Schools program.

Finally, parents may select fully private schooling for their children, and through the Ohio voucher program receive up to $2250 from the State for tuition at any private school that meets the program's admissions, tuition, and other requirements. 234 F.3d at 948. Over 3700 students participated in the voucher program in the 1999-2000 school year. Taylor Pet., at 4. Both religious and secular schools have qualified for and have accepted students under the voucher program. *Id.*[2]

Parents in the Cleveland school district thus have a wide variety of state-funded educational choices for their children, and are entirely free to select among those choices.

The Sixth Circuit sought to justify its refusal to consider the full range of state-funded educational choices available to parents by claiming that reviewing the "entire context of Ohio

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[2] The voucher program also allows Cleveland students to attend public schools in adjacent school districts and provides voucher payments to such schools *in addition to* an "average daily membership" for each student of over $4200. Taylor Pet., at 3. However, no out-of-district public schools have elected to participate in the voucher program despite ample funding.

education" was not before the court and would require inappropriate consideration of legislative choice and educational policy. 234 F.3d at 958. The court also noted that the Community Schools program was contained in a separate chapter of the Ohio Code, makes no reference to the voucher program, and only the voucher program was challenged by the plaintiffs. *Id.*

But the court of appeals seems to have misunderstood the relevance of other state-funded educational options to its analysis of the voucher program. Both the independence of any private choice to send children to religions schools using vouchers and the overall primary effect of the voucher program in general, can only be determined in the full context of Cleveland's publicly funded educational system. It is impossible to say that the State somehow coerced parents into selecting religious schooling without knowing what other choices the State afforded to parents as alternatives. Likewise, it is impossible to conclude that the State is advancing or endorsing religious schools without measuring the State's conduct toward such schools against a proper baseline of state support for secular schools (both private *and* public).

Absent a proper baseline for evaluating state activity or parental choice, any state conduct that benefits religion – if viewed in isolation – could be said to advance or endorse religion. Likewise any religious educational alternative allowed to parents will always be viewed as evincing bias, rather than neutrality, if abstracted from the pre-existing context of numerous state-supported secular alternatives. But this Court's cases consistently recognize that the state is permitted to confer benefits on religious entities equal to the benefits it confers on similarly situated non-religious entities. *Mueller* v. *Allen*, 463 U.S. 388, 398-99 (1983) (upholding tax deduction that "neutrally provides state assistance to a broad spectrum of citizens"). Indeed, the state may be *required* to allow religious groups equal participation in programs and benefits available to comparable nonreligious groups. *See, e.g., Good*

News Club v. *Milford Central School*, -- U.S. --, 121 S. Ct. 2093, 2097 (2001) (exclusion of religious club from use of after-school facilities violates free speech rights and not justified by Establishment Clause concerns); *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (public university may not discriminate against student religious publication in distribution of student activity funds). Equality of treatment by the state and the genuine independence of parental choice can only be measured in the full context of the state-funded educational options available to Cleveland parents.

In this case, the comparison should extend to all publicly funded educational options, and not just those under the voucher program alone. The additional options are in fact competitive with each other, available for the parents to choose on equal or better terms than the options under the voucher program, and establish a pre-existing baseline of extensive state support for nonreligious educational alternatives. Public and Community School alternatives should be included among the alternatives evaluated for this additional reason: The dispute in this case turns on the allegation of preferential state *funding* in support of religious schooling, and has nothing to do with public versus private administration of the particular schools. With regard to state funding, such alternatives are quite comparable to the schools participating in the voucher program. Including them in the baseline thus properly informs any analysis of whether the voucher program's creation of a state-funded option to attend religious schools constitutes a late-coming move in the direction of equality or instead some improper favoritism.

Contrary to the Sixth Circuit's view, it and this Court are not being asked to evaluate the legality of educational options other than the voucher program, but rather to evaluate the voucher program itself in the *context* of those other options. Merely because the State has proceeded in steps – first providing support for nonreligious public and Community

School options – and has finally expanded its support to privately run educational options does not mean that the earlier options cease to exist or are not sufficiently equivalent to the new options added.[3] Those options do exist, and this Court should not close its eyes to the true range of choices offered by the State to Cleveland parents.

III. Parents Have Genuine Choice Between Religious and Nonreligious Schools.

Considering the voucher program in its proper context as merely one element of a broader program of public support for education, it becomes apparent that parents have ample choice regarding whether to send their children to either religious or nonreligious schools.

At core, Ohio has said to Cleveland parents: We will devote public money to the education of your children; you pick the schools. Parents are free to select from a palette of alternatives including public, private, secular, and religious schools. They can send their children to the local public school or a public magnet school and receive the product of thousands of dollars per pupil of state educational support. They can seek private tutoring for their public school children, and receive additional voucher program funds for that purpose. They can send their children to Community Schools

[3] As a simple example, if the State appropriated money to pave all of the streets in town except the ones in front of religious institutions, but the next year thought better of it and appropriated money to pave those remaining streets, the second appropriation, viewed in isolation from the previous year's activity, would surely seem like an advancement of religion. Recognizing the full context, however, would reveal a prior discrimination against religious institutions that was merely rectified by the subsequent appropriation, creating equal access for religious institutions to benefits that already existed for others. Likewise, pretending that a voucher program discriminates in favor of religious schools while ignoring the pre-existing and far greater state support for nonreligious educational alternatives turns the concept of discrimination on its head.

where they will receive a publicly supported education and benefit from thousands of dollars of per pupil expenditures. Or they can elect private school options and receive public funds to pay for the vast majority of the tuition. Among private schools they may select from a variety of choices including, in the 1999-2000 school year, 10 secular schools and 46 religious schools of various persuasions.

Among those various options open to Cleveland parents, there is absolutely no state pressure or incentive to select a religious school over a secular school. If anything, there is pressure in the opposite direction. Secular local public, magnet, and Community schools all receive far more state money per pupil and that money completely covers the students' tuition. The vouchers given to parents selecting private schools for their children, however, are thousands of dollars less per pupil than the amount expended on those other alternatives, and the parents still must pay 10 or 25 percent of the tuition.[4]

While it is true that of the private schools willing to participate in the voucher program religious schools outnumber nonreligious schools, that has no impact on the freedom or independence of the *parents'* choice. The ability to choose among 10 secular private schools in the 1999-2000 school year is hardly a trivial or illusory opportunity, regardless of how many religious schools were also available as options. There is no evidence that any parents under the voucher program preferring a secular private-school option have been thwarted in their choice. Indeed, Judge Ryan, in dissent below, noted the "indisputable fact that of *all* the * * * nonreligious private schools participating in the program, not one has ever turned away a voucher applicant for any reason." 234 F.3d at 969 (emphasis in original). From the parents' perspective, therefore, choice is abundant, and there are four

[4] As between secular and religious private schools, of course, the voucher amounts are identical, again offering no pressure or incentive for the parents to choose a religious private school over a secular private school.

distinct categories of nonreligious publicly funded educational options from which to choose: local public schools with or without supplemental tutoring; magnet schools; Community Schools; and secular private schools. That participating private religious schools outnumber private secular schools under the voucher program does not deny or diminish the freedom parents have to choose a state-funded secular educational alternative.[5]

Even with the numerous secular options available to Cleveland parents, many in the voucher program have in fact elected to send their children to religious private schools using money provided under the voucher program. But that choice, and the flow of money resulting therefrom, is nothing other than a genuine and independent decision of private parents with ample alternative options. That such private choices result in greater or lesser attendance at religious schools in any given year does not impact the Establishment Clause analysis, much less demonstrate a constitutional violation. *See Agostini*, 521 U.S. at 229 (constitutionality of an aid program does not depend "on the number of sectarian school students who happen to receive the otherwise neutral aid"); *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").[6]

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[5] It is also worth noting, as petitioners point out, that the proportions of secular and religious schools participating in the voucher program is somewhat misleading given that some secular private schools have taken advantage of the option to convert to Community Schools and obtain the higher tuition payments available under that program. Taylor Pet., at 19. Private religious schools do not have that option.

[6] It is a long-established principle in equal protection jurisprudence that a disparate impact alone does not demonstrate a constitutional violation. For example, in *Washington* v. *Davis*, this Court held that a facially neutral law would not be found unconstitutional "*solely* because it has a racially disproportionate impact." 426 U.S. 229, 239 (1976) (emphasis in original). Indeed, this Court went further and held that disproportional impact alone would not even trigger "strict scrutiny." *Id.* at 242. Rather, the Court required demonstration of a purpose or intent to discriminate in order to establish an equal protection violation. *Id.*; *see also Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977) ("official action will not be held unconstitutional solely because it results in racially disproportionate impact"). The same principle should apply in Establishment Clause cases involving facially neutral statutes, particularly where, as here, there is no concern over entanglement (a concern somewhat unique to religion cases and lacking an analogue in Equal Protection jurisprudence). In essence, the religion clauses of the First Amendment combine to form a specialized equal protection clause designating religious viewpoint as a suspect category. *Cf. Agostini*, 521 U.S. at 232 (upholding program whose criteria "neither favor nor disfavor religion"). Given the functional equivalence of the religion clauses and the equal protection mandate, it is appropriate to look to equal protection jurisprudence for insight into how to handle facially neutral laws having allegedly disparate impacts.

IV. SCHOOLS HAVE NONDISCRIMINATORY ACCESS TO THE OHIO VOUCHER PROGRAM.

Given that there is no coercion on parents to select religious as opposed to secular education from *among* their various options, the only remaining issue is whether the structure of the voucher program itself seeks indirectly to pressure parents to prefer religious schools over secular schools.

After reciting the program's limited voucher amounts, tuition caps, and high percentage of religious schools among those participating, the Sixth Circuit opined that the

> idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation of the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program.

234 F.3d at 960. The court then concluded that the Ohio voucher "program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria," that it "has the primary effect of ad-

vancing religion, and that it constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause." *Id.* at 961.

The court of appeals' contention that the participation criteria for schools is non-neutral is simply wrong as a facial matter. None of the criteria in any way makes reference to religion, except to the extent that they *forbid* discriminating against students on the basis of their religion – hardly an attempt to favor religious schools. As for the remaining criteria for participation, the State is certainly entitled to pursue goals unrelated to religion and to cabin various choices according to such separate goals.

In this case each of the participation criteria built into the voucher program serve palpably neutral and valid state goals. For example, participating private schools are required to be within the Cleveland school district and to meet the State's basic educational standards. 234 F.3d at 948. Those restrictions plainly serve secular purposes of convenience, physical accessibility, and quality education. Participating schools must likewise give priority to low-income voucher students and may not discriminate based on race, religion, or ethnicity. *Id.* at 949. Again, such restrictions serve the neutral secular goals of helping first those students most in need and of assuring nondiscrimination. Finally, participating schools must limit the total tuition charged to voucher students to no more than $2500, up to 90% of which can then be reimbursed through the voucher program. *Id.* at 948. That too furthers plainly secular goals of ensuring that such schools are affordable to the beneficiaries of the vouchers, preventing schools from simply raising their tuition by the amount of the voucher, and maximizing the return on the government's resources by requiring participating schools to absorb some of the cost of educating the voucher-eligible students.

While these various selection criteria certainly limit the schools that can participate in the program, and hence limit parents' choices of where to use their voucher funds, such

limits are facially neutral as between religious and secular school options, and do not vitiate the genuine independence of the private choices made within those limits.

Having no indicia of bias from the voucher program criteria themselves, the court of appeals sought to infer a lack of neutrality from the *outcome* of the private choices – by both parents and private schools – under the voucher program. But the court's inferences are both illogical and demeaning to the religious schools electing to participate and to the parents electing to send their children to those schools.

The inference of a lack of genuine choice from the high percentage of voucher-eligible schools that are religious is illogical in that it effectively denies the significant private secular choices under the voucher program and completely ignores the secular public and Community School choices available to parents. That there are a large variety of religious educational alternatives – presumably representing a variety of religious views – does not in any way deprive parents of their secular choices. More religious choices do not favor any given choice, particularly where there is no dispute that all parents seeking a secular education for their children can select one either within or without the voucher program. The assumption that the greater number of religious schools somehow pressures parents to select those schools denies the essential free will of the parents doing the choosing and assumes, without support, that they mindlessly or randomly select among private schools and hence are channeled to religious institutions by sheer probabilities. That view is not only illogical, it is fundamentally incompatible with the First Amendment, which necessarily assumes that individuals are capable of free choice and will choose – whether in matters of speech or religion – according to their own beliefs and intellects so long as they are presented with a choice.

The court of appeals' related inference of a biased design from the high percentage of voucher parents who in fact choose religious schools is also demeaning to those parents

because it assumes that such a choice could not possibly be genuine. It begs the underlying question by simply assuming that if there were only more secular private alternatives, those parents would surely change their selections. But just as we cannot assume that public employees providing remedial education services at religious schools will lose fidelity to their tasks and begin teaching religion, *Agostini*, 521 U.S. at 234, likewise we cannot assume that parents who desire a secular private education for their children will somehow lose control over their volition when confronted with numerous religious choices in addition to the many secular options that are available to them. Rather, this Court should assume that where secular options are available to parents on the same or better terms as religious options – as is the case here – a parent's choice of a religious school is genuine and independent and the burden should be on any challengers to prove otherwise.

The additional inference that high participation by religious schools demonstrates programmatic bias in favor of those schools is also illogical and is demeaning to the schools themselves. The voucher program pays a maximum of $2250 per student and requires participating schools to limit tuition for each voucher student to $2500. 234 F.3d at 948. The Sixth Circuit speculated that the tuition caps and limited reimbursement under the voucher program reflected an attempt to favor religious schools because such schools have lower operating costs and greater supplemental income from private donations than do private secular schools. 234 F.3d at 959.

The notion that a religious character gives an institution an inherent ability to educate at a lower price, and that the voucher program had the primary and intentional effect of using that differential ability to channel money to advance religion, is economically specious and politically speculative. There is no reason to believe, and none suggested, that the cost – in human time and material resources – of educating a child differs according to the religious orientation of a school. The number of teachers, books, and rooms needed to provide

an education meeting Ohio's standards would seem to be a constant across comparable populations of children.

As for the court's suggestion that religious schools have lower overhead costs, that argument confuses "cost," in an economic sense, with the means of paying for that cost. A religious school's overhead cost – in terms of the need for a building, administrative and janitorial services, and the like – is in all respects identical to the overhead cost of a secular school. What the court probably had in mind was that religious institutions running such schools may simply elect to use buildings they already own for school purposes, and thus can avoid expending current *cash* on providing a physical space for the school. But the fact that the overhead requirement is met using physical as opposed to monetary assets does not mean that it is costless. The economic cost is the same; it is merely the method of payment that is different.[7]

The court of appeals' reference to religious schools' supposedly greater supplemental income from private donations is likewise not an argument about differential educational costs, but rather about the differential ability to *pay* for such costs. Indeed, what it boils down to in the end is an argument about *wealth*: Because religious schools and their sponsoring institutions are supposedly richer – in physical, human, and financial assets – than secular schools and their patrons, they are said to be given preferential treatment by a voucher program that limits its payments and asks schools to share the costs of educating Cleveland students. Merely articulating the argument accurately should be sufficient to refute it.

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[7] The same point is true as to teachers who may come from within the religious institution itself rather than be hired externally. Such teachers represent human capital, and when an institution devotes such capital to the task of teaching, the diverted value of that activity, and hence the economic "cost" of such diverted resources, is no different than if those in charge simply hired teachers in the market and used their own human resources for other purposes creating value for the religious institution.

Aside from the fact that there is no evidence that religious schools and their patrons as a class are wealthier than secular schools and their supporters, it would not matter even if it were so. The government routinely adopts policies that discriminate in one way or another on the basis of wealth, and the fact that the rich and the poor, as classes, have very different racial makeups has never been sufficient to establish racial discrimination. Rather, the mere correlation between wealth and race, or here supposedly between wealth and religion, is just that, a correlation, and is not inherent to racial identity or religious belief. Given that lack of connection, even if the voucher program could be characterized as favoring wealthy schools that can contribute their own resources to the educational program, that is a perfectly valid secular goal regardless of the distribution of wealth across religious lines.[8]

What the voucher program ultimately does is create an incentive for charity among educational institutions. That religious institutions may be effective at generating and providing charity does not mean that all incentives for charity constitute an endorsement or advancement of religion. If that were so, then the tax deductibility of charitable donations would be invalid. But the Establishment Clause only bars government from directly favoring religion, it does not require government to affirmatively exclude religious institutions from facially neutral programs under which they might have greater success than secular institutions.

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[8] Of course, *amici* strongly question the assumption that religious educational institutions are categorically wealthier than secular institutions. Certainly at the university level, many of the very wealthiest institutions – such as the Ivy League schools – are quite secular and receive ample donations not from any sectarian sense of charity, but from institutional devotion and more universal charitable impulses. At the lower school levels, secular organizations – both public and private – are equally capable of seeking charitable contributions of time, buildings, and money in order to subsidize the education they provide and thus lower their nominal, if not their actual, "costs." Indeed, many do.

In the end, Ohio's support for various educational alternatives is facially neutral and shows no hidden scheme to advance or endorse religion. If anything, Ohio's educational policies continue, slightly mitigated, the disfavored treatment of private educational options – both religious and secular – by allocating far less money per pupil than the State is willing to spend on publicly run secular schooling. And even among private schools, sectarian institutions receive less favorable treatment through their exclusion from eligibility for the Community Schools program – which provides secular schools a better funded and competitive means of attracting Cleveland students than the voucher program provides to religious schools. That the voucher program finally lets religious institutions sit at the table of publicly funded educational alternatives – albeit on terms worse than are available to most secular institutions – is neither improper advancement nor endorsement of religious institutions; it is merely one step on the path toward the neutral treatment of religion that the religion clauses of the First Amendment command.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Sixth Circuit should be reversed.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

SUSAN TAVE ZELMAN,
Superintendent of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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35 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT.	2
ARGUMENT	4
I. The Court Has Described the Standards to Adjudicate the Validity of Public Programs that Provide Educational Benefits	4
A. Under the Precedent of this Court, a Religion-Neutral and Generally Available Public Benefit is Presumptively Constitutional	4
B. The Court Below Relied on Analyses and Standards that neither Reflect nor Apply this Court's Jurisprudence.	12
II. The Ohio Scholarship Program is Constitutional When Reviewed in Light of This Court's Current Standards For Interpretation of the Establishment Clause. .	22
III. Religious Schools Are not Disqualified from Participating in Public Programs on Account of their "Religiosity", nor Should Suspicions about the Motives of Schools, Teachers and Parents Displace the Record Evidence.	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: **Page**

Agostini v. Felton,
521 U.S. 203 (1997) ..... *passim*

Aguilar v. Felton,
473 U.S. 402 (1985) 26

Bowen v. Kendrick,
487 U.S. 589 (1988) 2,25,26

Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995) 11

Church of the Lukumi Babalu Aye v. Hialeah,
508 U.S. 520 (1993) 11

Committee for Public Education v. Nyquist,
413 U.S. 756 (1973) 13,14

Gillette v. United States,
401 U.S. 437 (1971) 11

Hunt v. McNair,
413 U.S. 734 (1973). 7

Lemon v. Kurtzman,
403 U.S. 602 (1971). ..... *passim*

Lynch v. Donnelly,
465 U.S. 668 (1984). 4,18

Meek v. Pittenger,
421 U.S. 349 (1975). 19,26

Mitchell v. Helms,
530 U.S. 793 (2000). ..... *passim*

Mueller v. Allen,
463 U.S. 388 (1983). ..... *passim*

Rhode Island Federation of Teachers v. Norberg,
630 F.2d 855 (1st Cir. 1980) 16

Roemer v. Board of Public Works of Maryland,
426 U.S. 736 (1976). 25

Santa Fe Independent School District v. Doe,
___ U.S. ___, 120 S.Ct. 2266 (2000). ..... *passim*

School District of Grand Rapids v. Ball,
473 U.S. 373 (1985). 19,26

Simmons-Harris v. Zelman,
234 F.3d 945 (6th Cir. 2000) ..... *passim*

Walz v. Tax Commission,
397 U.S. 664 (1970). 4

Widmar v. Vincent,
454 U.S. 263 (1981). 7

Witters v. Washington Department of Social Services for the Blind,
474 U.S. 481 (1986). ..... *passim*

Wolman v. Walter,
433 U.S. 229 (1977). 19

Zobrest v. Catalina Foothills School District,
509 U.S. 1 (1993). ..... *passim*

STATUTORY PROVISIONS:

Individuals with Disabilities Education Act, 20 USC §§1400-1491 (1994 & Supp. III 1997). 9

Ohio Rev. Code §3313.974 5

Ohio Rev. Code §3313.975 5,6

Ohio Rev. Code §3313.975(A) 6

Ohio Rev. Code §3313.976 5,6,14

Ohio Rev. Code §3313.976(A)(4) 23

Ohio Rev. Code §3313.976(C) 23

Ohio Rev. Code §3313.977 23

Ohio Rev. Code §3313.978 5,13,23

Ohio Rev. Code §3313.978(A) 8,17

Ohio Rev. Code §3313.978(A)(1) 17

Ohio Rev. Code §3313.978(b) 19

Ohio Rev. Code §3313.978(C)(4) 8

Ohio Rev. Code §3313.979 5,13

ARTICLES:

Mark Chopko, *Vouchers Can Be Constitutional*, 31 Conn. L. Rev. 945 (1999) 5

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BRIEF OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The United States Conference of Catholic Bishops ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States.[1] USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus authored this brief, in whole, and no person or entity other than the amicus made a monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief.

of this Court's jurisprudence in that regard.

Especially in the past decade, States have struggled with how best to provide meaningful educational choices to parents who lack resources to choose from the many educational opportunities available. This case involves such a mechanism, provided by Ohio for low income parents whose children are in the Cleveland School District. This case offers an opportunity to clarify that the Establishment Clause is not violated when a public program, neutral with respect to religion, allows individual parents to choose from religious schools among the available educational options. In this case, religious schools participate as one part of a much larger educational whole. Relying on record evidence that consistently demonstrates wholly private, individual decisionmaking, and reaffirming that suspicion about the nature of religious schools' and parents' desire to use them is no longer a legitimate basis for deciding cases, this Court can clearly confirm the role of religious providers as participants in a public program in which low income families benefit. The Ohio Pilot Scholarship program is both constitutionally and educationally sound.

SUMMARY OF ARGUMENT

The case at bar is a new issue for the Court, but is not a new problem. This Court has interpreted the Establishment Clause to reflect the common sense conclusion that secular programs directed at secular interests, neutral with regard to religion and freely available to a broad class of citizens, do not become unconstitutional when religious institutions provide services under those programs. *Cf. Bowen v. Kendrick*, 487 U.S. 589 (1988) (inclusion of religious institutions among service providers to address teenage pregnancy constitutional). Absent an affirmative intention to discriminate with respect to religion, such a program, which offers potential program beneficiaries the chance to make a personal choice about where to obtain

such benefits, does not violate the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986).

The decision below represents an attack upon the Ohio legislature's legitimate and well-focused attempts to resolve a wholly secular concern: relief for low income citizens whose children attended schools in the Cleveland school district. The legislature designed a means to enable better choices for those who chose to stay in the Cleveland public schools. At the same time, it created a scholarship program for those who chose to leave. Only because many parents chose religiously affiliated schools for their scholarship children did this case become the latest episode in the ongoing struggle to set reasonable, workable, and constitutional boundaries between religion and government. Thus, this case also represents an attack on the private decisionmaking of thousands of Cleveland parents seeking the best possible education for their children. Without a scintilla of record evidence that the legislation's primary effect was to advance religion, the court below indulged in the same sort of "presumptions" and affirmative "hostility" to religion that this Court has explicitly rejected over the last 25 years.

This Court should confirm that there does exist a set of broadly applicable and usable standards that can be applied to evaluate public programs that may include religious institutions. These standards were ignored by the panel majority in favor of a unreflective application of a single nearly 30-year-old (and entirely distinguishable) opinion whose central propositions and assumptions the Court has incrementally but dramatically abandoned, among them that religious schools are presumptively disqualified from participation. Here the religiosity of a school has no constitutional significance because each school must agree to a set of state rules that govern its educational content and conduct. In addition, the record speaks plainly to the reasons why parents choose the schools they do

and why the schools and teachers are likely choices. The participating schools and their teachers care about the children they teach, and are successful at educating children in an environment that promotes and respects their individuality.

When a public educational program is designed to, and does, allocate aid on the basis of neutral, secular criteria that neither favor nor disfavor religion, and makes that aid available to all potential beneficiaries on a nondiscriminatory basis, then that program does not contravene the Establishment Clause. *Agostini*, 521 U.S. at 231. Here there is no evidence that, in design or in actual practice, the Ohio scholarship program is anything more. It is a vital social benefit program in which religious schools may constitutionally participate while advancing the common good.

ARGUMENT

I. The Court Has Described the Standards to Adjudicate the Validity of Public Programs that Provide Educational Benefits.

A. Under the Precedent of this Court, a Religion-Neutral and Generally Available Public Benefit Is Presumptively Constitutional.

This Court has long stated that its interpretation and application of the Establishment Clause reflects the Clause's history and the nation's tradition. *E.g., Lynch v. Donnelly*, 465 U.S. 668 (1984). Certainly the government may not assume "sponsorship, financial support, and active involvement...in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). The heart of the phrase, for Establishment Clause purposes, is "religious activity." The Clause, this Court has said, is to assure that government stays out of the "precincts" of religion, and vice versa. *Lemon v. Kurtzman*, 402 U.S. 602, 614

(1971); Mark Chopko, *Vouchers Can Be Constitutional*, 31 Conn. L. Rev. 945, 973-74 (1999). The instant case, however, is not about a subject that legitimately concerns only government or religion, but falls within the class of social welfare issues, here, education, in which both institutions have a proper interest and historic role. The case illustrates that both can advance the public's interests without excessively involving one institution in matters proper to the other. *Id.*

The Ohio Scholarship and Tutorial Program, Ohio Rev. Code §§3313.974-3313.979, on its face and in fact, was designed to offer financial assistance to low income families and their children who would otherwise attend the Cleveland public schools. The program applies to any state school district (like Cleveland's) directly supervised and operated by the State Superintendent of Public Instruction, instead of local authority. Ohio Rev. Code §3313.975. Scholarships are available to those whose family income is less than 200% of the "poverty line". Ohio Rev. Code §3313.978. In fact, over 60% of the children receiving scholarships are from families at or below the poverty line itself. *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000).

The program is designed so that the student can use the educational aid in several ways, at a public school in an adjacent school district,[2] at an area private school that has registered to participate, or through special tutorial help while attending the Cleveland public schools. Ohio Rev. Code §§3313.976-3313.978. The maximum amount of aid that the state will

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[2]While adjacent public schools have not decided to participate, this is hardly a design flaw of the scholarship program. The Ohio legislature explicitly provided for such schools to be able to participate in the program and for students from Cleveland to be able to select them, and "there is not the slightest hint in the record" that the government of the State of Ohio was aware that these school districts would not participate. *Zelman*, 234 F.3d at 968 (Ryan, J., concurring in part, dissenting in part.)

provide to a child attending a private school is $2250, and is capped at 90% of the tuition the school charges to low income children. Children can also decide not to take scholarships from the program, but rather to attend newly-created "Community Schools", which have no religious affiliation and are not governed by the Cleveland School Board, in which case the state pays that school approximately $4000 per child. Affidavit of Jurkowitz at 2 (146a).[3]

The program is structured so that at least one half of the students receiving aid through the program are receiving tutorial assistance grants while continuing to attend local public schools. Ohio Rev. Code §3313.975(A). The Ohio program makes no distinctions at all between religious and nonreligious private schools that can register for and participate in the program, Ohio Rev. Code §§3313.975, 3313.976, and all participating private schools are required not to discriminate in admissions on the basis of religion, among other factors. *Id.* In this factual and legal setting, this Court has already settled the principles that control.

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court sustained a Minnesota tax deduction program covering educational expenses, which was available to parents of both public and private school children. The program permitted deductions from state income taxes, limited to actual expenses paid for school tuition, textbooks and transportation, but capped by statute. *Id.* at 391. Calling it a "fixed principle", the Court rejected the position that "any program which in some manner aids an institution with a religious affiliation" violates the

[3]Reference will be made to affidavits in the record by name of affiant and page number and, where applicable, the page number from the Appendix to the Petition for Writ of Certiorari filed by Petitioners Hanna Perkins School, *et al.*, as follows: "Aff. of Jurkowitz at 2-3 (146a-147a)". Reference to documents contained in the Joint Appendix will be to the Joint Appendix page number, as follows: "Aff. of Grandberry at 1(J.A. 192a)."

Establishment Clause. *Id.* at 393, quoting *Hunt v. McNair*, 413 U.S. 734, 742 (1973).

The Establishment Clause was not offended by the tax deduction program where it was available to all eligible taxpayers, and was a form of public assistance made available generally without regard to the private or religious nature of the schools attended by the children of the taxpayers.[4] The program was evaluated within the context of the state income tax system and the beneficiaries of the program were individual parents who decided whether, where, and how to use these benefits. Private religious schools benefitted from the program, if and when they did, "only as a result of numerous private choices of individual parents of school-age children", and so "no imprimatur of state approval...can be deemed to have been conferred on any particular religion or upon religion generally." *Mueller*, 463 U.S. at 399, quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981).

The Court emphasized the primacy of program design, explicitly rejecting reliance upon after-the-fact statistical analyses about patterns of use:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be

[4]The *Mueller* Court did not artificially limit its review of the program to an examination of by whom, or where, the benefits of the program were actually used in any particular instance, or evaluate only the benefits flowing to parents of students at religious schools. *Mueller*, 463 U.S. at 397-99.

evaluated.

Mueller, 463 U.S. at 401. Thus, while parents of children attending private schools might have had higher deductions, the Court decided that it "need not consider these contentions in detail", and rather, "decline[d] to engage in the type of empirical inquiry into those persons benefitted by [this] state law..." which the plaintiffs had proposed. *Id.* at 401-02.

Three years later, the Court reaffirmed the determinative importance of the purpose and design of a state educational benefit program in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). "Central" to the Court's decision was the fact that the aid recipient had decided where his state funding would be directed, and he, not the government, had "transmit[ted] it" to his school of choice, a Bible college. *Id.* at 488. Not only was the decision to use the aid to study for the ministry an independent and private personal choice, but the program itself "creates no financial incentive for students to undertake a sectarian education". *Id.* It did not "provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions". *Id.*[5]

The Court confirmed that the proper "effects" analysis was of the effect of the program overall, as designed, not the effect

[5]By contrast, the scholarship program at issue here may be said to impose a negative financial incentive against those parents who would use it to help fund private education, because the program provides a maximum benefit of 90% of the otherwise applicable tuition rate, and that only for the very poorest parents, whereas those further from the poverty line receive benefits equal to 75% of their tuition payments. Ohio Rev. Code §3313.978(A). The remainder of the tuition is not the government's responsibility. Ohio Rev. Code §3313.978(C)(4). By contrast, a parent who is content to have his child remain in the Cleveland public school system incurs no expense.

of only one aspect of it. The program overall was a religion-neutral, broadly-available state program which helped defray the educational expenses of any eligible visually handicapped student, created no financial incentives to choose religious as opposed to nonreligious training, and left the decision to the independent private choice of the individual involved.[6] As such, "the Washington program works no state support of religion prohibited by the Establishment Clause". *Id.* at 489.

When the Court thereafter sustained the provision of federally-funded special education assistance to a student on the premises of his religious school, under the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1491 (1994 & Supp. III 1997), it stated "we have *consistently* held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge." *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 8 (1993) (emphasis added). The benefits of the program flowed to all eligible parents covered by the program whether their children attended public or private schools, and flowed to sectarian schools (as certain amounts of both IDEA and Ohio scholarship funds do) "only as a result of numerous private choices of individual parents". *Zobrest*, 509 U.S. at 3, quoting *Mueller*, 463 U.S. at 399. And, as in *Witters*, there was no financial incentive to undertake religious education, and the benefits of the program were made available without regard to the religious or private nature of the institutions that ultimately benefitted from the aid. *Zobrest*, 509

[6]Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurred specially to note the importance of *Mueller*, which, for the purposes of the Court's analysis, evaluated the entire Minnesota program as a whole. Justice Powell wrote: "nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole*." *Witters*, 474 U.S. at 492 (emphasis in original).

U.S. at 10, citing *Witters*, 474 U.S. at 487.

What the Court did *not* do in *Zobrest* is equally important. It did not engage in a statistically-driven analysis of the number of religious schools to which benefits ultimately accrued, nor did it rely on the number of children attending religiously associated schools who would be entitled to IDEA benefits, or the dollar value of those benefits. The question of where these individually directed benefits ultimately flowed, and in what amounts, did *not* decide the Establishment Clause question, as it should not here. *Zobrest*, 509 U.S. at 8-14. "[A]ny attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to 'the private choices of individual parents...'. Disabled children, not sectarian schools, are the primary beneficiaries of the IDEA...". "Thus, the function of the IDEA is hardly to provide desired financial support for nonpublic sectarian institutions". *Zobrest*, 509 U.S. at 12-13, quoting *Witters*, 474 U.S. at 488 (internal quotation marks omitted.)

Four years later, *in Agostini v. Felton*, 521 U.S. 203 (1997), the Court expressly recognized that the criteria it used for deciding whether a government aid program had the primary effect of advancing or inhibiting religion had "changed". *Agostini*, 521 U.S. at 223. The Court cautioned against the assumption that "all government aid that directly assists the educational function of religious schools is invalid". *Agostini*, 521 U.S. at 225. Courts are to examine with specificity who is directing the use of the aid, to determine whether that use, whatever it is, is properly to be attributed to the government. *Id.* at 224. It is only "*state* decisionmaking", *id.* at 226 (citation omitted) that implicates Establishment Clause dangers in this context. If, on the other hand, funds originating with the government flow to religiously affiliated schools "only as a result of the genuinely independent and private choices of individuals", the Establishment Clause is not violated. *Id.*

It is particularly significant that *Agostini* also jettisoned a host of factual presumptions made in earlier cases, including that public employees on the premises of religious schools would provide religious instruction, that their very presence on the campuses of religious schools created a symbolic union between the government and religion, and that providing public employees to work on religious campuses financed religious indoctrination by the government. *Id.* at 226-28. Courts are, rather, to rely on the evidentiary record before them to decide whether, *in fact*, the program in question actually had the effect of advancing religion. The clear legal benchmark is whether the aid program is religiously neutral, is generally available to a broad class of beneficiaries, supports a public function, and is available without government incentives for or against religion.[7]

Mitchell v. Helms, 530 U.S. 793, 120 S.Ct. 2530 (2000), confirms these criteria. The plurality opinion in *Mitchell* emphasized particularly the importance of governmental religious neutrality, and wrote that where governmental aid "is neutrally available and, before reaching or benefitting any

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[7]Neutrality does not shield a legislature's "covert" intention to target religious activity for particular benefits or detriments from effective constitutional review. *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 534 (1993). The Constitution prohibits "subtle departures from [religious] neutrality" just as it does more obvious ones. *Gillette v. United States*, 401 U.S. 437, 452 (1971). Reviewing courts cannot restrict themselves only to a review of formally-neutral statutory criteria, while remaining "studiously oblivious" to the effects of the government's actions in the Establishment Clause context. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in judgment). For example, in *Santa Fe Independent School District v. Doe*, ____ U.S. ___, 120 S.Ct. 2266 (2000), the Court reviewed the record evidence concerning the school district's historic actions in regard to school prayer, its conduct of the current policy, its delivery of prayer over the school's public address system, under faculty supervision, and the regulation's title ("Prayer at Football Games"), among other factors and concluded that the District's newly - adopted "election" practice was actually and demonstrably a covert attempt to further evangelical religious conduct. *Santa Fe*, 120 S.Ct. at 2277-79.

religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion". 120 S.Ct. at 2544 (internal citations omitted). Justices O'Connor's and Breyer's concurrence recognized the importance of governmental neutrality, but emphasized that *Agostini* should control when evaluating a program's primary effect. *Id.* at 2560. Both the plurality and the concurrence agreed on the significance of religiously neutral eligibility criteria in evaluating the Establishment Clause implications of a government aid program. *Compare,* 120 S.Ct. at 2541 (plurality) *with id.* at 2561 (O'Connor, J.)

The plurality and the concurrence also clearly agree that the proper legal analysis does not turn upon the numerical proportion of aid benefits that ultimately flow to religious organizations. In *Mitchell*, 30% of the educational benefits available was used at private schools; of those, 34 of 46 were Catholic, seven were associated with other denominations and five were nonreligious. 120 S. Ct. at 2538. Neither the plurality nor the concurrence suggests that the numbers or proportions of ultimate recipients who attended religious schools have any legitimate bearing on the legal analysis. "We were not 'willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid'". *Id.* at 2562 (O'Connor, J., concurring) (quoting *Agostini*, 521 U.S. at 229.)

Program design delineates the scope for judicial review. The Court will evaluate whether the program is neutral with regard to religion, is generally available to a broad class of beneficiaries, supports a public function, and creates no financial incentives for or against making a choice of a religious provider. If so, and absent evidence that the program hides some improper governmental purpose, the program is constitutional.

B. The Court Below Relied on Analyses and Standards that neither Reflect nor Apply this Court's Jurisprudence.

The Sixth Circuit wrongly decided that the Ohio scholarship program was in violation of the Establishment Clause, principally because it concluded that the Supreme Court decision most factually similar to the case was *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). There are two principal reasons why *Nyquist* is not applicable, much less controlling. The first concerns the changes this Court has made in its own jurisprudence since then, detailed above. The second reflects the Court's concern with design and implementation.

The program at issue in *Nyquist* was designed by the New York legislature to provide financial support *only* to the state's private schools themselves, and to ensure that the private schools remained financially viable. *Nyquist*, 413 U.S. at 762-769. By providing direct government funding of private schools, and direct tuition reimbursement, the Court said, the legislature had *intended* to "provide assistance to private schools, the great majority of which are sectarian". *Id.* at 783. "[T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions". *Id.*

The Ohio program, on the other hand, was designed and structured to give means tested assistance to low income students living within a school district that had been placed under the control of the state's superintendent of schools. Ohio Rev. Code §3313.978, §3313.979. It was designed to provide no grants to any schools themselves, and it did *not* do so. The only beneficiaries are children and families who receive a scholarship check, "payable to the parents of the student entitled to the scholarship", who then decide privately to which of the participating schools it should be directed. *Id.* at §3313.979. *See Nyquist*, 413 U.S. at 782-83, n.38.

The Ohio scholarship program also did, in fact, operate as the legislature had intended, to provide low income children with better educational options. The range of options was narrowed by the decision, for reasons that do not appear in the record and can only be supposed, of neighboring public schools to refuse to participate, but a broad range of options nevertheless existed. Low income Cleveland public school students had the option of remaining in their public schools,[8] doing so and receiving tutorial assistance, attending "Community Schools", attending private religious schools of a variety of denominations, or attending private nonreligious schools. All schools, alike, in order to participate in the scholarship program, must register and must meet state minimum academic standards and must not discriminate on the basis of race, religion or ethnic background. Ohio Rev. Code §3313.976. Like state educational aid to all disabled students, or the provision of education-related tax incentives to all eligible parents, Ohio's program has the primary effect of furthering important social interests, not of ensuring that religious schools are financially supported.

This amicus also writes to emphasize three particular strands of error that infuse the majority's approach to the case, beyond its erroneous reliance on *Nyquist*.[9] First, the *Zelman*

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[8]Undoubtedly a very large number of students and their parents made this choice. Of all the otherwise eligible children in Cleveland, Ohio, only 3761 enrolled in the program. *Zelman*, 234 F.3d at 949.

[9]The majority in *Zelman* has also revived, and apparently depended in part upon, a legal theory that has been accorded little judicial weight since *Nyquist*, that financial aid ultimately flowing from parents to religious schools could thereafter be "divertable" by the school to religious uses, and so have a primary effect of advancing religion. *Zelman*, 234 F.3d at 960. "Divertability" was simply not an issue treated by this Court in *Mueller*. Moreover, in *Witters*, the funds were ultimately paid to a bible college for training Mr. Witters in the ministry, and so clearly were used (under the mode of analysis used by the Sixth Circuit below) for advancing religion. *Witters*, 474 U.S. at 749-50. In this case, divertability is

court ignored this Court's emphasis on design and adopted a "result-driven" and logically backwards mode of analysis in which the mere statistical frequency of individual, private decisions to attend religious schools led to erroneous conclusions about the nature of the program itself and its primary effects. Second, it focused on only one part of the scholarship program itself, rather than on the full panoply of alternatives available under it, or its larger educational context. Third, it ignored a record that consistently demonstrates private, individual decisionmaking, without record evidence to the contrary, despite this Court's contrary injunction in *Agostini*.

The decision below turns exclusively on a crude numerical analysis in which the result (that a large proportion of Cleveland parents who decided to take advantage of the program chose religious schools) drives the legal assessment of the program. Put concisely, the *Zelman* majority decided that the Ohio scholarship program had a primary effect of advancing religion, under the test adopted in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), because it concluded that there was only an "illusory choice" afforded to participants as between attendance at private and public schools, and because "the majority of places available in the program are for students attending sectarian schools". *Zelman*, 234 F.3d at 959. Thus, because many of those who decided to participate decided to enroll in private schools, and 46 of the 56 private schools registered to participate in the program were religiously affiliated, the court concluded that the "primary effect" of the program was to "provide a grant of state aid directly and predominantly to the coffers of the private, religious schools,... There is no neutral aid when that aid principally flows to religious institutions...." *Id.* at 949, 960-61. If too many recipients use their scholarships at

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as much a "red herring". The actual scholarship benefits here go to the parents in question, who decide to "spend" them at the participating school they decide is best for their child.

religious schools, that government program by definition could not be constitutional, according to the court below. Yet, this sort of numerical analysis has been repeatedly and explicitly rejected by this Court. *Mueller*, 463 U.S. at 401. But the mode of analysis this Court rejected in *Mueller* is the very one on which the *Zelman* majority depends.

In evaluating the effect of *Mueller* on this case, it is significant that the Court there resolved a conflict between the appellate decision in *Mueller,* and that of the First Circuit in *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980). *Mueller*, 463 U.S. at 391. *Norberg* turned upon the facts that 94% of those benefitting from the program attended religious schools, that 79% of the students attending nonpublic schools attended religious schools, and that the majority of parents eligible for the program sent their children to religious schools. 630 F.2d at 859-860. These figures, the First Circuit believed, showed that the program conferred a governmental benefit along "nearly solid sectarian lines". *Id.* *Mueller*, of course, resolved that circuit conflict by rejecting a mode of analysis driven by statistics reflecting private parental preferences for religious schools.[10]

It is this very same sort of numerically-focused analysis that was rejected in *Agostini* when the Court wrote:

> [n]or are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school studentswho happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school.

Agostini, 521 U.S. at 229. This same concept was reinforced three years later by both the plurality and the concurrence in *Mitchell*. 120 S.Ct. at 2542; *id*. at 2562 (O'Connor, J., concurring.) By reasoning from one particular result, backwards, to the presumed overall cause, the panel majority makes the Establishment Clause turn upon the proportion of aid that ultimately flows to religious entities, no matter who directs it there or how the program is designed.[11] Having been resoundingly rejected by all of this Court's recent government aid cases, this result-driven approach must likewise be rejected here.

A second major flaw in the Sixth Circuit's approach to this case is that it examined only one narrow portion of the scholarship program itself, and neither considered the full range of alternatives it presented, nor evaluated them in the context of the broader state educational program. The primary function of the Ohio scholarship program could hardly be to provide financial support for religious schools, since the beneficiaries may choose to use scholarship benefits at any of a broad range of private schools, both religious and nonreligious, or at none at all. Indeed, the program as designed by the Ohio legislature made scholarship funds "available" to parents to use to attend neighboring public schools. *Mueller*, 463 U.S. at 397. Ohio Rev. Code §3313.978(A)(1). It is only the unrelated, after-the-fact, refusal of neighboring public schools to participate in the

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[10] As Justice Powell pointed out in *Witters*, 474 U.S. at 491, n.3, whether one individual decides to use government benefits at a religious school, or whether over 90% of benefits flow to religious schools, is not legally significant. Rather, "the aid was thus channeled by individual parents and not by the State", making the program permissible under the "primary effect" test of *Lemon*. *Id.*

[11] The *Zelman* majority does not propose any standards for "how much" ultimate religious use of originally-governmental aid is "too much", consigning the federal courts to a continuing quagmire of case-by-case decision making in which the only fixed legal standard is that if the government's "aid principally flows to religious institutions", no matter who directed it there, or why, the second prong of the *Lemon* test is violated. *Zelman*, 234 F.3d at 961.

program that prevented recipients from being able to exercise that choice as well. Students may also attend "Community Schools".

After first acknowledging that 10 of the 56 participating private schools are not religiously affiliated, the majority relegated all but religious schools to the status of nonparticipants in the program. It decided that the other options open to Cleveland public school parents, such as the Community Schools program, or indeed the public schools themselves, "were at best irrelevant", thus skewing the legal landscape so that the scholarship program was unavoidably viewed out of context. *Zelman*, 234 F.3d at 958. It held, without record support, and ignoring that parents, not schools, were the intended beneficiaries, that "practically speaking, the tuition restrictions... limit the ability of nonsectarian schools to participate in the program...." *Id.* at 959. It disparaged parental choices as "alleged" and "illusory". *Id.* The majority ultimately stated flatly that "here aid goes only to students enrolled in private schools." *Id.* at 960. By so limiting the program, simply by stating it was so, and ignoring the real and larger educational context, the majority ensured that it could not but be seen as violative of the Establishment Clause.

The majority's decision proves the accuracy of the Court's words in *Lynch v. Donnelly*, 465 U.S. at 689, that "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." Just such a "crabbed reading", both of that Clause and of the scholarship program, is at the heart of the *Zelman* majority opinion. *Id.* at 687. Viewed as a whole, the scholarship program at issue here presents a broad range of private and public educational alternatives for low income parents in Cleveland. The program provides meaningful nonreligious alternatives, none of which have ever been demonstrated to be unavailable to any participant who sought to

use them. *Zelman*, 234 F.3d at 969. The program provides for education in the public school system with additional support by way of tutoring paid for as part of the scholarship program; indeed, at least as many students are helped in this fashion as could possibly attend all private schools with scholarship help. Ohio Rev. Code §3313.978(b).

The *Zelman* majority erred in treating options such as the Community Schools program as "irrelevant". 234 F.3d at 958. While the Community Schools program is enacted in a chapter of the Ohio Revised Code different from that pertaining to the scholarship program, this is the storied "distinction without a difference". Indeed, in both *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), the same argument was rejected.[12] The existence and availability of a range of educational choices for parents - - public schools, public school tutoring, Community Schools, religious schools, and nonreligious private schools -- is important to the analysis. When Cleveland parents choose, as many have, to send their children to religious schools, it is a true independent choice, not an "illusory" one.

A third major flaw in the *Zelman* majority's approach is its dependence upon judicial presumption rather than record evidence. This deserves special emphasis because of the pivotal role that this problem has played in the development of recent Establishment Clause jurisprudence. One of the *Agostini* Court's primary criticisms of *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), was that it turned on unsupported assumptions about how the aid program could potentially be misused. *Agostini*, 521 U.S. at 219-20. Potential problems, the

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[12] As the Court wrote in *Wolman* "the Ohio Code provides in separate sections for the loan of textbooks to public school children and to nonpublic school children", which was found to be of no consequence. *Wolman*, 433 U.S. at 238, n.6. In *Meek* the Court observed that "it is of no constitutional significance whether the general program is codified in one statute or two". *Meek*, 421 U.S. at 360, n.8.

Court has said, do not trump the genuine design of the program. *Zobrest*, 509 U.S. at 12-13. Blanket presumptions about the nature of the aid that could legitimately be provided, or to ad[illegible] "flat rule[s]" would "exalt form over substance". *Agostini*, 521 U.S. 223-4. Rather, the Court emphasized the need to review the record for evidence of *actual* constitutional infringements. *Id.* at 224.[13] Indeed, absent contrary record evidence, the assumption to be made is that aid programs have been properly and constitutionally effected. *Id.*

The *Zelman* majority apparently rejected this teaching, and grounded its opinion on outright factual errors, that program "aid goes only to students enrolled in private schools", as well as on ungrounded conclusions that the program "discourages...participation by schools not funded by religious institutions". 234 F.3d at 959, 960. Further, it depended upon purely factual assertions for which no record support was ever adduced, for example, the claim that religious schools have lower overhead costs and lower tuition needs than other private schools because of income from private donations. *Id.* In fact, there is no evidence of record that any participant desiring to attend a nonreligious school was ever denied admission, or was forced to attend a religious school as a result of governmental financial incentives rather than personal individual choice. *Id.* at 969, 971 (Ryan, J., concurring in part and dissenting in part.) Nor, indeed, was there any factual evidence adduced showing that eligible beneficiaries who wished to use the tutorial assistance provided for by the scholarship program, were ever unable to do so.

Judge Clay pointed to the fact that none of the neighboring

[13]This echos the Court's explicit rejection, in *Mueller*, *supra*, of another appeal for presumption-based, inflexible rules turning on the statistical character of program recipients. *Mueller*, 463 U.S. at 401. Rather, the Court said that the constitutionality of the program was to be decided by review of the "essential features" of the program, operating as it was designed to do. *Id.* at 396-98.

public schools had decided to participate in the program as an indication that the Ohio scholarship program provided no realistic alternatives to religious education and so the legislation had an impermissible "primary effect" of advancing religion. *Id.* at 959-61. The court's discussion of this issue, however, fails to reveal a single record citation showing that this was the intention of the Ohio legislature when it passed the pilot scholarship program, or that it actually had that effect. Judge Ryan, who concurred in part and dissented in part in *Zelman*, related that "there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate." *Id.* at 968. Indeed, neighboring public school districts could decide to participate in the future. The dissent also demonstrated the existence of other private choice options that do not involve religious schools at all. *Id.* at 970-71. In short, while an actual improper purpose for legislation may indeed throw doubt upon its constitutionality, particularly if it is targeting religion, this amicus suggests that, at the least, there must be some demonstrated record or evidentiary support for such a proposition for a court to so conclude, particularly in the face of unimpeachable program design and structure.

The majority's fundamental presumption is indeed perverse, and is one of antipathy toward religion generally: that it is inconceivable that scholarship recipients would frequently have chosen religious schools for their children, if the program had truly been religiously neutral and broadly available and created no financial incentives to choose such a school. That having occurred, the majority reasons, the program is *ipso facto* unconstitutional. Under this presumption, the frequent choice of religious schools, no matter how independently made, would doom any scholarship or government aid program. We suggest that the majority's logic would move constitutional jurisprudence backwards.

II. The Ohio Scholarship Program Is Constitutional When Reviewed in Light of this Court's Current Standards.

Clearly, nothing in the structure or content of the Ohio scholarship program shows that it does anything other than provide benefits neutrally to a broad class of citizens, defined without reference to religion. *Zobrest*, 509 U.S. at 8. The aid is absolutely neutral and its amount is no different depending upon whether the recipient's child attends a religious school or a nonreligious school. It benefits a broad class of citizens, literally thousands of the least well-off families in Cleveland. Beneficiaries are defined only by their family's income level, their residence in the Cleveland school district, and their desire to either obtain tutorial benefits and remain in the public schools, or attend another school whether nonreligious and private or any of a variety of religious private schools representing a broad spectrum of denominations.

The revised "primary effect" test adopted by this Court in *Agostini* also emphasizes the design and structure of the program in question. These criteria are whether the aid results in governmental indoctrination of religion, whether the aid program defines its recipients by reference to religion, and whether the aid creates an excessive entanglement between religion and government. *Agostini*, 521 U.S. at 234. The key to the first of these criteria is whether the aid program, as designed and operated, results in *governmental* indoctrination.

Any review of the Ohio scholarship program shows that the government involves itself in no way whatsoever in the religious instruction of children who choose to attend religious schools. No facet of the program itself, and no fact attested to in any of the affidavits of record here,[14] show that "government

[14]To the contrary *see, for example*, Appendix to Petition for Writ of Certiorari filed by Petitioners Hanna Perkins School, *et al.*, at 80a through 188a.

inculcation of religious beliefs" is occurring here.[15] *Id.* at 223. To the contrary, the program makes no distinction at all between religious schools and nonreligious schools (and clearly grants no especial benefits to the latter), and prohibits discrimination in admission based on religion while imposing affirmative income-based priorities for admissions to participating private schools. Ohio Rev. Code §3313.976 (A)(4) and §3313.977. It does not governmentally restrict (but in fact encourages) the participation of neighboring public schools. Ohio Rev. Code §3313.976(C). The benefits that recipients may receive from participating in the program are precisely the same whether they decide to use them at a religious or a non-religious school. These design factors show that the government simply is not involving itself at all in religious indoctrination. The scholarship program is, by design, genuinely neutral as to the matter. An affirmatively religious choice of schools, if one is made, is the "genuinely independent and private choice[]" of the recipient's family. *Agostini*, 521 U.S. at 226.

The Ohio scholarship program also does not "define its recipients by reference to religion". *Agostini*, 521 U.S. at 234. The design of the program sets standards for program participation, which include low income levels, attendance at one of the failed Cleveland public schools, and, under certain circumstances, status as a prior enrollee or as a sibling of another enrolled student. Ohio Rev. Code §§3313.978, 3313.977. None of these standards bears any relationship to religion. In fact, the evidence of record is that the religious preferences of school applicants do not have any bearing on beneficiaries' admission to those participating schools that are

[15]Even if some religious schools are ultimately better off as a result of private choices of scholarship recipients, the Court has made it clear that it does not adhere to any rule that "government aid that directly aids the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225. Obviously, any benefit that ultimately flows here to a religious school, is "indirect" at the very most.

religious, or their participation in those schools' educational programs. *See, for example*, Affidavit of Bolek at 1 (182a); Aff. of Berning at 1 (86a); Aff. of Clemons at 2 (96a); Aff. of Cleveland at 1 (97a); Aff. of Cloud at 1 (99a); Aff. of Hackney at 1 (137a).

The design of the scholarship program also answers the subordinate question whether the program creates a "financial incentive to undertake religious indoctrination." *Agostini,* 521 U.S. at 231. There are no greater benefits to be had by attending a religious private school than by attending a nonreligious one. Furthermore, "of all the private nonreligious...schools participating in the program, not one has ever turned away a voucher applicant for any reason". *Zelman*, 234 F.3d at 969 (Ryan, J., concurring in part and dissenting in part). As shown above, the benefits of the scholarship program "are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school... [The] program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services." *Agostini*, 521 U.S. at 234. The record evidence is simply devoid of any indication that the availability of aid turned in any part on the recipients' religion, or on their private decisions about where to attend school. In both design and operation, this program provides no financial incentive to attend a religious school.

It is also significant that the criteria applied by the scholarship program could not possibly themselves have given the *recipients* of the aid any "financial incentive to undertake religious indoctrination," within the meaning of the *Agostini* test. 521 U.S. at 231. The recipients of the aid are the parents who decide to take advantage of it. They have no financial incentive at all to choose religious schools at which to use the aid. In fact, to the contrary, the scholarship program provides only 75% or 90% of the tuition at participating schools,

depending upon income level. Thus, the only effect of the program is to give low income individuals a better range of choices in education, and reduce, but far from eliminate, the costs to parents of some of those choices.

For all the same reasons stated above, the design and structure of the scholarship program also demonstrates that there is no entanglement at all of government with religion. *Id.* at 234. "[N]o serious claim" of excessive entanglement was ever made. *Zelman*, 234 F.2d at 967 (Ryan, J., concurring in part and dissenting part). The opinion below demonstrates no involvement of the government with religion, over and above the existence of a "Cleveland Scholarship and Tutoring Program Administration Providers Manual," *Zelman,* 234 F.3d at 948, and the fact that the state mails scholarship checks to the schools directly, which parents then endorse to the schools. Apart from these minimal and purely administrative contacts, far less meaningful than those at issue in *Agostini*, 521 U.S. at 233-34, *Bowen v. Kendrick*, *supra*, or *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976), the State of Ohio simply does not "entangle" itself at all with any of the religious schools participating in this program.

III. Religious Schools Are not Disqualified from Participating in Public Programs on Account of their "Religiosity", nor Should Suspicions about the Motives of Schools, Teachers and Parents Displace the Record Evidence.

Last year in *Mitchell v. Helms*, a plurality of the Court urged the abandonment of the disqualification of religious schools for participation in broad social programs, based on an

assumption that they are "pervasively sectarian."[16] That opinion indicates a further erosion of a set of presumptions adverse to religion that had previously characterized this Court's approach to the Establishment Clause, factual presumptions that had formed the underpinnings of *Meek v. Pittenger, supra*, *School District of Grand Rapids v. Ball, supra,* and *Aguilar v. Felton*, 473 U.S. 402 (1985). *Agostini* not only rejected the assumption that public employees on the premises of religious schools would participate in state-sponsored religious indoctrination, but rather, "absen[t] evidence to the contrary,...assumed instead" that they would not. 521 U.S. at 224. *Agostini* also rejected, for lack of evidence, the rule that all aid that directly assists religious schools in providing education is invalid. *Id.* at 225.

The majority below erred when it presumed the worst about why religious schools decided to participate in the scholarship program, and the motives of teachers and parents, to support its conclusion that the "primary effect" of the program is governmental support of religion and religious indoctrination. The record makes abundantly clear the actual motivations of the schools, principals, and teachers participating in the Ohio scholarship program, and the actual salutory effects on the beneficiaries.

First, and most importantly, religious schools are not disqualified on the grounds that they take their religion or religious motivations seriously. The nature of a voucher or scholarship program is precisely one in which program beneficiaries (low income children and parents) can make a choice among program participants (schools) that best reflects

[16]Justices O'Connor and Breyer concurred and did not specifically join the plurality opinion of four justices. The concurrence, however, cites to the separate opinion of Justices Scalia and Kennedy in *Bowen v. Kendrick*, which states that focusing on the religious nature of the program participants fundamentally asks the wrong question. *Mitchell*, 120 S.Ct. at 2558, citing *Bowen*, 487 U.S. at 621-22.

how the parents want their children educated. That parents would choose Catholic schools should not be a surprise or a cause for concern. Catholic schools stand for quality education, presented by professionals, who believe that the needs of children are at the center of everything they do. The schools reflect the nature of the communities they serve. Indeed, the overall statistics reflecting the religious makeup of the student bodies at schools participating in the scholarship program reflect extraordinarily high numbers of students whose personal religious beliefs are other than those of the organization to which the school belongs. Aff. of Jurkowitz at 2, 3 (146a-147a); Aff. of Bolek at 1 (182a). That the schools are an expression of the Catholic Church's mission in the world and reflect a set of moral values of those who lead the institution and teach does not undermine the willingness of the schools to abide by their agreements when they participate in the Ohio scholarship program. When the schools promise to participate in the program, they expect to be bound by their commitments. Aff. of Jurkowitz at 4 (149a); Aff. of Dalton at 3, 4 (109a-10a). *See Mitchell*, 120 S.Ct. at 2560-61 (O'Connor, J.) (presuming schools and instructors will comply with program restrictions).

Participating schools are required to, and do, meet all applicable state academic standards and secular instructional requirements. Aff. of Bolek at 2 (183a); Aff. of Jurkowitz at 4 (149a); Aff. of Dalton at 4 (110a) ("these schools teach the S[t]ate-mandated secular courses in a manner most likely to meet current research concerning effective presentation of that subject matter"). Religious schools continue to participate in the scholarship program despite the fact that to do so entails a "net" financial loss for them. Aff. of Jurkowitz at 1 (145a) ("the scholarship amount is less than the cost of providing a [s]tate-required secular education to the scholarship pupil"); Aff. of Bolek at 2, 3 (183a-184a) ("We are pleased to help the Scholarship pupils... however this presents an added financial burden... [T]he $1995 tuition does not cover the costs of the

secular education provided to the children. Since the Pilot Scholarship Program calls for grants equal to 90% of regular tuition, the [scholarship] children at our institution receive $1,795.50 per year".) In fact, children on scholarships are frequently developmentally far behind their grade levels, leading to additional costs and expenses which are borne by the schools themselves. Aff. of Bolek at 3 (184a); Aff. of Gibson at 1 (131a); Aff. of O'Dea at 1 (162a).

Catholic schools participate because of an abiding commitment to help low income, and especially minority and special needs, children, and because of a belief in the tremendous importance of primary and secondary education. Aff. of Bolek at 2, 3 (183a-184a) ("our mission [is] helping educate economically disadvantaged children....."); Aff. of Gibson at 1 (131a); Aff. of Greene at 1 (135a) (this "program has enabled parents and students to make choices that more wealthy families can make and provides opportunities for lower income students to have a fair chance of success in life"); Aff. of Keen at 1(125a) ("most of the [scholarship] children come from underprivileged families that would not have the resources to send their children to a school of their choice"); Aff. of Metzler at 1 (156a); Aff. of Dickson at 1 (125a) ("program has enabled scholarship students to achieve at higher academic levels".)

The record also confirms that teachers are motivated to participate in the program for educational reasons, and because of the special, and otherwise unmet, needs of many of the children so educated. Joint Aff. of School Psychologists at 1-5 (J.A. 200a-205a); Aff. of Barlow at 1 (82a); Aff. of Beasley at 1 (84a); Aff. of Cover at 1(103a) ("there are 120 [scholarship] pupils enrolled in the school this year. They are receiving an excellent education...I remain as a teacher at this school... because I know I can make a difference in a child's life..."); Aff. of Davies at 1 (116a) ("Scholarship families choose St. Vitus

School because they feel comfortable there.....safety and a better learning atmosphere are key issues".)

In much the same way, even if their personal motivations were legally relevant (and they are not), the parents of scholarship students chose religious schools primarily for educational and developmental reasons. Aff. of Barclay at 1(80a) ("the Scholarship program...helps me get a better education for my children that I couldn't otherwise afford"); Aff. of Berning at 1 (86a) ("I selected [our school]... because it was able to provide special help to weaknesses my older son had in school"); Aff. of Brackins at 1 (88a)("the [program] has enabled my son to attend a more favorable educational setting than I could have possibly afforded on my own"); Aff. of Cloud at 1 (99a) ("I am very grateful to the scholarship program because it gives parents the choice of bettering their children's education"); Aff. of King-Eash at 1 (152a).

Many parents of special needs children also decided to select religious schools because of the help that they could provide for their children. Aff. of Jones at 1 (186a); Aff. of Call at 1, 2 (J.A. 190a-191a); Aff. of Dowthit at 1 (127a). In many cases, parents choose religious schools simply because of safety and health conditions. Aff. of Grandberry at 1, 2 (J.A. 192a-193a); ("Another reason for transferring Byron was because of the disturbances within his classroom at [previous school]. Going back to a Cleveland public school would destroy all of the good things that have been accomplished... Not only will his academic progress be stunted, I would fear for the safety of my son"); Aff. of Clemons at 1(95a) ("I feel comfortable that she is being educated in a safe and calm atmosphere and that she now enjoys going to school"); Aff. of Thomas at 1 (181a) ("I can send my children to school and not have to worry abut them getting into fights or experiencing assaults upon teachers. I selected this school because it is safe...".) Aff. of Greene at 1 (135a). In two cases, beneficiaries noted that their children

were happier at their new schools simply because they now had toilet paper available to them in restrooms. Aff. of Goodgame at 1 (133a); Aff. of Hunter at 1 (139a).

Parents choose a school based on their conclusion that the selected school offers the best available education for their children, and they can frequently do so only because of the help the Ohio scholarship program provides. There is no spectre of advancement of religion to be apprehended here. This beneficial and religiously-neutral state program aids disadvantaged families to educate their children in a program in which religious schools, among others, extend themselves to those most in need.

CONCLUSION

For the foregoing reasons, the judgments below that the Ohio scholarship program is unconstitutional should be reversed.

Respectfully submitted,

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IN THE

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SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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20 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... (ii)

INTEREST OF THE *AMICUS CURIAE* 1

ARGUMENT 6

I THIS COURT'S DECISIONS PRIOR TO *MITCHELL v. HELMS* RECOGNIZED THE CONSTITUTIONAL LEGITIMACY OF INDIVIDUAL PRIVATE CHOICE 6

II THE PLURALITY OPINION AND THE OPINION OF JUSTICES O'CONNOR AND BREYER IN *MITCHELL v. HELMS* CONFIRMED THE PRIVATE-CHOICE RATIONALE 9

III MAXIMIZING PRIVATE CHOICE IS A SOCIALLY DESIRABLE OBJECTIVE THAT PROMOTES FUNDAMENTAL CONSTITUTIONAL RIGHTS 11

IV THE *NYQUIST* DECISION SHOULD BE OVERRULED 13

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Agostini v. Felton, 521 U.S. 203 (1997) 9, 11, 14

Aguilar v. Felton, 473 U.S. 402 (1985).....14

Board of Education v. Allen, 392 U.S. 236 (1968) 1

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 14

Good News Club v. Milford Central School, 121 S. Ct. 2093 (2001) 14

Lemon v. Kurtzman, 403 U.S. 602 (1971).....4, 8

Meek v. Pittenger, 421 U.S. 349 (1975).....14

Mitchell v. Helms, 530 U.S. 793 (2000).....*passim*

Mueller v. Allen, 463 U.S. 388 (1983).....6, 7, 11

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 3, 13

Wisconsin v. Yoder, 406 U.S. 205 (1972) 13

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 7, 9, 10, 11

Wolman v. Walter, 433 U.S. 229 (1977).....14

Zobrest v. Catalina Foothills School District, 509 U.S. 7 (1993).....8, 11

MISCELLANEOUS

Breger & Gordis, Vouchers for School Choice: Challenge or Opportunity? (Wilstein Institute of Jewish Policy Studies 1998).....5, 12

New York State Education Department, Nonpublic School Enrollment And Staff: New York State (University of the State of N.Y., 1998).....3

Schick, A Census of Jewish Day Schools in the United States (Avi Chai Foundation 2000).....3

INTEREST OF THE AMICUS CURIAE[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has consistently supported the principle of fair and even-handed treatment for children who attend Jewish and other religious schools. Over the past 33 years, from *Board of Education v. Allen*, 392 U.S. 236 (1968), to *Mitchell v. Helms*, 530 U.S. 793 (2000), COLPA has filed *amicus* briefs in nearly all of this Court's educational funding cases involving the Religion Clauses of the First Amendment.

COLPA submits this *amicus* brief on behalf of, and is joined by, the following national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada – The oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America – The nation's largest grassroots Orthodox Jewish organization, with chapters in numerous Jewish communities throughout the United States and Canada. One of Agudath

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[1] No party or party's counsel authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. See Rule 37.6

Israel's functions is to serve as an advocate for the cause of Jewish schools and Jewish education.

- National Council of Young Israel – A coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

- The Rabbinical Alliance of America – An Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

- The Rabbinical Council of America – The largest Orthodox Jewish rabbinical organization in the world with a membership that exceeds one thousand rabbis and is deeply involved in issues related to religious freedom.

- Torah Umesorah-National Society for Hebrew Day Schools – The coordinating body for more than 600 Jewish Day Schools across the United States and Canada.

- The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") – The largest Orthodox Jewish synagogue organization in North America, representing nearly one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

Individual Orthodox Jews who are members of these organizations subscribe to the view that Jewish

education is a key, if not *the* key, to Jewish continuity and survival. The overwhelming majority of these organizations' constituents, as well as an increasing number of Jewish parents who are not affiliated with these organizations, choose to send their children to Jewish elementary and secondary schools. They do so because Jewish religious school education is the most reliable means of teaching the values of the Jewish faith to Jewish children. It is virtually a religious necessity to provide a thorough Jewish education to a Jewish child in the United States, and it is consistent with the fundamental constitutional principle recognized by this Court in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

Jewish day schools are now located in 38 States, and their total student population exceeds 180,000. Schick, *A Census of Jewish Day Schools in the United States*, p. 3 (Avi Chai Foundation 2000). In New York State, home to the largest concentration of Jewish families in the United States, State Education Department figures for school year 1980-81 showed 56,000 students. Ten years later, for school year 1990-91, the number of students had increased to more than 82,000.[2] The latest Jewish day school enrollment figure for New York State is in excess of 100,000. See Schick, *supra*, p. 20. Similar growth patterns – albeit not as dramatic – have occurred in other parts of the country.

But with growth come growing pains. Many Jewish schools, especially those that service children from low-income backgrounds, struggle mightily to meet skyrocketing budgets. Outstanding teachers leave their

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[2] *New York State Education Department, Nonpublic School Enrollment And Staff: New York State* (University of the State of N.Y., 1998)

jobs because they are paid too little, too late or not at all. Jewish parents struggle mightily and sacrifice heroically to send their children to Jewish day schools so that they will learn not only reading, writing and arithmetic, but also about the Jewish people's history, culture and faith. And many Jewish parents are financially unable to pay even the minimum necessary to gain entrance to a Jewish day school. While it is heartening that the American Jewish community has committed a greater percentage of its charitable resources to Jewish education, many Jewish schools and parents continue to face serious fiscal problems.

This is why COLPA and the organizations it represents have had a long-standing interest in promoting and defending constitutionally permissible means of expanding the range of parental choice. Programs such as the Ohio school-voucher system enable parents with even the most modest means to select alternatives to designated public schools. On behalf of the Orthodox Jewish community, COLPA filed an *amicus curiae* brief in *Mitchell v. Helms*, 530 U.S. 793 (2000), addressing the harmful consequences of the restraints that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and subsequent restrictive rulings of this Court had imposed upon *neutral* government financial support for secular education in *all* schools – be they public or private, secular or religious. This Court's decision in *Mitchell v. Helms* was a welcome reappraisal of the doctrinaire rules of constitutional law that had seriously impeded the proper education of hundreds of thousands of children in the United States.

This case affords the Court another opportunity to remove constitutional clouds from innovative programs that improve educational opportunities for American

parents and children. School-voucher programs such as the Ohio provisions challenged in this case begin to give parents a real choice in selecting the best schools for their children. By enabling parents to direct state education funds to any qualified school that, in the view of the parents, offers the best education for their children, school-voucher laws open new avenues for educational improvement of *all* schools throughout the nation. For the first time in the history of American education, the public-school system is being challenged by competitive forces to improve the quality of its services.

Although no Jewish school has heretofore participated in the Ohio program that is challenged in this case,[3] the constitutional principle that this case will establish has great significance for parents across the country who want to educate their children in Jewish schools. The Court's recent precedents provide ample support for the overriding constitutional proposition that we believe governs this case – *i.e.*, that any legislation that uniformly affords everyone an opportunity for true private choice in selecting a child's education is presumptively constitutional so long as it is not exploited to defy compelling federal policies such as racial desegregation. That presumption is not to be set aside because a parent may chose a private school rather than a public school or because the parent selects a religious or "sectarian" school rather than one that is secular in outlook. The Establishment Clause of the First

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[3] The Cleveland Area Director of the American Jewish Committee reported, "Because the Cleveland Voucher Plan was limited to the City of Cleveland, and because there are very few Jews living within the city limits, there has been no direct impact of the plan on the Jewish community." Martin J. Plax, *"The Cleveland Experiment," in* Breger & Gordis, Vouchers for School Choice: Challenge or Opportunity? p. 33 (Wilstein Institute of Jewish Policy Studies 1998).

Amendment should not be manipulatively exploited as a barrier to prevent American parents from effectively choosing the schools that will best serve their children.

ARGUMENT

I

THIS COURT'S DECISIONS PRIOR TO *MITCHELL v. HELMS* RECOGNIZED THE CONSTITUTIONAL LEGITIMACY OF INDIVIDUAL PRIVATE CHOICE

Mueller v. Allen, 463 U.S. 388 (1983), concerned a Minnesota law that authorized state income–tax deductions for parent's educational expenses, including those for children attending parochial schools. In a majority opinion by then Associate Justice Rehnquist, the Court upheld the constitutionality of the law against an Establishment Clause challenge. The Court recognized "that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children." 463 U.S. at 399. Nonetheless, the Court added, in an observation applicable to this case (*id.;* citation omitted):

> It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children . . . . Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of state approval" can be deemed to have been conferred on any particular religion, or on religion generally.

The Court's opinion in *Mueller v. Allen* went on to emphasize that the financial benefits to religious schools in that case were "ultimately controlled by the private choices of individual parents" (463 U.S. at 400), and that the decisions of parents of children in private schools to take advantage of such tax relief "is no doubt due to the fact that they bear a particularly great financial burden in educating their children" (463 U.S. at 402).

The "private-choice" rationale of *Mueller v. Allen* was applied in two seminal governmental aid-to-education cases decided in subsequent Terms. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), *all* the Justices agreed that the "private choice" exercised by a recipient of a state grant for the training of the handicapped to use the funds for religious training as a minister insulated the grant from an Establishment Clause challenge. Justice Marshall – who was a staunch proponent of a broad application of the Establishment Clause – said in his majority opinion (474 U.S. at 488):

> Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.

And Justice Powell, who joined Justice Marshall's opinion, issued a concurrence that reaffirmed *Mueller v. Allen* and went on to note (474 U.S. at 490-491; emphasis added and footnote omitted):

> [S]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, *because any aid to religion results from the private choices of individual beneficiaries.*

In her separate concurrence, Justice O'Connor quoted this passage from Justice Powell's concurrence and added (474 U.S. at 493):

> The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief.

The constitutional legitimacy of private choice was reaffirmed in *Zobrest v. Catalina Foothills School District,* 509 U.S. 7 (1993). A government-paid sign-language interpreter was permitted to serve a deaf student at a Roman Catholic high school because the interpreter's presence at the religious school was "a result of the private decision of individual parents." 509 U.S. at 10. Even the dissenting Justices in *Zobrest* agreed that "[w]hen government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion." 509 U.S. at 22-23. The dissenters would have decided *Zobrest* differently only because of "the graphic symbol" of having a government-paid interpreter "mouthing" a religious message. 509 U.S. at 23. If not for that apparent state imprimatur on religion, the interposition of private choice between the State's

financial grant and the use of the State's funds in a religious school would, even in the view of the dissenters, have overridden the Establishment Clause challenge.

II

THE PLURALITY OPINION AND THE OPINION OF JUSTICES O'CONNOR AND BREYER IN *MITCHELL v. HELMS* CONFIRMED THE PRIVATE-CHOICE RATIONALE

Mitchell v. Helms, 530 U.S. 793 (2000), concerned a program of state aid to education under which state-funded materials and equipment were provided to public and private schools, including those that were "pervasively sectarian." Although private choice was not directly relevant to the precise issue before the Court, six Justices explicitly approved the private-choice rationale that governs this case.

In *Agostini v. Felton*, 521 U.S. 203, 226 (1997), the Court's majority opinion had quoted the language of *Witters* that had insulated from Establishment Clause challenge money that went to religious institutions "only as a result of the genuinely independent and private choices" of individuals. The plurality opinion in *Mitchell v. Helms* again quoted that language (530 U.S. at 809). The *Mitchell* plurality went on to say, in terms that foreshadow the issue in this case (530 U.S. at 809-810; citations omitted):

> We have viewed as significant whether the "private choices of individual parents," as opposed to the "unmediated" will of government, determine what schools ultimately benefit from the government aid,

> and how much. For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones.

Justice O'Connor's concurring opinion in *Mitchell v. Helms* (joined by Justice Breyer) emphasized the difference between a "per-capita-aid program" and a system of government financial aid for education that is a "true private-choice program." (530 U.S. at 842). Justice O'Connor observed that when the decision to direct the government funds to a particular school is made by the parent, "[t]he fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision." (530 U.S. at 842) (emphasis original). That distinction, she noted, quoting her conclusion in *Witters*, makes a significant difference, as well, in any appearance of endorsement (*id.*):

> [W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "[n]o reasonable observer is likely to draw from the facts . . . an inference that the

> State itself is endorsing a religious practice or belief."

In sum, this Court's line of cases from *Mueller v. Allen* through *Witters*, *Zobrest*, *Agostini*, and, most recently, *Mitchell v. Helms*, has reaffirmed time and again that a "true private choice" to assign government funds, *inter alia*, to a private religious school overcomes any Establishment Clause claim. That simple principle governs and controls this case and the constitutionality of any neutral school-voucher program.

III

MAXIMIZING PRIVATE CHOICE IS A SOCIALLY DESIRABLE OBJECTIVE THAT PROMOTES FUNDAMENTAL CONSTITUTIONAL RIGHTS

Our free society encourages individuals to make personal choices on the broadest range of subjects. We encourage competition in consumer goods, and we expect Americans to make their own distinctive decisions as to how to spend their money. In fact, government encourages choice over a wide array of government-sponsored conduct. One perceptive scholar recently noted the anomaly of singling out education as the unique subject on which personal private choice – particularly when religiously motivated – is denied:

> We can live where we choose, even if we are on welfare. We can eat what we like, even if we are on food stamps. We can go to the doctor that we favor, even if we are on Medicaid. We can attend the college of our choice, even if we pay for it with Pell Grants

> or other scholarships. We can travel where we like, even if we get there by public transportation. In the midst of all that, elementary and secondary education is a sort of policy ghetto. It is just about the only place where we take for granted that involuntary, government-run, no-choice state monopoly, state regulation and control should rule our lives, and this in respect to something so very crucial to our lives.

Chester E. Finn, Jr., *"The Effect Upon Public Schools: Financing and Support," in* Breger & Gordis, Vouchers for School Choice: Challenge or Opportunity? p. 55 (Wilstein Institute of Jewish Policy Studies 1998).

Singling out education – and particularly religious education – as the one aspect of modern life in which a personal determination regarding available public funds or facilities may *not* be made deprecates both education and religion. The Ohio tuition voucher plan challenged in this case gives parents the power to make practical personal choices by selecting the school to receive government funds set aside for their children's education. That is a desirable empowerment of individual citizens.

The possibility that religion may influence this private choice does not invalidate it, any more than it would invalidate a housing subsidy used by its recipient to pay rent on an apartment selected because it is near a church. This Court's recent decisions have recognized that in contemporary society religion is a legitimate motivation for private behavior, and that the Establishment Clause does not relegate religion to disfavored status. A parent who chooses to use

governmental funds to pay a child's tuition at a religious school is engaging in behavior that is as worthy as the choice of the parent who selects a school because of its better athletics or drama program, or because the school excels in math or laboratory sciences. Indeed, the parent's choice of a religious school has long been recognized to be constitutionally protected. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

Whenever true private choice is interposed between a government expenditure and the recipient of the government funds, government is not "endorsing" or sponsoring the institution that is given the government payment. The benefit is conferred, in such an instance, by the private citizen who makes his or her personal choice.

Nor is it only the parents and children directly affected who gain from a law permitting private choice. Competition from the private sector may spur greater achievement in the public schools and thereby benefit the children who remain in the public-school system. Similar "yardstick regulation" programs have routinely been implemented in other areas of public life such as transportation, public-utility services, and services to low-income persons.

IV

THE *NYQUIST* DECISION SHOULD BE OVERRULED

The majority of the court below invalidated Ohio's school-voucher program because it believed that "*Nyquist* governs our result." Pet. App. 24a. Although

we disagree with the specific grounds that the majority below cited as supporting the applicability of *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 745 (1973) ("*Nyquist*"), -- *i.e.*, the majority's erroneous assertions that the Ohio program, although neutral on its face, favored "sectarian" schools and that it effectively excluded public schools -- the lower court's reliance on *Nyquist* proves that the continued presence of that 1973 decision may result in the judicial invalidation of similar programs in other jurisdictions. The time has come to give *Nyquist* the same authoritative burial that this Court gave to *Aguilar v. Felton*, 473 U.S. 402 (1985), in its decision in *Agostini v. Felton*, 521 U.S. 203, 235-236 (1997), and that it gave to *Meek v. Pittenger*, 421 U.S. 349 (1975), and to *Wolman v. Walter*, 433 U.S. 229 (1977), in its recent decision in *Mitchell v. Helms*, 530 U.S. at 793, 835 (2000). *Nyquist*, like these other decisions, rests on now-rejected premises of hostility to religion and religious education. The clear trend of this Court's precedents over the last two decades has been toward principled neutrality and away from the strict separationism of the 1970's. Recent decisions, including last Term's ruling in *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001), have granted to religious institutions the equality before the law that had long been denied under the guise of enforcement of the Establishment Clause.

This Court should take another important step in providing fair and equitable treatment to parents who choose to have their children educated in religious nonpublic schools. It should declare, in this case, that States may enact tuition-voucher programs under which a parent's private choice to educate a child in a religious school is as legitimate as the child's compulsory assignment to a public school, and that it may result in

assistance, from the public treasury, to the substantial cost of private education. If the State's program, like Ohio's, is truly neutral and does not create any "impermissible incentive" to choose a religious school and if it is not a subterfuge to avoid racial desegregation, it does not, under this Court's recent decisions, raise any question under the Establishment Clause or any other constitutional provision. This Court should unequivocally declare that constitutional principle and authoritatively overrule the only precedent that might be thought to warrant a different result.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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IN THE

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Senel Taylor, Johnnietta McGrady, Christine Suma, Arkele Winston, and Amy Hudock

&

Susan Tave Zelman, Superintendent of Public Instruction of Ohio,

Petitioners,

v.

Doris Simmons-Harris, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS IN SUPPORT OF PETITIONERS

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15 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

ARGUMENT.....2

I. Individual Choice Effecting Receipt of State Funds Does Not Constitute State Advancement of Religion

II. Receipt of Voucher Monies From Students Does Not Relieve Sectarian Schools of Costs Otherwise Borne by the Schools

CONCLUSION.....8

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997).....*passim*

Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).....5,7,9

Lemon v. Kurtzman, 403 U.S. 602 (1971).....2,3

Mitchell v. Helms, 530 U.S. 793 (2000).....4,7

Mueller v. Allen, 463 U.S. 388 (1983).....4,6

Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995).....4,7

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 150 L. Ed. 2d 805 (2001).....*passim*

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Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).....*passim*

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U.S. Const. Amend. I.....2

Ohio Rev. Code § 3313.976.....7

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Association of Independent Schools ("NAIS") is a voluntary membership organization that represents over 1,100 independent pre-collegiate schools nationwide. NAIS believes that educational choice for students and their families is of paramount importance. To further this goal, NAIS promotes high standards of academic excellence for independent schools as well as encourages increased affordable access to private schools and diversification of independent school communities.

The pre-collegiate education system in the United States is a mosaic of public, religious, independent, and other private schools, all working together to provide the best possible education for American children. A system that relies on the richness of pluralism and diversity must make its resources accessible to all children. A basic belief of private education is that families should have options in the pursuit of their children's education. Such choices always have existed for families that have the means to pay private school tuition costs, and should be available to all. Government funded educational choice initiatives play an important part in this ideal.

Private schools have long been committed to extending equity and access for children in the United States. These schools have developed strong financial aid programs and

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[1] Counsel for NAIS authored this brief in its entirety. No counsel for a party authored this brief in whole or in part and no person, other than NAIS, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief is being submitted with the written consent of all parties pursuant to Rule 37.2. Letters of consent from all parties' counsel are being filed simultaneously with the Clerk of the Court.

recruitment practices that encourage broad and diverse student populations. Over the past several decades, independent schools have seen steady increases in enrollment of students from varying social, economic, racial, and ethnic backgrounds. This increased access to private schools has shown that these schools provide learning environments and activities that are attractive to families from diverse circumstances.

NAIS considers choice fundamental to the issue of equity and access in education. This choice should be entirely left to students and their parents irrespective of the sectarian nature of an individual's school of choice. NAIS does not advocate any particular brand of public school choice plan or legislation. Rather, NAIS generally supports policy initiatives that increase educational opportunities for children who do not have educational choices available to them. NAIS strongly believes that a decision for the respondents in this matter would stymie efforts to improve educational opportunities for children throughout the United States.

ARGUMENT

This case presents the question of whether scholarships or other tuition aid provided to students for enrollment in the school of their choice regardless of religious affiliation violates the Establishment Clause, U.S. Const. Amend. I. Using the test first enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court of appeals found that the Ohio Pilot Project Scholarship Program had the "impermissible effect" of promoting religion in violation of the Establishment Clause of the First Amendment, despite the Program's neutral purpose and provision of direct funding to students. *Simmons-Harris v. Zelman*, 234 F.3d 945, 959 (6th Cir. 2000), *cert. granted*, 150 L. Ed. 2d 805 (2001). *See Lemon*, 403 U.S. at 612-13

(identifying three elements to be considered in assessing Establishment Clause violations: (1) secular purpose, (2) primary effect to neither advance nor inhibit religion, and (3) no excessive entanglement between government and religion); *Agostini v. Felton*, 521 U.S. 203 (1997) (modifying second element to include consideration of government entanglement). The court of appeals determined that the government impermissibly limited the choices of the qualified applicants to sectarian schools, thereby creating a primary effect of advancement of religion. *See Simmons-Harris*, 234 F.3d at 960.

NAIS submits this brief to address two aspects of the Sixth Circuit's opinion that contravene Establishment Clause precedent. First, a government program such as the Ohio Pilot Project Scholarship Program does not run awry of the Establishment Clause when the decision to use government-disbursed funds at sectarian schools is made by the program participants themselves. Providing state funds directly to individual students to use at their choice, rather than giving the funds directly to sectarian institutions without student intervention, insulates the government from an inference of support or sponsorship of religion. Second, receipt of government initiated funds at sectarian schools is allowable where the funds do not relieve the schools of costs otherwise borne by the schools, but rather merely pay for the specific services needed by the student beneficiary.

This Court has consistently upheld government programs that provide educational services or funds to individuals irrespective of the sectarian nature of the institutions they choose to attend. *See Agostini*, 521 U.S. at 234 (upholding public school teachers providing remedial services to needy students in religious schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 US 1, 9 (1993) (allowing publicly funded

interpreter for deaf student attending Roman Catholic high school); *Witters v. Washington Dep't of Servs. for the Blind,* 474 U.S. 481, 489 (1986) (upholding postsecondary grant for blind student who chose to attend divinity school using grant money); *Mueller v. Allen,* 463 U.S. 388, 403-04 (1983) (sustaining tax deductions for educational expenses incurred at public, private, and religious schools). School "vouchers" or tuition aid provided directly to students for use at the school of their choice should be no different.

I. INDIVIDUAL CHOICE EFFECTING RECEIPT OF STATE FUNDS DOES NOT CONSTITUTE STATE APPROVAL FOR RELIGION

When funds reach religious institutions only indirectly through the private and independent decisions of individuals, such programs do not run afoul of the Establishment Clause. Independent choices by students and their parents ensure that a sectarian school's ultimate receipt of these funds in no way connotes State selection or approval of the sectarian school or its causes. *See Mueller*, 463 U.S. at 399; *Zobrest* 509 U.S. at 10; *see also Rosenberger v. Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819, 848 (1995) (O'Connor, J., concurring); *accord Mitchell v. Helms*, 530 U.S. 793, 843 (2000) (O'Connor, J.); *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part). This Court has repeatedly enforced the principle that such direct aid to individuals who freely choose to use this money for services offered by sectarian entities is constitutional. The Ohio Program provides students and their families with such choices.

In *Witters*, the Court upheld a student's use of a government tuition grant to study theology at a sectarian school. The grant money was paid directly to the student, who in turn exercised his personal choice to spend the money

pursuing a religious profession. The Court reasoned that since the tuition grant money "ultimately flowed" to sectarian institutions "only as a result of the genuinely independent and private choices" of eligible student recipients, the tuition grant was not an impermissible "direct subsidy." *See Witters,* 474 U.S. at 487-88 (*citation omitted).*

Here, as in *Witters*, the tuition grants were "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature'" of the institutions that might benefit as a result of individual recipients' choices. *Id.* at 487 (*quoting Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782-83 n.38 (1973)). Funding programs, such as the instant school voucher program, that utilize neutral eligibility criteria and provide for individual choice ensure that sectarian schools' participation in the program "'[could] not be attributed to state decisionmaking,'" but rather only to the individual recipient of funds. *See Zobrest*, 509 at 10 (*quoted in Agostini*, 521 U.S. at 226). As in these earlier cases, the Ohio Program provides opportunities for educational choices to qualified individuals. Individuals participating in the Program are free to exercise that choice in favor of public or private, and sectarian and nonsectarian schools.

In the face of this jurisprudence, the Sixth Circuit inexplicably found it "inappropriate" to consider parental choice as a determinative factor where there is "government limitation of the available choices to overwhelmingly sectarian private schools." *Simmons-Harris v. Zelman*, 234 F.3d at 960. The court of appeals' argument goes awry in its reliance on the number of participating sectarian schools to reach the conclusion that the relative percentages of nonsectarian to sectarian private schools must prove that the State improperly limited individual choice so

overwhelmingly that it impermissibly promoted religion through the Ohio Program.[2] The court of appeals failed to acknowledge both the neutrality and availability of the program to other nonsectarian private schools as well as the non-private school options available to participants.

This Court has specifically rejected the worth of resultant percentages as determinative of Establishment Clause violations. *See Mueller*, 463 U.S. at 401; *see also Agostini*, 521 U.S. at 210, 229 (upholding use of public school remedial teachers in private schools even though 90% of the schools within area in question were sectarian). As a matter of law, the court of appeals erred in basing its ultimate conclusion on such percentages. Further, in relying so heavily on these percentages, the court of appeals creates precedent that affects educational choice initiatives around the country, as well as many other federal and state programs.

This precedent requires legislatures to second guess the participation of schools and the resultant choices of parents, unconstitutionally inhibit the participation of sectarian schools, or severely limit the educational aid options. This end would result in largely tax-based initiatives for educational choice, initiatives that rarely aid those who need such educational choice the most, those whose income is below the poverty line plus 200%, the very focus of the Ohio Program.

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[2] Interestingly, with 82% sectarian schools, the relative percentages of registered private schools in Cleveland School District are remarkably reflective of the nationwide sectarian-nonsectarian state of private schooling in the country. Nationally, sectarian schools represent fully 78.4% of all private schools. Private School Universe Study 1999-2000, U.S. Department of Education, National Center for Education Statistics (Nov. 8, 2001, available at http://nces.ed.gov/pubs2001/2001330.pdf).

Beyond its reliance on resultant statistics, the court of appeals' use of the statistics themselves is misleading because the court fails to acknowledge that by meeting very basic, nonreligious, statutory requirements, *all* private schools within a covered school district are eligible to participate in the Program, regardless of religious affiliation. These relative percentage numbers are irrelevant to the issue of promotion of religion in such a neutral program. There is no basis for sole, or even primary, reliance on school participation figures to prove promotion of religion, so long as the program has a neutral purpose that is based on individual choice. *See Simmons-Harris v. Zelman*, 234 F.3d at 972-73 (Ryan, J., concurring in part and dissenting in part); *accord Zobrest* 509 U.S. 1; *Rosenberger,* 515 U.S. 819; *Mitchell,* 530 U.S. 793; *Witters*, 474 U.S. 481. In other words, the Ohio Program provides the maximum opportunity for participation by all of the private schools in the relevant district.

Even if sectarian school participation figures are taken into account, these figures must be considered in light of the Ohio Program as a whole. Consideration of all of these options is what makes this instant case the resolving point of the tension between this Court's recent precedent and *Nyquist*. The tension results from the question this Court reserved in that case: whether scholarships or other aid made available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions violates the Establishment Clause. *Nyquist,* 413 U.S. at 782 n.38.

The Ohio Program offers a multitude of options to eligible students, including opportunities to attend a sectarian or nonsectarian private school in the district, a participating public school located in an adjacent district, a community or magnet school, or their current public school with additional,

voucher-obtained tutoring. *See* Ohio Rev. Code § 3313.976; *Simmons-Harris v. Zelman*, 234 F.3d at 968 (Ryan, J., concurring in part and dissenting in part). None of the schools or programs receives any extra funding or payments until the student and his family makes the decision to attend.

Unlike *Nyquist*, however, this program allows public schools to be a very real part of this choice, and receive scholarship payments as well. Students and parents in the Cleveland district were provided with more choices than are available in almost any other area in the country. Rather than proving that the State has limited educational choices to predominantly sectarian schools, the Program illustrates how the State of Ohio has expanded the host of typically available educational options.

II. RECEIPT OF THESE FUNDS WOULD NOT RELIEVE SECTARIAN SCHOOLS OF COSTS OTHERWISE BORNE BY THE SCHOOLS

Noticeably absent from the court of appeals' analysis is any consideration of the direct affect of receipt of the funds by the participating schools. In both *Agostini* and *Zobrest*, this Court found that whether a program impermissibly finances religious indoctrination rests partially on whether the funding "reliev[es] sectarian schools of costs [they] otherwise would have borne in educating [their] students." *Agostini,* 521 U.S. at 226 (*quoting Zobrest,* 509 U.S. at 12). As in these cases, the Ohio Program does not relieve the participating sectarian schools of costs they are otherwise obligated to bear as operational consequence.

In the instant case, as in cases this Court has previously considered, sectarian schools are incidental beneficiaries of students' educational choice. The funding does not provide

the sectarian schools financial relief in violation of the Establishment Clause. In *Agostini* this Court found that provision of a public school teacher to teach remedial classes in sectarian schools did not relieve the sectarian schools of educational costs they would have otherwise absorbed.

Similarly, in *Zobrest*, this Court found that providing an interpreter for a deaf student who wished to attend a sectarian high school would also not relieve the school of any costs for which it would otherwise have paid. In both cases, this Court came to the conclusion that the benefit truly ran to the student and his family and as a result of the educational choice. *See Agostini*, 521 U.S. at 226; *Zobrest* 509 U.S. at 12-13. Any benefit received by the school was incidental to the individual choice and not a result of a government decision. *See id.* The chief benefit of the interpreter or the remedial teacher was for the student directly. Any minor benefit to the school was incidental to the student's choice.

By comparison, in *Nyquist* this Court found that New York State funds given directly to sectarian schools for facility maintenance violated the Establishment Clause. *Nyquist*, 413 U.S. at 796-97. These are clearly costs that schools normally have to bear to continue educating students, and the school has an obligation to ensure that this maintenance occurs regardless of which students attend. Unlike facility maintenance, the *Agostini* and *Zobrest* schools did not have a need for the interpreter or remedial teacher unless the direct beneficiaries, the eligible students, were at the schools.

As with the Title I and the IDEA benefits at issue in *Agostini* and *Zobrest*, the Ohio Program only provides aid to eligible students, through whichever school option they choose. In the sectarian schools, no other students or the

religion itself benefit from the voucher payment. In all three cases, the benefit is based on the qualifying criteria of the student himself, and is for his sole benefit to be used at his discretion. If the student is not at the school, the interpreter, the remedial class, or the tuition payment for the extra student need not occur, as there is no need or benefit. In this way, none of the programs provide impermissible financial relief to the participating sectarian schools. Schools receive only the incidental benefit of having another student. The student receives the primary benefit to meet his needs.

The vouchers are used directly for tuition, paid and applied like the tuition of any other student attending the school. The State is not relieving the school of any financial burden it would otherwise bear in its day to day operations; to the contrary, the State fails to pay the entire tuition amount. In many cases this may result in schools, sectarian or otherwise, using other funding to meet the remainder of the student's tuition.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be *reversed*.

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SUSAN TAVE ZELMAN, *et al.*,
Petitioners,
v.
DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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37 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. THE SPECIAL TREATMENT OF PRIMARY AND SECONDARY SCHOOLS ARTICLULATED IN SOME OF THIS COURT'S ESTABLISHMENT CLAUSE CASES IS UNSOUND AND OWES MORE TO BYGONE PREJUDICES AND FEARS THAN TO THE COMMANDS OF THE FIRST AMENDMENT 5

A. This Court Has Often Treated Aid Involving Primary and Secondary Schools as a Special Analytical Category. 5

B. This Court's Treatment of Aid to Students in Primary and Secondary Religious Schools as an Especially Suspect Category of Aid is Rooted in an Erroneous Historical Narrative.. 8

C. The Special Treatment of Aid to Primary and Secondary Religious Schools in the Nineteenth Century was a Manifestation of Nativist Bigotry and an Effort to Maintain the Nondenominational Protestant Character of the Public Schools. 14

1. Nineteenth Century "Common

Schools" Inculcated Students with the Protestant "Common Religion," Thus Distinguishing Themselves From "Sectarian" Schools.....14

2. Nativist Hostility to Irish and East-European Immigrants and Their Religions Produced Fierce, Organized Opposition to "Sectarian" Schools...17

3. Nineteenth and Early Twentieth Century State Court Litigation Reinforced the Distinction Between "Common" and "Sectarian" Schools..23

II. THIS COURT SHOULD EXAMINE THE CLEVELAND SCHOOL CHOICE PROGRAM AFRESH, UNENCUMBERED BY A POPULAR BUT FALSE NARRATIVE. 28

CONCLUSION.....30

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U.S.203 (1997) 3, 7
Aguilar v. Felton, 473 U.S. 402 (1985) 7
Billard v. Board of Educ., 76 P. 422 (Kan. 1904).....26
Board of Educ. v. Minor, 23 Ohio St. 211 (1872) 20
Boyette v. Galvin, No. 98-CV-10377 (D. Mass. filed Mar. 3, 1998) 2
Church v. Bullock, 109 S.W. 115 (Tex. 1908).....26
Commonwealth v. Board of Educ. of Methodist Episcopal Church, 179 S.W. 596 (Ky. 1915).....26
Conrad v. City of Denver, 656 P.2d 662 (Colo. 1983) 24
Cook Cy. v. Chicago Indust. Sch. for Girls, 18 N.E. 183 (Ill. 1888) 23
Derry Council, No. 40, Junior Order United American Mechanics v. State Council of Pennsylvania, 47 A.208 (Pa. 1900).....22
Evans v. Selma Union High Sch. Dist., 222 P. 801 (Cal. 1924) 24
Everson v. Board of Educ., 330 U.S. 1 (1947).....27, 28
Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792 (Ky. 1905) 26
Hale v. Everett, 53 N.H. 9 (1868).....14
Kaplan v. Independent Sch. Dist., 214 N.W. 18 (Minn. 1927) 25
Knowlton v. Baumhover, 166 N.W. 202 (Iowa 1918).....25
Lemon v. Kurtzman, 403 U.S. 602 (1971) .....*passim*
McCollum v. Board of Educ. 333 U.S. 203 (1948).....3, 4, 12
McCormick v. Burt, 95 Ill. 263 (1880).....27
Mitchell v. Helms, 120 S. Ct. 2530 (2000).....*passim*
Moore v. Monroe, 20 N.W. 475 (Iowa 1884) 25
Mueller v. Allen, 463 U.S. 388 (1983).....2, 5, 6, 7

Nevada ex rel. Nevada Orphan Asylum v. Hallock, 16 Nev. 373 (1882) 21, 23
North v. Board of Trustees of Univ. of Illinois, 27 N.E. 54 (Ill. 1891) 27
People ex rel. Ring v. Board of Educ.f Dist. 24, 92 N.E. 251 (Ill. 1910) 24, 26
Roemer v. Board of Pub. Works of Md., 426 U.S. 736, (1976) 7
Smith v. Donahue, 195 N.Y.S. 715 (N.Y. App. Div. 1922) 23
Spiller v. Inhabitants of Woburn, 12 Allen 127 (Mass. 1866) 27
State ex rel. Finger v. Weedman, 226 N.W. 348 (S.D. 1929) 26
Stevenson v. Hanyon, 7 Pa. Dist. R. 585 (1898) 15
Tash v. Ludden, 129 N.W. 417 (Neb. 1911) 27
The Dublin Case, 38 N.H. 459 (1859) 14
Tilton v. Richardson, 408 U.S. 672 (1971) 7
Vidal v. Girard's Ex'rs, 43 U.S. 127 (1844) 16
Warde v. Manchester, 56 N.H. 508 (1876) 15
Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) 2, 6
Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 3, 6

Statutes and Constitutions

Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) 21
Act of July 3, 1890, 26 Stat. L. 215 § 8, ch. 656 (1890) 21
Act of June 20, 1910, 36 Stat. 557 § 26 (1910) 21
ARIZ. CONST. art. IX § 10 21
DEL. CONST. art. X § 3 21
IDAHO CONST. art. X § 5 21
IOWA CONST. art. 1, § 3 25
KY. CONST. § 189 21
MASS. CONST. amend. art. XLVI 18
MASS. CONST. amend. art. XVIII 18

MO. CONST. art. IX § 8 21
MONT. CONST. art. X § 6 21
N.D. CONST. art. 8, § 5 21
N.Y. CONST. art. XI § 3 21
S.D. CONST. art. VIII § 16 21
WASH. CONST. arts. IX § 4, Art. I § 11 21

Other Authorities

ANSON STOKES, CHURCH AND STATE IN THE UNITED STATES (1950) 10
DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973 ..... 11, 12
Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968) 6
Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L. J. 43 (1997) 5
E.I.F. WILLIAMS, HORACE MANN: EDUCATIONAL STATESMAN (1937) 15
Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999) 7
HORACE MANN, LIFE and WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-1848 (1891) 15
HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH (1912) 23
JOHN R. MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS (1990) 18
Julie K. Underwood, *Changing Establishment Analysis Within and Outside the Context of Education*, 33 HOW. L.J. 53 (1990) 6
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Matthew S. Steffey, *Redefining the Modern* Constraints *of the Establishment Clause: Separable Principles of*

Equality, Subsidy, Endorsement, and Church Autonomy, 75 MARQ. L. REV. 903 (1992) 6
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OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION ASSEMBLED MAY 4TH, 1853 TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Vol II 19
R. FREEMAN BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION (1950) 9
R. MICHAELSEN, Piety In The Public School (1970) 16, 20
Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992) 21
2 THE COLLECTED WORKS OF ABRAHAM LINCOLN (R. Basler ed. 1953) 17

IN THE

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SUSAN TAVE ZELMAN, *et al.*,
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DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioners pursuant to Rule 37.3 of this Court.[1] The Becket Fund is a nonpartisan, interfaith, public-interest law firm, whose mission is to defend the free speech and religious freedom rights of Americans of all faith traditions.

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[1]All parties have consented to the filing of this brief. Consent letters from all parties are being filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus*, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

Amicus submits this brief to attempt to correct what we believe is a misreading of historical events of the 19th Century that long has colored analyses of aid to religious primary and secondary schools. This *amicus* brief traces the 19th Century efforts to bar aid to "sectarian" schools, which, we will demonstrate, were not based on fair-minded debates over the proper separation of church and state, but rather were the result of anti-Catholic and anti-immigrant nativism and a desire to preserve the Protestant character of the public schools.[2] In light of this history, this *amicus* brief argues that this Court should not treat primary and secondary school aid as a special analytical category, as it has frequently done, but instead should look at this case under general Establishment Clause principles. This brief is thus similar in certain respects to the brief *Amicus* submitted in *Mitchell v. Helms*, 530 U.S. 793 (2000) (available at www.becketfund.org/litigate/mitchell.pdf), which traced the history of the concept of barring aid to "pervasively sectarian" institutions back to similar unfirm foundations.

SUMMARY OF THE ARGUMENT

Petitioners and other *amici* undoubtedly will address fully how the program at issue in this case should be upheld on the grounds that it involves the same principle that led to this Court upholding the aid in *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). In a nutshell, the Ohio program does

[2]In *Boyette v. Galvin*, No. 98-CV-10377 (D. Mass. filed Mar. 3, 1998), *amicus* represents parents challenging Massachusetts' 1854 "Anti-Aid" Amendment to its constitution, adopted at the height of the anti-Catholic and nativist "Know-Nothing" movement, on the grounds that it was based on irrational animus and violates our clients' Equal Protection and First Amendment rights.

Dist., 509 U.S. 1 (1993). In a nutshell, the Ohio program does not "define its recipients by reference to religion," *Agostini v. Felton*, 521 U.S. 203, 234 (1997), and "[a]ny aid provided under [the Ohio] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 488.

This brief addresses a different issue. *Amicus* urges this Court to reject the argument that money flowing to religiously affiliated or oriented primary and secondary schools constitutes a separate analytical category under the Establishment Clause. While some of this Court's direct-aid opinions, separate opinions of Justices, and various commentators have viewed monetary aid for education at primary and secondary religious schools as being especially suspect, this concept in the law does not have its origins in well-meaning theories of how best to maintain the proper separation of church and state. Rather, this practice of treating aid to lower schools as a unique Establishment Clause problem has its origin in the nativist and anti-Catholic bigotry of the 19th and early 20th Century. In short, it flowed not from the 18th Century thought of Madison and Jefferson, but from the fears and prejudices of later generations.

There is a popular narrative, though, that looks to the debates over aid to religious primary and secondary schools in the 19th Century as a basis for arguing that such aid should be treated as a special species of Establishment Clause problem today. This notion is traceable to the separate opinion of Justice Frankfurter in *McCollum v. Board of Education*, 333 U.S. 203 (1948), and the separate opinion of Justice Brennan in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which describe the battles over aid to religious schools and the subsequent determination, engrafted onto the constitutions of most states, to bar aid to "sectarian" schools. Both Justices cited this as the development

of a consensus that "prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people." *McCollum*, 333 U.S. at 215 (Frankfurter, J., concurring); *see also Lemon*, 403 U.S. at 648 (Brennan, J., concurring) ("[F]or more than a century, the consensus . . . has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions."). As recently as two terms ago Justices of this Court have relied on this historical narrative. *See Mitchell v. Helms,* 530 U.S. 793, 872 (2000) (Souter, J., joined by Stevens and Ginsburg, JJ.) (citing opinions of Justices Brennan and Frankfurter and stating that the turmoil over government establishments "in our own history . . . has led to a rejection of the idea that government should subsidize religious education.").

But as this brief will show, this narrative was based on the failure of Justices Brennan and Frankfurter to recognize that "nonsectarian" in the historical sources they cited was not a synonym for "secular." In the 19th Century school debates, keeping the common schools "nonsectarian" essentially meant keeping them non-Catholic. Indeed, "nonsectarian" was understood to allow the public schools to include a form of nondenominational Protestantism that relied on individual interpretation of the Bible. Moreover, constitutional amendments adopted in a majority of states that barred aid to "sectarian" schools, known as Blaine Amendments, were in fact the product of organized nativist efforts to preserve the Protestant character of the "nonsectarian" public schools and to suppress the cultural threat posed by the growth of Catholic "sectarian" schools.

Part I of this *amicus* brief traces the development of the popular myth that the 19th Century controversies over primary and secondary "sectarian" aid grew out of laudable concerns for the separation of church and state, and the adoption of that myth

in this Court's jurisprudence. Part II seeks to lay out for this Court a more accurate picture of the period. Part III urges this Court to analyze this case under general Establishment Clause principles, without the anachronistic baggage of viewing aid to primary and secondary schools as a separate analytical category. *Amicus* agrees with the conclusion of Professor Douglas Laycock that "we should not unwittingly reason from a premise rooted in nineteenth century anti-Catholicism. We must think these questions out afresh, with no inherited presuppositions." Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L. J. 43, 53 (1997).

ARGUMENT

I. THE SPECIAL TREATMENT OF PRIMARY AND SECONDARY SCHOOLS ARTICULATED IN SOME OF THIS COURT'S ESTABLISHMENT CLAUSE CASES IS UNSOUND AND OWES MORE TO BYGONE PREJUDICES AND FEARS THAN TO THE COMMANDS OF THE FIRST AMENDMENT.

A. This Court Has Often Treated Aid Involving Primary and Secondary Schools as a Special Analytical Category.

There is, as this Court has recognized repeatedly, a fundamental difference between financial aid provided directly by the government to religious schools and aid that reaches such schools only indirectly, through the private choices of those who receive benefits through public-welfare programs. This Court's cases teach that an individual's own choice to use funds received through religion-neutral programs to send her child to a religious school simply does not unconstitutionally "establish" or "endorse" religion. *See, e.g., Mueller v. Allen*,

463 U.S. 388 (1983) (upholding tax deduction for educational expenses despite majority of beneficiaries using benefit for religious school expenses); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 488 (1986) (upholding blind man's use of vocational training funds to attend religious seminary since "[a]ny aid provided under [the] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients,"); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (upholding government payment of interpreter for deaf child attending religious school since the "interpreter will be present in a sectarian school only as a result of the private decision of individual parents.").

Nonetheless, Respondents and their *amici* likely will attempt to distinguish these three cases on the grounds that *Witters* involved higher education, that *Zobrest* involved in-kind aid, and that *Mueller* involved tax deductions, while the Cleveland Pilot Project Scholarship Program involves money from the public fisc winding up in the checking accounts of religiously affiliated or oriented primary and secondary schools. Such attempts should fail.

It is true, of course, that courts and commentators have often suggested that primary and secondary schools are, for Establishment Clause purposes *sui generis*.[3] For example, the

[3]*See, e.g.*, Matthew S. Steffey, *Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement, and Church Autonomy*, 75 MARQ. L. REV. 903, 921-22 (1992); Julie K. Underwood, *Changing Establishment Analysis Within and Outside the Context of Education*, 33 HOW. L.J. 53, 56 (1990); Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 561-62 (1968); *see also* Michael J. Perry,

"divisiveness" doctrine—which appears now to have been abandoned by this Court[4]—was not focused on political divisiveness generally, but instead on the particularly worrisome divisiveness that was thought to attend financial aid to religious primary and secondary religious schools. *See, e.g., Mueller v. Allen*, 463 U.S. at 403 n.11 (divisiveness inquiry is "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736, 765-66 (1976) ("divisiveness" principle not applied in higher-education context); *Tilton v. Richardson*, 408 U.S. 672, 688-89 (1971) (same).

In a similar vein, the dissenting Justices in *Mitchell* noted that "two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools." 530 U.S. at 885. Monetary aid is likewise a ground for distinction recognized by the Court. In *Agostini*, the Court stressed that "[n]o Title I funds ever reach the coffers of religious schools." 521 U.S. at 228-29.

As we will show, though, heightened suspicion directed toward monetary aid involving religious primary and secondary

Freedom of Religion in the United States: Fin de Siecle Sketches, 75 IND. L.J. 295, 321 n.83 (2000) (observing, but disagreeing with, special treatment of primary and secondary education in the Establishment Clause context); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 342-47 (1999) (same).

[4]*See, e.g., Mitchell*, 530 U.S. at 825 ("the dissent resurrects the concern for political divisiveness that once occupied the Court but that post-Aguilar cases have rightly disregarded"); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor J., dissenting).

schools—and toward the instruction they provide—is rooted not in the tolerant pluralism of Madison, but instead in a later generation's shameful nativism and prejudice.

B. This Court's Treatment of Aid to Students in Primary and Secondary Religious Schools as an Especially Suspect Category of Aid is Rooted in an Erroneous Historical Narrative.

An early and influential effort to justify the special judicial attention directed at primary and secondary religious schools and their students is Justice Brennan's concurrence in *Lemon v. Kurtzman*. There, he insisted that the case required an examination of "the history of public subsidy of sectarian schools, and the purposes and operation of these particular statutes." *Lemon*, 403 U.S. at 644. He then proceeded to describe the school-funding crisis that rocked New York City in the early 1840's, and how 35 States, responding in the second half of the 19th Century to "widespread demands throughout the States for *secular public education*," enacted constitutional provisions barring aid to religious schools. *Id.* at 647 (emphasis added). In this respect, Justice Brennan followed the trail blazed by Justice Frankfurter in his concurrence in *McCollum*:

> In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was taught. In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict. The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people.

333 U.S. at 214-15 (notes omitted). And, moving forward in time, the historical narrative embraced by Justices Brennan and Frankfurter was endorsed recently by the dissenting Justices in *Mitchell*. *See* 530 U.S. at 872 (Souter, J., joined by Stevens and Ginsburg, JJ.) (citing opinions of Justices Brennan and Frankfurter and stating that the turmoil of government establishments "in our own history . . . has led to a rejection of the idea that government should subsidize religious education.").

But Justice Brennan failed entirely to appreciate that, in the historical works on which he relied, "nonsectarian" was not a synonym for "secular." Rather, "nonsectarian" had a very different, specific meaning. It denoted, even according to the historians Justice Brennan cites, a form of nondenominational Protestantism relying on individual interpretation of the Bible.[5]

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[5]For example, one of the historical works Justice Brennan cites, R. FREEMAN BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION (1950), explains that educators in the first half of the 19th Century "came to the conclusion that moral education should be based on the common elements of Christianity to which all Christian sects would agree or to which they would take no exception." *Id.* at 117. This included "reading of the Bible as containing the common elements of Christian morals but reading it with no comment in order not to introduce sectarian biases." *Id.* When Catholic immigrants grew in numbers throughout the nation, Butts reports, "they soon raised the objection that what seemed to be 'non-sectarian' to Protestants was actually 'sectarian' to Catholics." *Id.* at 118.

This oversight led Justice Brennan to misunderstand the controversy that arose in New York City when Catholics, seeking a portion of the state common school fund for parochial schools, "contend[ed] that the [city] council was subsidizing sectarian books and instruction" in the various New York City schools supported by state funds. 403 U.S. at 646. After noting that the Scotch Presbyterian and Jewish communities also sought funding for their schools, *id.*, Justice Brennan stated:

> Although the Public School Society undertook to revise its texts to meet the objections, in 1842, the state legislature closed the bitter controversy by enacting a law that established a City Board of Education to set up free public schools, prohibited the distribution of public funds to sectarian schools, and prohibited the teaching of sectarian doctrine in any public school.

Id.

Similarly, 2 ANSON STOKES, CHURCH AND STATE IN THE UNITED STATES (1950), another work heavily relied on by Justice Brennan, discusses educator Horace Mann's similar understanding of the term "nonsectarian." *Id.* at 55-56. Stokes quotes Mann's report to the Board of Education in 1848, which reveals the point well:

> [S]ectarian books and sectarian instruction, if their encroachment were not resisted, would prove the overthrow of the schools . . . . Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and in receiving the Bible, it allows it to do what it is allowed to do in no other system, to speak for itself.

Id. at 57.

Again, though, "sectarian" and "nonsectarian," had a specific meaning in the context of these debates, and "nonsectarian" was by no means a synonym for "secular." Instead, it meant non-denominational Protestantism. This fact is illustrated nicely in the Public School Society's proposed "textbook revisions"[6] that Justice Brennan reports failed to resolve the matter. After a series of fruitless meetings over proposed changes, the Public School Society's trustees expressed their frustration that, to the Catholics, "[e]ven the Holy Scriptures are sectarian and dangerous 'without note or comment'; and certainly no comments would be acceptable other than those of their own church." DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 50 (1974).

Moreover, the state legislature did not really "close[ ] the bitter controversy," as Justice Brennan reported—it simply handed victory to one side. The first Board of Education, elected after the school controversy was supposedly settled, hired a prominent nativist as Superintendent of Education, and the schools included daily readings from the Protestant Bible. *Id.* at 80. Catholics objected, but the Board ruled that reading the Bible "without note or comment" did not constitute

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[6]Catholics objected, for example, to textbooks describing Martin Luther as "the great reformer. . . . The cause of learning, of religion, and of civil liberty, is indebted to him, more than any man since the Apostles," and to others with passages openly disparaging "Popery." DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 52 (1974).

sectarianism. *Id.*

After the New York controversy was concluded, Justice Brennan reported, "[t]he Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing urbanization soon lead to widespread demands throughout the States for secular education." 403 U.S. at 646-47. As a result, by 1900, 35 states "had added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools." *Id.* at 647. He cites a number of cases applying these laws, and declares, in support of striking down the aid at issue in *Lemon*:

> Thus for more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions.

Id. at 648-49.

Amicus respectfully submits that Justice Brennan's account of these 19th Century developments is—like his presentation of the New York City crisis—inadequate and incomplete. The same is true of Justice Frankfurter's conclusion in his *McCollum* concurrence, reflecting on the efforts in New York and Massachusetts to keep their common schools "nonsectarian," that "long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people." *McCollum*, 333 U.S. at 215.

Unfortunately, these accounts and the popular narrative that they helped create, *see, e.g., Mitchell,* 530 U.S. at 872

(Souter, J., dissenting), place a benign separationist veneer over what the 19th Century state constitutional enactments really were: an effort to suppress Catholic schools and preserve Protestant hegemony generally, and the Protestant character of the public schools particularly. Because the history of barring public funds for sectarian schools during this period is, as Professor Douglas Laycock has stated, "the source of the legal tradition that treats school funding as an especially important issue in the separation of church and state," Laycock, *supra*, at 50, an accurate understanding of that history is critical.

This *amicus* brief seeks to lay out this history for the Court and show that what moved the states to bar aid to "sectarian" schools were not lofty principles of religious liberty, but instead various recurrent strains of anti-Catholic bigotry and an effort to ensure that public schools could continue to teach the supposedly "nonsectarian" common Protestant religion. *Amicus* does this not to score debater's points, or to construct a history of grievance, but to urge this Court to view the Cleveland school choice program through a lens unclouded by anachronistic biases and shoddy history. Correctly understood, nothing in the Establishment Clause requires this Court to reserve particular suspicion for religious primary and secondary schools. Again, following Professor Laycock, we urge this court to agree that "Americans today should not unwittingly reason from a premise rooted in nineteenth century anti-Catholicism. We must think these questions out afresh, with no inherited presuppositions." *Id.* at 53.

C. The Special Treatment of Aid to Primary and Secondary Religious Schools in the Nineteenth Century was a Manifestation of Nativist Bigotry and an Effort to Maintain the Nondenominational Protestant Character of the Public Schools.

1. Nineteenth Century "Common Schools" Inculcated Students with the Protestant "Common Religion," Thus Distinguishing Themselves from "Sectarian" Schools.

In the northeast States, the birthplace of the "common school," there was an ongoing religious debate in the 19th Century between the Unitarian and Orthodox divisions of the Congregational faith. *See, e.g., Hale v. Everett*, 53 N.H. 9, 111 (1868) ("the great mass of our people . . . were Congregationalists . . . . Such was their Christianity and their Protestantism, as was that of most of the New England states"). *See also The Dublin Case*, 38 N.H. 459 (1859) (describing the history of the Congregational Church and the conflicts between the Unitarians and Trinitarian/Orthodox in New England). A desire to make peace between these factions, together with the emerging principle of universal education, led to the creation of "nonsectarian common schools," first in Massachusetts and then elsewhere.

But "nonsectarian" in this sense did not mean nonreligious. The term referred to schools that taught religious doctrine acceptable initially to all Congregationalists, and, later, to most Protestants.[7] When Horace Mann developed his system

[7]"Our fathers were not only Christians; they were, even in Maryland by a vast majority, elsewhere almost unanimously, Protestants." *Hale*, 53 N.H. at 111 (quoting 2 BANCROFT'S

of common, nonsectarian schools, the conflict he addressed was that between Orthodox and Unitarian Congregationalists.[8] E.I.F. WILLIAMS, HORACE MANN: EDUCATIONAL STATESMAN

HIST. U.S. 456). *See also Stevenson v. Hanyon*, 7 Pa. Dist. R. 585, 589 (1898) ("Christianity is part of the common law of this State [Pennsylvania]"); *Warde v. Manchester*, 56 N.H. 508, 509 (1876) ("[T]he protestant religion is regarded with peculiar favor . . . .").

[8]Responding to the charges that he sought the removal of religion, and the Bible in particular, from the common schools, Mann issued a statement on "Religious Education" in his Report on Education for 1848:

> But it will be said that this grand result in practical morals is a consummation of blessedness that can never be attained without religion, and that no community will ever be religious without a religious education. Both these propositions I regard as eternal and immutable truths.

HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-1848, at 292 (1891). Thus, the "Father of Public Education" himself vehemently denied that he "ever attempted to exclude religious instruction from school, or to exclude the Bible from school, or to impair the force of that volume." *Id.* at 311. Instead, he describes the public school system at that time as building "its morals on the basis of religion; it welcomes the religion of the Bible." *Id. See also* note 5, *supra*. Mann welcomed religion in the common schools—so long as it was of the "common," "non-sectarian" variety.

266 (1937); *see also* R. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL 69 (1970) ("Horace Mann scorned sectarianism. By that he meant chiefly the sectarianism of the evangelical Protestant denominations.").

The New York Public School Society's inability to appreciate Catholics' objections to required readings, without note or comment, of the "nonsectarian" King James Bible reflected a similar understanding. Indeed, during this period, even Justices of this Court defined "sectarian" with reference to a benchmark of nondenominational Protestantism. In *Vidal v. Girard's Ex'rs*, 43 U.S. 127 (1844), Justice Story asked rhetorically, in response to the assertion that Christianity could not to be taught by laymen in a college:

> Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, *not sectarian*, upon the general evidence of Christianity, from being read and taught in the college by lay-teachers? .... Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?

Id. at 200 (emphasis added). Thus, the Court took for granted the proposition that, in 1844, the "common religion" was not sectarian. Other religions were.

2. Nativist Hostility to Irish and East-European Immigrants and Their Religions Produced Fierce, Organized Opposition to "Sectarian" Schools.

The common-school movement coincided with a surge in Irish, German, and other European Catholic and Jewish immigrants, and a corresponding backlash—one that lasted well into the 20th Century—against those immigrants and their religions. This backlash formed the basis of organized nativist movements that thrived on Protestant fears of the immigrants' cultures and faiths.

One of the earliest and most prominent nativist groups was the Know-Nothing party, which "included in its platform daily Bible reading in the schools." *Lemon*, 403 U.S. at 629 (citation omitted). Abraham Lincoln wrote of that party:

> As a nation we began by declaring that 'all men are created equal.' We now practically read it, 'all men are created equal, except Negroes.' When the Know-Nothings get control, it will read 'all men are created equal except Negroes and foreigners and Catholics.' When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty.

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (R. Basler ed., 1953).

This was not a fringe movement. In Massachusetts, the elections of 1854 swept the Know-Nothing party into power. Know-Nothings won the governorship, the entire congressional delegation, all forty seats in the Senate, and all but 3 of the 379 members of the House of Representatives. JOHN R. MULKERN,

THE KNOW-NOTHING PARTY IN MASSACHUSETTS 76 (1990). Armed with this overwhelming mandate, they turned quickly to what Governor Henry J. Gardner called the mission to "Americanize America." *Id.* at 94. The Know-Nothings required the reading of the King James Bible in all "common" schools; they proposed constitutional amendments (which passed both houses of the legislature) that "would have deprived Roman Catholics of their right to hold public office and restricted office and the suffrage to male citizens who had resided in the country for no less than twenty-one years"; they dismissed Irish state-government workers; and they banned foreign-language instruction in the public schools. *Id.* at 102. The official bigotry is perhaps best—and comically—illustrated by the removal of a Latin inscription above the House Speaker's desk and the establishment by the legislature of a "Joint Special Committee on the Inspection of Nunneries and Convents." *Id.* at 102-103. This Committee was charged with the task of liberating women thought to be captive in convents and stamping out other "acts of villainy, injustice, and wrong . . . perpetrated with impunity within the walls of said institutions." *Id.* at 103.

Of particular interest here is the fact that the Know-Nothings also succeeded in adding an amendment to the Massachusetts Constitution which had been proposed and narrowly rejected by the people one year before: "[M]oneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools . . . shall never be appropriated to any religious sect for the maintenance exclusively of its own schools." MASS. CONST. amend. art. XVIII (superseded by MASS. CONST. amend. art. XLVI). *See* MULKERN, *supra* at 54-56, 79, 105-106. The amendment's proponents were open about their motives:

> Sir, I want all our children, the children of our Catholic and Protestant population, to be educated together in our public schools. And if gentlemen say that the resolution has a strong leaning towards the Catholics, and is intended to have special reference to them, I am not disposed to deny that it admits of such interpretation. I am ready and disposed to say to our Catholic fellow-citizens: "You may come here and meet us on the broad principles of civil and religious liberty, but if you cannot meet us upon this common ground, we do not ask you to come."

OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION ASSEMBLED MAY 4, 1853 TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Vol. II, at 630 (Mr. Lothrop). Yet this very provision—unquestionably the product of prejudice—was among the 19th Century enactments cited approvingly by Justice Brennan as representing the "consensus . . . that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions."[9]

Nor were nativist sentiments and outbursts confined to Massachusetts. The understanding of "nonsectarianism" as "lowest common denominator" Protestantism also led, for example, to a telling battle in Cincinnati between the "common

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[9] *Lemon*, 403 U.S. at 648-49 & n.7. Ironically, it was acknowledged in a source on which Justice Brennan relied that the anti-aid amendment in Massachusetts was the result of the "fanaticism" of the Know-Nothings, who "sought to abolish the Catholic school, force the children to attend public school, [and] use the Protestant Bible as a reader." BURTON CONFREY, SECULARISM IN AMERICAN EDUCATION: ITS HISTORY 141 n.69 (1931).

religionists" and a group of Catholics, Jews, and freethinkers that opposed Protestant devotional Bible reading. *See Board of Educ. v. Minor*, 23 Ohio St. 211 (1872). Protestant opposition to the removal of "their" Bible from the public schools was fierce and virulently anti-Catholic. *See* MICHAELSEN, *supra* at 118 ("[T]he Dutch Reformed *Christian Intelligencer* denounced the Cincinnati board's action as a move to 'hand the public schools over to Pope, Pagan, and Satan.'").

Nothing, though, refutes the claim that the common-school movement serves as a separationist model for church-state relations as decisively as does the history of the enactment and enforcement of the state "Blaine Amendments." Blaine Amendments take their name from Representative James G. Blaine, who in 1875, introduced in the U.S. House of Representatives a proposed constitutional amendment that would have barred states from giving school funds to sectarian schools.[10] There were no illusions about the purpose of such amendments. As this Court stated in *Mitchell*: "Consideration

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[10]LLOYD JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 138-139 (1987). The amendment read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Id.

of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" 120 S. Ct. at 2551 (plurality opinion); *see also Kotterman v. Killian*, 972 P.2d 606, 624 (Az. 1999) ("[C]ontemporary sources labeled the amendment part of a plan to institute a general war against the Catholic Church.") (citation omitted).

After Blaine's Amendment barely failed in the Congress,[11] state after state either voluntarily adopted similar "Blaine Amendments" to their constitutions,[12] or were forced by Congress to enact such Articles as a condition of their admittance into the Union.[13]

Many prominent people threw their weight behind the effort. In 1875, President Grant spoke of the Catholic Church as a source of "superstition, ambition and ignorance." President

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[11]The measure passed the House 180-7 but fell four votes short of the Senate. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 38 (1992).

[12]*See, e.g.*, N.Y. CONST. ART. XI § 3 (adopted 1894); DEL. CONST. ART. X § 3 (adopted 1897); KY. CONST. § 189 (adopted 1891); MO. CONST. ART. IX § 8 (adopted 1875).

[13]*See, e.g.*, Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling legislation for South Dakota, North Dakota, Montana and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling legislation for New Mexico and Arizona); Act of July 3, 1890, 26 Stat. L. 215 § 8, ch. 656 (1890) (enabling legislation for Idaho); S.D. CONST. art. VIII § 16; N.D. CONST. art. 8, § 5; MONT. CONST. art. X § 6; WASH. CONST. arts. IX § 4, art. I § 11; ARIZ. CONST. art. IX § 10; IDAHO CONST. art. X § 5.

Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (quoted in Laycock, *supra*, at 51). Institutions were formed to fight Catholic interference with the Protestant public school system. *See, e.g., Derry Council, No. 40, Junior Order United American Mechanics v. State Council of Penn.*, 47 A. 208, 209 (Pa. 1900) (among purposes of the Junior Order of United American Mechanics were "to maintain the public-school system of the United States, and to prevent sectarian interference therewith; to uphold the reading of the Holy Bible therein"). A succession of anti-Catholic organizations continued efforts to oppose Catholic education and influence using the various tools of the state legislature, Congress, and the judiciary. In the 1890s, the "American Protective Association" was politically successful in inciting anti-Catholic hatred.[14]

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[14]Oath No. Four of the APA began:

> I do most solemnly promise and swear that I will always, to the utmost of my ability, labor, plead and wage a continuous warfare against ignorance and fanaticism; that I will use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people; that I will never allow any one, a member of the Roman Catholic Church, to become a member of this order, I knowing him to be such; that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant.

HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH

3. Nineteenth and Early Twentieth Century State Court Litigation Reinforced the Distinction Between "Common" and "Sectarian" Schools.

The Blaine Amendments resulted in a wave of state-court litigation firmly establishing the notion that Catholic "sectarian" schools were unable to share in neutral education programs benefiting the "common" schools. Blaine Amendments, and other Blaine-like provisions, were frequently used to strike down programs such as payment for orphans at a Catholic asylum, *Nevada ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882), payment for tuition at an "industrial school for girls," *Cook Cy. v. Chicago Indus. Sch. for Girls*, 18 N.E. 183 (Ill. 1888), and provision of textbooks and other supplies for parochial school students, *Smith v. Donahue*, 195 N.Y.S. 715 (N.Y. App. Div. 1922).

When Catholic children attending public schools complained about the Protestant doctrine taught there, their charges went unanswered by the courts. While the Catholic Church forbade its faithful from reading the King James version of the Bible,[15] courts continued to hold that the reading of that

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36 (1912); *See also* KINZER, AN EPISODE IN ANTI-CATHOLICISM 139 (1964).

[15]As the California Supreme Court described the religious differences between the King James (Protestant) and Douai (Catholic) versions of the Bible:

> The Douai version is based upon the text of the Latin Vulgate, the King James version on the Hebrew and Greek texts. There are variances in the rendering of certain phrases and passages. The Douai version incorporates the Apocrypha,

translation was *not* sectarian instruction.[16] *See People ex rel. Vollmar v. Stanley*, 255 P. 610, 617 (Colo. 1927) ("It is said that King James Bible is proscribed by Roman Catholic authority; but proscription cannot make that sectarian which is not actually so."), *overruled by Conrad v. City of Denver*, 656 P.2d 662 (Colo. 1983).

Other courts were candid about their intent to keep Protestant religious instruction in the public schools, and "sectarian" ideas out:

> The plaintiff's position is that, by the use of the school-house as a place for reading the Bible, repeating the Lord's prayer, and singing religious songs, it is made a place of worship, and so his children are compelled to attend a place of worship, and he, as a tax-payer, is compelled to pay taxes for building and repairing a place of worship.
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> . . . . The object of the provision [IOWA CONST. art. 1, § 3], we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship.
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> . . . . Possibly, the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible. Whether this be so or not, it is sufficient to say that the courts are charged with no such mission.

Moore v. Monroe, 20 N.W. 475, 475-76 (Iowa 1884).[17] *See also Kaplan v. Indep. Sch. Dist.*, 214 N.W. 18, 20 (Minn. 1927) (upholding Bible reading, and adding, "[w]e are not concerned with nice distinctions between sects, nor as to how among them the different authorized versions of the Bible are regarded.").

The claims of a group of Catholics and Jews against a public school board that conducted religious exercises, including the reading of the King James Bible and recitation of the Lord's Prayer, were dismissed when the Texas Supreme Court held that such exercises did not render the school

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which are omitted from the texts of the Testaments in the King James version.

Evans v. Selma Union High School Dist., 222 P. 801, 802-03 (Cal. 1924). *See also State ex rel. Finger v. Weedman*, 226 N.W. 348, 350-53 (S.D. 1929) (discussing conflict between Catholics and Protestants over Bible reading); *People ex rel. Ring v. Board of Educ. of Dist. 24*, 92 N.E. 251, 254 (Ill. 1910) ("Catholics claim that there are cases of willful perversion of the Scriptures in King James' translation.").

[16]The Bible was, of course, widely read for devotional purposes, not simply used for its literary or historical merit, as it is today in some public schools. *See State ex rel. Finger v. Weedman*, 226 N.W. 348 (S.D. 1929) ("[W]e emphasize that in our opinion the reading of the Bible and repeating of the Lord's Prayer without comment in opening exercises is necessarily devotional.").

[17] Ironically, in a later decision, the Iowa Supreme Court enjoined a school district from providing funds to a public school operating in the same building as a Catholic parochial school—while explicitly reaffirming its decision in *Moore*. *Knowlton v. Baumhover*, 166 N.W. 202, 214 (Iowa 1918).

sectarian. *Church v. Bullock*, 109 S.W. 115, 118 (Tex. 1908) ("Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits reading the Bible, offering prayers, or singing songs of a religious character in any public building of the government would produce a condition bordering upon moral anarchy.").

The Kansas Supreme Court justified its holding that the reading of the Lord's Prayer[18] and the Twenty-Third Psalm did not constitute "sectarian or religious doctrine" by arguing that the public schools had an obligation to teach morals and ideals to its students, and "the noblest ideals of moral character are found in the Bible." *Billard v. Board of Educ.*, 76 P. 422, 423 (Kan. 1904).

Similarly, daily religious services at a Methodist College were held by the Kentucky Court of Appeals not to constitute "sectarian instruction." *Commonwealth v. Board of Educ. of Methodist Episcopal Church*, 179 S.W. 596, 598 (Ky. 1915). *See also Hackett v. Brooksville Graded Sch. Dist.*, 87 S.W. 792, 793 (Ky. 1905). The Nebraska courts also applied the term "sectarian" to allow Protestant instruction in the public schools. *See State v. Scheve*, 93 N.W. 169, 172 (Neb. 1903) (overruling motion for rehearing) (constitutional prohibition

[18]*See Ring*, 92 N.E. at 254 ("The Lord's Prayer is differently translated in the two versions."). *See also State ex rel. Finger v. Weedman*, 226 N.W. 348, 351 (S.D. 1929) ("The King James version is a translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as 'that man of sin.'").

against sectarian instruction "cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state."); *Tash v. Ludden*, 129 N.W. 417, 421 (Neb. 1911) ("This is a Christian country, Nebraska is a Christian state, and its normal schools are Christian schools; *not sectarian*, nor what would be termed religious schools; . . . .") (emphasis added).

Objecting students were not excused from the "nonsectarian" religious exercises. *See, e.g., McCormick v. Burt*, 95 Ill. 263 (1880) (affirming judgment against Catholic plaintiff who was suspended for not observing Bible reading rule); *Spiller v. Inhabitants of Woburn*, 12 Allen 127 (Mass. 1866) (upholding student's "exclusion" from school for refusing to bow her head during public school prayer). *Cf. North v. Board of Trustees of Univ. of Illinois*, 27 N.E. 54 (Ill. 1891) (holding that mandatory chapel exercises, the avoidance of which resulted in the expulsion of the Plaintiff from the State university, did not violate the Illinois constitution).

In short, the common schools could be as religious as they wanted, so long as the religion in question was "common." It was only Catholic schools and others that deviated from the common religion that were denied aid.

* * *

Following the incorporation of the Religion Clauses against the States, this Court began examining whether state aid to religious schools and religious school students was constitutional under the First Amendment. The effort began in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), at a time when public schools with "nonsectarian" religious exercises were still

flourishing.[19] The rhetoric of challenging aid to "sectarian" schools—the prohibited category under state Blaine Amendments—was subsequently adopted, seemingly uncritically, into First Amendment jurisprudence. And with the concurrences of Justices Frankfurter and Brennan in *McCollum* and *Lemon*, this rhetoric was given a new pedigree. The origins of the idea that we should be particularly suspicious of aid to "sectarian" education were not merely forgotten, but a new narrative was constructed that put the finest gloss of principle over the ugly developments of the 19th Century.

II. THIS COURT SHOULD EXAMINE THE CLEVELAND SCHOOL-CHOICE PROGRAM AFRESH, UNENCUMBERED BY A POPULAR BUT FALSE NARRATIVE

The notion that the Nation's long history regarding monetary aid to primary and secondary "sectarian" schools counsels that such aid is an especially suspect Establishment Clause problem is, as has been demonstrated, a fundamentally flawed narrative. The history of the rise of the public schools and the 19th Century triumph of the no-aid-to-sectarian-schools concept in the passage and implementation of the Blaine

[19]It is interesting that the challenged aid to parochial school students in *Everson* involved a program in New Jersey, the constitution of which had an Establishment-like Clause, a Conscience Clause and other provisions, but no Blaine Amendment or other similar anti-sectarian language in its constitution. Thus, in order to challenge the transportation program at issue, it was necessary for the plaintiffs in that case to urge upon the Court a federal prohibition against neutral aid on the grounds that the students receiving the aid attended a category of disqualified, *i.e.*, sectarian, schools.

Amendments simply cannot serve as the touchstone, or even a make-weight, for determining the constitutionality of school aid cases under the Establishment Clause. As *amicus* has demonstrated, these Blaine Amendments were enacted and implemented not out of broad-minded appeals to the first principles of the Establishment Clause, but rather out of anti-immigrant and anti-Catholic bigotry and the desire to preserve Protestant cultural hegemony through the public schools.

As Professor Ira Lupu has argued: "The Protestant paranoia fueled by waves of Catholic immigration to the U.S., beginning in the mid-nineteenth century, cannot form the basis of a stable constitutional principle." Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J. OF L., ETHICS & PUB. POL. 375, 386 (1999). Or as Professor Douglas Laycock has warned, we "should not unwittingly reason from a premise rooted in nineteenth century anti-Catholicism. We must think these questions out afresh, with no inherited presuppositions." Laycock, *supra*, at 53.

Amicus similarly urges this Court to analyze the Cleveland Pilot Scholarship Program "afresh," under the general principles it has articulated in its recent Establishment Clause jurisprudence. The popular narrative that justifies treating monetary aid to religious primary and secondary schools with singular suspicion is a false one—indeed the actual history is a shameful one—that should not encumber this Court's analysis of the aid at issue in this case.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed.

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On Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit

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BRIEF OF THE REACH ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a program designed to create additional educational options for children of parents who lack the means to afford alternatives to their distressed public schools violates the Establishment Clause of the First Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
A. THIS COURT'S *NYQUIST* AND *SLOAN* DECISIONS WERE PREMISED ON ERRONEOUS PRESUMPTIONS.	3
B. THE COURT BELOW ERRED IN ASSESSING THE SECTARIAN EFFECT OF THE OHIO PILOT SCHOLARSHIP PROGRAM IN ISOLATION FROM THE STATE'S OVERALL EFFORTS AT EQUALIZING EDUCATIONAL OPPORTUNITIES.	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	Page
Agostini v. Felton, 521 U.S. 203 (1997)	7
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	*passim.*
Mitchell v. Helms, 530 U.S. 793 (2000)	7
Mueller v. Allen, 463 U.S. 388 (1983)	9
Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000)	8
Sloan v. Lemon, 413 U.S. 825 (1973)	3
STATUTES:	
24 Purdon's Pa. Statutes §15-1501-C	8
24 Purdon's Pa. Statutes §20-2001-B	2
38 U.S. Code §3451	8
38 U.S. Code §3500	8
42 U.S. Code §9858	8

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BRIEF OF THE REACH ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS[*]

The REACH Alliance is a membership organization composed of individuals and organizations interested in

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[*] Counsel for the *Amicus Curiae* authored this brief in its entirety. No person or entity other than the *Amicus Curiae* or its members made a monetary contribution to the preparation or submission of this brief.

bringing about enhanced opportunities for Pennsylvania parents to send their children to the kindergartens, elementary schools and secondary schools which best suit the needs of those children. It has been a principal advocate of "school choice" reforms in Pennsylvania, such as the Educational Improvement Tax Credit, 24 P.S. §20-2001-B, *et seq.*

Organizational members of the REACH Alliance include: The Commonwealth Foundation; Minorities for Choice; The Pennsylvania Manufacturers Association; The Pennsylvania Family Institute; The Pennsylvania Catholic Conference; the Pennsylvania Knights of Columbus; Citizens for Educational Freedom; The Keystone Christian Education Association; and The Henkels Foundation.

Counsel of Record for all of the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

SUMMARY OF ARGUMENT

Parents who exercise a constitutionally-protected liberty to choose to enroll their children in the public or nonpublic schools that, while meeting compulsory attendance obligations, best serve the needs of their children, may be furnished governmental assistance in defraying the costs of that schooling without violation of the Establishment Clause of the First Amendment.

ARGUMENT

The United States Court of Appeals for the Sixth Circuit, in the decision below, has perpetuated two errors of

Establishment Clause jurisprudence that need to be put to rest.

The first of these errors is that legislatures that seek to equalize educational opportunities for *all* elementary and secondary school children, by defraying their educational costs, are furnishing institutional aid to religious enterprises.

The second of these errors is the notion that legislative efforts to equalize educational opportunities for *all* elementary and secondary school children must be examined in isolation, to determine if their effect is to advance religion, rather than in the context in which they were enacted – the State's overall allocation of resources between and among children attending public and nonpublic schools.

A. THIS COURT'S *NYQUIST* AND *SLOAN* DECISIONS WERE PREMISED ON ERRONEOUS PRESUMPTIONS.

In 1973, in the companion cases of *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, and *Sloan v. Lemon*, 413 U.S. 825, this Court invalidated tuition reimbursement and tuition "grant" programs that had been adopted in the State of New York and in the Commonwealth of Pennsylvania.

The core of the Court's explanation of its reasoning in those cases can be found in footnote 38 in the *Nyquist* majority opinion:

> "*Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. See also *Tilton v. Richardson*, supra, in which federal aid was

made available to *all* institutions of higher learning, and *Walz v. Tax Comm'n*, supra, in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions. We do not agree with the suggestion in the dissent of The Chief Justice that tuition grants are an analogous endeavor to provide comparable benefits to all parents of school children whether enrolled in public or nonpublic schools. Post, at 801-803. The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools "totally at state expense." And, in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools - a result wholly at variance with the Establishment Clause.

"Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See *Wolman v. Essex*, 342 F Supp 399, 412-413 (SD Ohio), *affd*, 409 US 808, 34 L Ed 2d 69, 93 S Ct 61 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G. I. Bill," 38 USC §1651, impermissibly advance religion in violation of the Establishment Clause. See also n 32, supra."

413 U.S. at 782, n.38.

Three faulty presumptions are contained in this single passage:

1. That children whose parents have a fundamental right to choose a nonpublic school for them receive an extra public benefit when the State subsidizes their education, due to the fact that all children are *presumptively* to be considered as public school children.
2. That allowing parents to choose nonpublic schools for their children, with a lessened additional financial burden, is the equivalent of direct subsidization of their schools.
3. That the "beneficiaries" of a statute that lessens the financial burdens for parents, who are satisfying compulsory school attendance obligations, are the schools which the students attend, rather than the parents and their children.

It is profoundly offensive to parents who choose nonpublic schools for their children to be subjected to a legal presumption that their children "belong" in public schools, and that any other choice is a deviation from a government-sanctioned norm. Most nonpublic school parents are quite willing to make financial sacrifices to send their children to schools that are not 100% government-subsidized. Nor do those parents believe that their government is under an obligation to subsidize their choice of nonpublic schooling. But when government acts to offset some of the additional financial burdens those parents have assumed, it is tilting all common sense reality to say that government is according them an "extra benefit." Their children are receiving what public school children are receiving: an education that fulfills compulsory education requirements. They are not being paid

an amount in excess of the charge required to send their children to nonpublic schools.

The first flawed presumption of footnote 38 in *Nyquist* was given dispositive effect in *Sloan*, wherein the Court ruled that the Commonwealth of Pennsylvania had "singled out a class of its citizens for a special economic benefit." 413 U.S. at 832. That view is similar to saying that a coach is conferring a benefit on an athlete he or she has singled out for exemplary "added training" when that coach allows that athlete to stop running punitive wind sprints. Helping nonpublic school parents achieve parity in government-provided educational benefits is merely, in the words of former Chief Justice Burger, "simple equity." *Nyquist*, supra, at 803 (Burger, J., dissenting).

The second and third erroneous presumptions in *Nyquist's* footnote 38 are similar to one another in their misconception of the *purposes* of efforts to equalize educational opportunities for parents. The Court's view of such efforts is even more explicitly set forth in a subsequent passage in *Nyquist*, where the majority states that, "insofar as such benefits render assistance to parents who send their children to sectarian schools, their *purpose* and inevitable effect are to aid and advance those religious institutions." 413 U.S. at 793.That view allows the *Nyquist* majority to hold that a tuition reimbursement benefit for parents is government "sponsorship" or "financial support" of religion. 413 U.S. at 771.

The *Nyquist* majority further reveals its presumptive bias against measures that aid parents in meeting their educational obligations by broadly characterizing them as an example of "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court." 413 U.S. at 785. There is thus little wonder – given the prism through

which the *Nyquist* majority viewed legislative efforts at equalizing educational benefits for parents – that the *Nyquist* Court decried such efforts, at length, as being "politically divisive," and therefore at odds with the overriding purposes of the Establishment Clause. 413 U.S. at 794-798. Such a formulation of the purposes of the Establishment Clause, coupled with a skewed view of the purposes of efforts to bring "simple equity" to the funding of educational options, fashioned a pernicious recipe for oppression of the choice of non-government education. If a substantial enough faction could politically oppose such efforts (however unjustly and through whatever mischaracterizations of their purposes), those efforts (however just and whatever their non-religious purposes) would violate our organic law and could not be countenanced.

Fortunately, however, this Court has already abandoned and discredited the presumption that efforts at assisting parents to make their own choices of where their children will be educated are intended as, or result in, impermissible subsidies to the schools which they choose. *Mitchell v. Helms*, 530 U.S. 793, 841-843 (O'Connor and Breyer, JJ., concurring). To the extent that *Nyquist's* presumptions about the purposes and effects of "true private-choice" programs (*Mitchell, id.* at 842) are no longer recognized as commanding a majority of this Court, *Nyquist's* continuing force as precedent should be explicitly overruled. This Court has not shrunk from eliminating wrongly decided precedent cases that were based on similarly erroneous presumptions that underlay unjust Establishment Clause rulings. See, *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Mitchell v. Helms*, supra, 530 U.S. at 837 (O'Connor and Breyer, JJ., concurring). Overruling the holding and reasoning of *Nyquist* will remove the pall of doubt from "scholarship" and "certificate" programs that honor parental choices between religious and non-religious educational

alternatives. Those programs now include the "G.I. Bill," 38 U.S.C. §3451, *et seq.*; Military Survivors' and Dependents' Educational Assistance, 38 U.S.C. §3500, *et seq.*; Federal Child Care and Development Block Grant certificates, 42 U.S.C. §9858, *et seq.*; and Pennsylvania's Educational Support Services Program, 24 P.S. §15-1501-C, *et seq.*

B. The Court Below Erred in Assessing the Sectarian Effect of the Ohio Pilot Scholarship Program in Isolation from the State's Overall Efforts at Equalizing Educational Opportunities.

The State of Ohio will spend approximately $7.4 billion in State funds alone on education in its Fiscal Year 2002. State of Ohio Executive Budget, p. E-106. (Available online at http://www.ode.state.oh.us/legislative/Links/EDU_Budget.pdf.) Of that amount, approximately $178 million (or about 2.4%) will be set aside for services for nonpublic school students. *Id.* at p. E-105. Ohio also grants the authority to its local taxing authorities to raise and spend public funds for public education purposes (including capital and operating expenditures).

The realities of the overall disparities in public spending on public v. private school options could not have been ignored by the Ohio General Assembly when it enacted the Ohio Pilot Scholarship Program. Those realities should not have been ignored by the Sixth Circuit below. *Simmons-Harris v. Zelman*, 234 F.3d 945, 958 (6th Cir. 2000).

By viewing a program aimed at remedying overall disparities in available opportunities totally in isolation from those portions of the State budget and education laws which created the disparities in the first place, the Court below

unjustly prejudiced the result in this case. Under the analytical approach adopted by the Court below, it will never be possible to remedy an existing legal disparity in the funding of educational opportunities without repealing and reenacting the entire Ohio Education Code.

The approach in *Mueller v. Allen*, 463 U.S. 388, 401-402 (1983), to the "statistical effects" of a facially neutral program that produced more use by parents who chose religiously-affiliated schools, is more fundamentally just than that employed by the Court below. In *Mueller*, this Court recognized the simple reality that, if "parents of children in private schools choose to take especial advantage of [the tax deduction for educational expenses], it is no doubt due to the fact that they bear a particularly great financial burden in educating their children." 463 U.S. at 402.

CONCLUSION

For the foregoing reasons, your *amicus* respectfully supports the Petitioners in urging that the decision of the Court below be reversed.

Respectfully submitted,

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QUESTION PRESENTED

1. Does the expansive interpretation given to the Establishment Clause by the Sixth Circuit Court of Appeals impermissibly intrude on the core state function of providing for the health, safety, welfare, *and morals* of the people and unduly interfere with the right of parents to direct the moral upbringing of their children?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. The Cleveland Scholarship Program Helps Further The Moral Instruction That Our Nation's Founders Thought Critical In A Republican Form Of Government. 5

II. Interpreting The Establishment Clause To Bar Ohio From Enacting A Program Which Allows Parents To Send Children To Religious Schools Is Incompatible With This Court's Recent Federalism Jurisprudence. 10

A. Education is a Core Function, Perhaps *The* Core Function, of State and Local Governments. 10

B. Applying An Expansive Interpretation of the Establishment Clause to the States Threatens to Undermine Core The State Police Power to Regulate *The Morals* of the People. 11

III. The Cleveland Scholarship Program Does Not Violate The Establishment Clause Even As Considered Apart From This Court's Federalism Decisions. 13

A. The Circuit Court Misread This Court's Establishment Clause Jurisprudence in Finding That The Cleveland Scholarship Program Constitutes an Establishment of Religion. 13

B. The Cleveland Scholarship Program Allows Parents Freely to Choose Which Schools Their Children Will Attend. 14

C. The Cleveland Scholarship Program Does Not Indoctrinate In, Define By, or Entangle Govern-ment With Religion. 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997)..... passim
Barnes v. *Glen Theatre, Inc.*; 501 U.S. 560 (1991) 13
Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) 11
Bowen v. Kendrick, 487 U.S. 589 (1988) 14
Cantwell v. *Connecticut*, 310 U.S. 296 (1940)..... 12
Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)..... 13
Everson v. *Board of Ed.*, 330 U.S. 1 (1947)..... 12
Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 14
Lemon v. Kurtzman, 403 U.S. 602 (1971)..... 13, 19
Mitchell v. Helms, 530 U.S. 793 (2000)..... 14, 18, 19
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)..... 16
Mueller v. Allen, 463 U.S. 388 (1983) 14, 15
Murdock v. *Pennsylvania*, 319 U.S. 105 (1943) 12
New State Ice Co. v. *Liebmann*, 285 U.S. 262 (1932)..... 13
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Rosenberger v. Rector of the University of Virginia, 515 U.S. 819 (1995)..... 17
Schneider v. *State*, 308 U.S. 147 (1939) 12
Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996)..... 12
Simmons-Harris v. *Goff*, 711 N.E.2d 203 (Ohio 1999) 3, 16

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000)..... passim
United States v. Lopez, 514 U.S. 549 (1995)..... 10, 12
United States v. Morrison, 529 U.S. 598 (2000)..... 16
Washington v. Davis, 426 U.S. 229 (1976)..... 17
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N.H. Const. of 1784, Pt. I § 5. 8
Nebr. Const. Art. 1, § 4 9
ORC § 3313.978(A) 19
ORC §3313.976(A)(4)..... 18
Pa. Const. of 1776, § 45 8
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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principles, at issue in this case, that among the core powers reserved to the states or to the people is the power to further the health, safety, welfare and morals of the people through education, and that parents have the fundamental right to seek proper moral as well as intellectual instruction for their children. The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute has published a number of books and monographs of particular relevance here, on the effectiveness, and the Constitutionality, of school choice programs, including Christopher Flannery, *Moral Ideas for America: Educating Americans,* and Lance Izumi, *The Verdict Is in: California's Public Schools Are Miserably Managed*. In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence, in order to further advance its mission. The Center's purpose is to promote the mission of the Claremont Institute through strategic litigation, including the filing of *amicus curiae* briefs in cases such as this, involving issues of constitutional significance going to the heart of our nation's founding principles.

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[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

The Center has previously participated in this case as *amicus curiae* in support of the petition for a writ of certiorari, and has participated as *amicus curiae* in this Court in such other important cases as *Adarand Constructors* v. *Mineta*, No. 00-730 (pending); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

STATEMENT OF THE CASE

American public schools are facing a crisis. Every day, children are threatened by violence, drug abuse, and sexual pressures; test scores are continually falling, and students are failing to graduate. The effects are particularly harsh on minorities. 69 percent of black high school seniors scored below basic proficiency levels on math tests in 2000; 43 percent scored below basic proficiency levels in reading. Rodger Doyle, *Can't Read, Can't Count,* SCIENTIFIC AMERICAN, Oct. 2001 at 24. More than 38 percent of job applicants lack basic reading, writing, or math skills, which "portents higher unemployment and lower pay...and certainly is a major contributor to poverty." *Id.*

Cleveland, Ohio's public schools have only a 38 percent graduation rate, and only 12 percent of sixth grade students passed the state's mathematics proficiency test in 1999. *Failing Cleveland's Students*, WASHINGTON TIMES, 1999 WL 3092877 (Aug. 26, 1999). Many parents wish to escape the ailing public education system by placing their children in private schools, but some cannot afford that alternative. In response to this problem, a number of States have set up school choice programs allowing parents to designate a school for their children to attend; if parents choose to send their child to a private school, the State then helps those parents by contributing toward the tuition a certain amount of the money which the state was already going to spend on the student in a government school. This increases the number of choices available to parents, and in their competi-

tion for students, the schools will improve their quality.[2] In *Simmons-Harris* v. *Goff*, 711 N.E.2d 203 (Ohio 1999), the Ohio Supreme Court held that this program did not violate the Establishment Clause of the First Amendment, because participation in the program is equally open to both religious and nonreligious schools, without government favoritism. As a result, "[w]hatever link between government and religion [that] is created by the School Voucher Program is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government.... No other aspect of the statutory scheme involves the government in indoctrination." *Id.* at 7. But in *Simmons-Harris* v. *Zelman*, 234 F.3d 945 (6th Cir. 2000), the Sixth Circuit Court of Appeals held that the program does violate the Establishment Clause, because religious schools—being more competitive—are more likely to attract customers. *See id.* at 959 ("Practically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs").

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[2] The results have, indeed, been improved test scores, greater number of scholarships for students, and increased parent satisfaction. *See, e.g.*, Thomas C. Dawson and Eric A. Helland, *Helping Hand: How Private Philanthropy and Catholic Schools Serve Low-Income Children in Los Angeles* (Pacific Research Foundation Study, 2001) (finding that Catholic schools in inner cities spend less than half the amount per student as public schools, yet achieve higher test scores); David Myers, et al., *School Choice in New York City after Two Years: An Evaluation of the School Choice Scholarships Program* (John F. Kennedy School of Government Study, 2000) (finding New York City's school choice plan resulted in safer campuses and increased test scores, especially among minority students); Paul Peterson *et al.*, *An Evaluation of the Cleveland Voucher Program after Two Years* (John F. Kennedy School of Government Study, 1999) (finding that the Cleveland Scholarship Program involved in this case achieved greater parental satisfaction and an average test-score increase of about forty percent).

SUMMARY OF ARGUMENT

The Cleveland Scholarship Program does not violate the Establishment Clause. The Founders who wrote that clause never intended that it should be read to prohibit a state from increasing parents' range of options in educating their children, nor did they intend that clause to prevent parents from seeking moral, as well as intellectual instruction for their children. Indeed, the best evidence suggests just the opposite: the Establishment Clause was designed not just to prevent the establishment of a national church but to prohibit the federal government from interfering with state encouragement of religion as the states exercised their core police powers to protect the health, safety, welfare, *and morals* of the people.

Moreover, this Court has held that providing children with moral education is not only a fundamental right, but a parental *duty*. The Cleveland Scholarship Program assists parents in fulfilling that duty—a duty the Founders agreed was of profound importance in maintaining American institutions. To hold that the Constitution prohibits the State from assisting parents who seek such moral instruction for their children would ignore the history and intent of the First Amendment.

Finally, this Court has repeatedly held that a government program that benefits a religious institution only as a consequence of genuinely independent parental decisions does not violate the Establishment Clause. This is precisely what the Cleveland Program does. Whether or not a majority of private schools participating in the program are religious, therefore, is irrelevant as long as the governmental program itself leaves the decision to attend any particular school to the parents. Because nothing in the program at issue here encourages parents to choose religious schools over non-religious schools or otherwise shows a governmental preference for religious schools as opposed to other schools that choose to participate in the program, the program passes muster under current Establishment Clause jurisprudence.

ARGUMENT

I. The Cleveland Scholarship Program Helps Further The Moral Instruction That Our Nation's Founders Thought Critical In A Republican Form Of Government.

America's founders believed that the education of children was vital to keeping America a free and functioning society. "If a people expect to be ignorant and free," said Thomas Jefferson, "they want what never was, and never can be, in the history of the world." *Letter from Thomas Jefferson to Charles Yancey*, (Jan. 6, 1816), *in* 10 THE WORKS OF THOMAS JEFFERSON 493, 497 (P. Ford ed. 1905). James Madison agreed:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.

Letter from James Madison to William Barry, (Aug. 4, 1822), *in* MADISON: WRITINGS 790 (J. Rakove, ed., 1999).

But by "education," the founders did not merely mean the dissemination of the facts of science or history; they meant also the inculcation of moral character. Following Montesquieu's well-known admonition that education in a republic, unlike that in a despotism or a monarchy, must necessarily be designed to inculcate virtue in the citizenry, *see* MONTESQUIEU, THE SPIRIT OF THE LAWS 13, 15 (T. Nugent trans., Britannica Great Books 1952) (1748), our nation's Founders repeatedly acknowledged the role that moral virtue had to play if their experiment in self-government was to be successful. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "That no free government, or the blessings of liberty, can be preserved to any people, but by a firm

adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15. The Massachusetts Constitution of 1780 echoes the sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality ...." Mass. Const. of 1780, Pt. 1, Art. 3.

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers:

> Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

The Federalist No. 55, at 346 (C. Rossiter and C. Kesler eds., 1999).

In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government. They were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. Many of the leading Founders, therefore, proposed plans for educational systems that would help foster the kind of moral virtue they thought necessary for self-government.

Perhaps the best example of this sentiment is expressed in the Northwest Ordinance, adopted by Congress in 1787 for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest*

of the River Ohio, Art. 3, 1 Stat. 51, 53 n. a (July 13, 1787, re-enacted Aug. 7, 1789); *see also, e.g.*, Mass. Const. of 1780, Ch. V, Sec. 2 ("wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties"). Even Thomas Jefferson, who coined the phrase "a wall of separation between church and state," *Letter to the Danbury Baptist Association*, Jan. 1, 1802, *in* JEFFERSON: WRITINGS 510 (M. Peterson, ed. 1984), provided in his famous proposal for a public education system in Virginia that "[t]he first elements of morality" were to be instilled into students' minds. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA *reprinted in id.* at 125, 273 (1785).

As the Northwest Ordinance makes clear, the fostering of moral excellence was, for the Founders, a task intimately tied to religion. President Washington, for example, noted in his Farewell Address that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, Farewell Address, *reprinted in* William B. Allen, ed., George Washington: A Collection 521 (1988). Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals." Benjamin Rush, Speech in Pennsylvania Ratifying Convention (Dec. 12, 1787), *reprinted in* Merrill Jensen, ed., 2 *Documentary History of the Ratification of the Constitution* 595 (1976). Accordingly, he proposed a public school system whose curriculum included religious instruction, noting that such an education would "make dutiful children, teachable scholars, and afterwards, good apprentices, good husbands, good wives, honest mechanics, industrious farmers, peacable sailors, and, in everything that relates to this country, good citizens." Benjamin Rush, To The Citizens of Philadelphia: A Plan for Free Schools, *reprinted in* L.H. Butterfield, ed., 1 Letters of Benjamin Rush 412, 424 (1951) (1786).

In addition, several of the States explicitly provided for religious education in their State constitutions. The

Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning...shall be encouraged and protected." Pa. Const. of 1776, § 45; *see also* Vt. Const. of 1777, Ch. II § XLI ("all religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of religion and learning, shall be encouraged and protected"). The Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 went even further. The Massachusetts Constitution provides:

> The people of this Commonwealth have the right to invest their legislature with power to authorize and require...the several towns...or religious societies to make suitable provision at their own expense...for the support and maintenance of public protestant teachers of piety, religion and morality.

Mass. Const. of 1780, Pt. I § 3. And New Hampshire's Constitution authorized the legislature

> to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" because "morality and piety...will give the best and security to government ....

N.H. Const. of 1784, Pt. I § 5.

While no State has, since the 1830s, supported such a starkly sectarian establishment of religion as is evident in the Massachusetts and New Hampshire constitutions' references to "protestant teachers," several continue to recognize the importance of moral-religious instruction in fostering the kind of citizen virtue the Founders thought necessary to the continued security of the republic. *See, e.g.*, Nebr. Const. Art. 1, § 4 ("Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature ... to encourage schools and the means of instruction"); Vt. Const. ch. II, § 68; Ind. Const. Art. 8, § 1;

Iowa Const., Art. IX, § 3; *see also* Mass. Ann. Laws ch. 71, § 30 (2001) (providing that it is the "duty" of Harvard professors and other teachers of youth "to impress on the minds of children and youth committed to their care and instruction the principles of *piety* and justice" (emphasis added)).

Particularly where, as here, individual parents remain free to direct the state's tuition support to schools of their own choosing, any incidental benefit to religion would have been viewed by the Founders as an added benefit, not a constitutional impediment. Benjamin Rush addressed this point in his proposal for a public education system: "The children of parents of the same religious denominations should be educated together," he wrote, "in order that they may be instructed with the more ease in the principles and forms of their respective churches." Benjamin Rush, "Plan for Free Schools," *supra*. "If each society in this manner takes care of its own youth," he noted, the whole republic must soon be well educated." Benjamin Rush, "To The Citizens of Pennsylvania of German Birth and Extraction: Proposal of a German College," *reprinted in* Butterfield, *supra*, at 364.

Given the Founders' views on the subject, the Sixth Circuit's holding that the Constitution they drafted and ratified mandates the *exclusion* of religious schools from the general tuition support program at issue here is extraordinary. Indeed, from the Founders' vantage point, such a holding would have been viewed as dangerous, because it thwarts rather than supports the very kind of moral-religious education that the Founders thought so necessary to the preservation of free government. *Cf.* Martin Luther King, Jr., THE WORDS OF MARTIN LUTHER KING JR. 41 (Coretta Scott King, ed., 1993) ("education which stops with efficiency may prove the greatest menace to society. The most dangerous criminal may be the man gifted with reason but with no morals. We must remember that intelligence is not enough. Intelligence plus character—that is the goal of education").

II. Interpreting The Establishment Clause To Bar Ohio From Enacting A Program Which Allows Parents To Send Children To Religious Schools Is Incompatible With This Court's Recent Federalism Jurisprudence.

A. Education is a Core Function, Perhaps *The* Core Function, of State and Local Governments.

This Court's recent federalism decisions further demonstrate the error of the decision below. As this Court has often acknowledged, the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the states or to the people. *See, e.g., United States* v. *Lopez*, 514 U.S. 549, 552 (1995); U.S. CONST. amend. X. As James Madison explained:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

Federalist No. 45 (J. Madison).

Education is among the most important of those duties not delegated to the federal government but reserved to the states or to the people, and as the discussion in Part I above demonstrates, moral instruction, particularly including the kind of moral instruction fostered by religion, has for most of our nation's history been viewed as an essential component of that core state function. Thus, any proper interpretation of the Establishment Clause—at least as it applies to the states—simply must recognize the important place religion has always played in state efforts to undertake this core police power.

B. Applying An Expansive Interpretation of the Establishment Clause to the States Threatens to Undermine Core The State Police Power to Regulate *The Morals* of the People.

It has long been settled that the First Amendment (like the other provisions of the Bill of Rights) was originally intended to apply only to the federal government, not to the state governments. "*Congress* shall make no law ..." meant precisely that. U.S. Const. Amend. I (emphasis added); *see also Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (holding the Free Exercise clause inapplicable to the states). This is particularly true with respect to the Establishment Clause, whose language, "Congress shall pass no law *respecting* the establishment of religion," was designed with a two-fold purpose: to prevent the federal government from establishing a national church; and to prevent the federal government from interfering with the state established churches and other state aid to religion that existed at the time. *See, e.g.*, W. Katz, Religion and American Constitutions 8-10 (1964); M. Howe, The Garden and the Wilderness 23 (1965) (both cited in G. Stone, et al., eds., Constitutional Law 1539 (3d ed. 1996); *see also* Neil Cogan, The Complete Bill of Rights 1-8, 53-62 (1997) (reprinting the debates in Congress leading to the proposal of the First Amendment's religion clauses).

Of course, the 14th Amendment affected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that would interfere with their fundamental rights. But the Establishment Clause is on its face different in kind than the other provisions of the Bill of Rights that had previously been incorporated and made applicable to the states via the 14th Amendment. The Free Speech and Free Exercise Clauses, for example, are much more readily described as protecting a "liberty" interest or a "privilege" of citizenship than is the Establishment Clause, yet when this Court in

Everson v. *Board of Ed.*, 330 U.S. 1 (1947), held that the Establishment Clause was incorporated and made applicable to the States via the Due Process clause of the 14th Amendment, it merely cited its prior cases incorporating the Free Speech and Free Exercise clauses, without any analysis of the evident differences between them and the Establishment Clause. *See id.*, at 5 (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), a free exercise case); *id.*, at 15 (citing, e.g., *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), a free exercise case, which in turn relied upon *Schneider* v. *State*, 308 U.S. 147 (1939), a free speech case).

Moreover, the application of the Establishment Clause to the states has allowed the federal courts and, via section 5 of the 14th Amendment, the Congress, to do the very thing the clause was arguably designed to prevent, namely, interfere with state support of religion. Indeed, the constitutional prohibition on federal intrusion into this area of core state sovereignty is much more explicit than the prohibition on federal commandeering of state officials, *see New York* v. *United States*, 505 U.S. 144 (1992), the limits of federal power inherent in the doctrine of enumerated powers, *see United States* v. *Lopez*, 514 U.S. 549 (1995), or even the barrier to federal power erected by the doctrine of state sovereign immunity that this Court has held to be implicit in the 11th Amendment, *see Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996). Yet in each of these latter areas, this Court has in recent years given renewed attention to the limits of federal power.

This Court need not revisit the long-standing precedent incorporating the Establishment Clause, however, in order to give due consideration to that precedent's effect on federalism. All that is required is for this Court to recognize that the scope of activity prohibited by the Establishment Clause may well be narrower with respect to the States than with respect to the Federal government. Such a distinction is particularly important in light of the fact that the States rather than the federal government have historically been

viewed as the repository of the police power—that power to regulate the health, safety, welfare, *and morals* of the people. *See, e.g., Barnes* v. *Glen Theatre, Inc.*; 501 U.S. 560, 569 (1991); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 304 (1932). Thus, even if the Sixth Circuit's "no aid to any or all religions, directly or indirectly," were an appropriate interpretation of the Establishment Clause vis-à-vis the federal government, the application of such a rule in the incorporated Establishment Clause context intrudes upon core areas of state sovereignty in a way that simply finds no support in either the text or theory of the 14th Amendment.

While a renewed appreciation of this core function of state sovereignty might well support even direct aid to religion (at least if it is offered on a non-sectarian basis), at the very least it must permit a religiously neutral program such as the Cleveland Scholarship Program at issue here, in which any aid to religion is only indirect, the result of wholly independent decisions by parents who freely choose whether to send their children to their neighborhood public school, a participating public school in an adjoining district, a non-religious private school, or a religious private school.

III. The Cleveland Scholarship Program Does Not Violate The Establishment Clause Even As Considered Apart From This Court's Federalism Decisions.

A. The Circuit Court Misread This Court's Establishment Clause Jurisprudence in Finding That The Cleveland Scholarship Program Constitutes an Establishment of Religion.

The Court below based its opinion largely on *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973). Yet this Court has acknowledged that "Establishment Clause jurisprudence has changed significantly" since the *Nyquist* case. *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997). Where the *Nyquist* ruling was based on the then-new test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court has

since that time repeatedly criticized the *Lemon* test. *See, e.g., Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400 (1993) (Scalia and Thomas, J.J., concurring in the judgment). In *Agostini*, the Court noted that "[w]hat has changed...is our understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Agostini*, 521 U.S. at 223.

Agostini held "that a federally funded program providing supplemental, remedial *instruction* to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees[.]" *Id.* at 234-235. The Cleveland Scholarship Program is narrower than the law in *Agostini*, because it does not go so far as to permit government employees to teach on the campus of a sectarian school. And it includes the protections for religious neutrality—including a provision which prohibits participating schools from discriminating on the basis of religion—which ensured that the more far-reaching program in *Agostini* was constitutional.

B. The Cleveland Scholarship Program Allows Parents Freely to Choose Which Schools Their Children Will Attend.

This Court has repeatedly held that a government education program whose incidental benefits to a religious group are the result of purely private individual choices, does not violate the Establishment Clause. *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini, supra*; *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Bowen* v. *Kendrick*, 487 U.S. 589 (1988); *Witters* v. *Washington Dept. of Svcs. for Blind*, 474 U.S. 481 (1986); *Mueller* v. *Allen*, 463 U.S. 388 (1983). Simply put, "government doesn't necessarily endorse private choices that people make with government funds, any more than it endorses cabbage by letting people use food stamps to buy the food of their choice, which may include cabbage." Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 ND J.L. ETHICS & PUB.

POL'Y 341, 357-358 (1999).

In *Mueller*, the Court considered a Minnesota law which permitted parents to deduct from their state taxes the amount of money they spent in sending children to private schools, including religious ones. The Court held that the deduction did not violate the Establishment Clause, and distinguished it from the law considered in *Nyquist*. "[U]nder Minnesota's arrangement," the Court held,

> public funds become available only as a result of numerous private choices of individual parents of school-age children. For these reasons, we recognized in *Nyquist* that the means by which state assistance flows to private schools is of some importance.... Where, as here, aid to parochial schools is available only as a result of decisions of individual parents, no "imprimatur of state approval," can be deemed to have been conferred on any particular religion, or on religion generally.

Mueller, 463 U.S. at 399.

Under the Cleveland Scholarship Program, "any money that ultimately [goes] to religious institutions d[oes] so 'only as a result of the genuinely independent and private choices of' individuals." *Agostini*, 521 U.S. at 226. The State of Ohio no more endorses a religious viewpoint—or sends a message of favoritism for a religious viewpoint—than it endorses cabbage by providing poor people with food stamps. Yet the Circuit Court found this freedom of choice to be "illusory" because "82 percent of the participating schools were sectarian." *Simmons-Harris* v. *Zelman*, 234 F.3d 945, 959 (6th Cir. 2000). In other words, unless the number of secular and sectarian private schools participating in the program is kept exactly balanced—presumably through some sort of quota system—the program will constitute an establishment of religion.

The fact that most of the schools participating in the program are religious is utterly irrelevant to the determina-

tion of whether the program establishes religion in violation of the First Amendment. By the same logic, one might declare that *everything* government does violates the First Amendment. After all, the vast majority of Americans are religious,[3] so it must necessarily be the case that "the great majority" of people who benefit from police or fire services, education or health care services, "are sectarian." *Cf. Zelman*, 234 F.3d at 958. But this Court has rejected the attenuated view that every private action must become state action if the government has been involved at any point. *See, e.g., Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972) (warning against "holding[s which] would utterly emasculate the distinction between private as distinguished from state conduct"). By way of analogy, this Court has rejected attenuated readings of the Commerce Clause which would define every conceivable activity as "interstate commerce." *See, e.g., United States* v. *Morrison*, 529 U.S. 598 (2000). For the same reasons, the private choices of parents do not become an establishment of religion when those choices are backed up by funding *which would have gone to educate the child anyway*. In short, as the Ohio Supreme Court held, "[t]o the extent that children are indoctrinated by sectarian schools receiving tuition dollars that flow from the School Voucher Program, it is not the result of direct government action." *Simmons-Harris* v. *Goff*, 86 Ohio St. 3d 1, 7 (1999).

The Circuit Court held that the Cleveland Scholarship Program was not religiously neutral. As the dissent below noted, this conclusion lacked even "a scintilla of evidence." *Zelman*, 234 F.3d at 970 (Ryan, J., dissenting in part). Indeed, the majority opinion acknowledged that "the voucher program does not restrict entry into the program to religious or sectarian schools[.]" *Id.* at 959. Yet it went on to find the program non-neutral because religious schools "often have low overhead costs, supplemental income from private

[3] Over 91 percent of Americans describe themselves as religious. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 62 (2000).

donations, and consequently lower tuition needs." *Id.*, (citing Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 262 (1999)).

In other words, because religious schools are cheaper, a program which grants benefits *equally* to religious and non-religious schools is made *unequal* precisely *because it does not discriminate*. This definition of neutrality is either Orwellian or meaningless, and it is contrary to this Court's repeated holding that religious and non-religious organizations should be treated equally, regardless of whether the church involved happens to be better situated to benefit from the equal treatment. By the same reasoning, a religious student organization that had access to the resources of its affiliated national religious society might better be able to publish a student newsletter without receipt of student activities fees, but this Court has held that depriving the group equal access to the forum provided by the fees was not compelled by the Establishment Clause. *Rosenberger* v. *Rector of the University of Virginia*, 515 U.S. 819 (1995).

Since the Cleveland Scholarship Program is open to non-religious schools on an equal basis, it cannot be characterized as an establishment of religion. The fact that secular schools do not choose to participate to the same extent as religious schools may be due to any number of factors—for example, the greater dedication which religious associations have traditionally had to the upbringing of children, or the fact that most Americans happen to be religious. The private choices that lead a religious association to participate in the program deserve as much respect as the private decision of parents to participate in the program at the other end. In neither case is there any discriminatory process by which the state chooses to foster one religion over another, or religion in general over irreligion. Just as in the racial discrimination cases such as *Washington* v. *Davis*, 426 U.S. 229 (1976), disproportionate impact without discriminatory intent can not violate the

Equal Protection Clause, so, too, when the Cleveland Scholarship Program provides an equal opportunity for religious and non-religious groups to participate, the fact that most participants happen to be religious can not violate the Establishment Clause, especially in a nation where most people are religious.

C. The Cleveland Scholarship Program Does Not Indoctrinate In, Define By, or Entangle Government With Religion.

To determine whether a government program has an impermissible effect under the lingering *Lemon* test, this Court has recently asked whether it "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement." *Agostini*, 521 U.S. at 234. The Cleveland Scholarship Program does none of these things. The Program does not result in governmental indoctrination because no "religious indoctrination that occurs in these schools could reasonably be attributed to government action." *Mitchell*, 530 U.S. at 809 (Thomas, J., plurality opinion). Indeed, the whole reason parents wish to send their children to private religious schools is because they are *dissatisfied* with government action to begin with; it is unlikely that they would get the impression that the religious school is acting as a government entity.

The Circuit Court admitted—although it later obscured—that the program does not define its recipients on the basis of religion. *Zelman*, 234 F.3d at 958. The law, in fact, prohibits schools from choosing or refusing students on the basis of religion, ORC §3313.976(A)(4), and prohibits participating schools from teaching "hatred of any person or group on the basis of...religion." *Id.* The Program defines participants only on the basis of class size or family income. *Id.*; ORC § 3313.978(A).

The program does not create an excessive entanglement with a religious organization, either. In assessing

"entanglement," the Court looks to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Agostini*, 521 U.S. at 232 (*quoting Lemon*, 403 U.S. at 615). In *Agostini*, this Court held that a finding of excessive entanglement could not rest on the ground that a government program would require "administrative cooperation" between the State and religious schools. *Id.* at 233-234. *Agostini* found no excessive entanglement in a statutory scheme far more "entangled" than the Cleveland Scholarship Program. In fact, the Cleveland plan is even narrower than the educational systems advocated by the Founders. It does not seek to have public officials teach moral virtue, which the Founders accepted as a constitutionally legitimate—indeed, imperative—governmental purpose. The Cleveland program merely allows parents to direct their tax dollars—which would have gone to education anyway—to the school they think proper for their children to attend.

In short, the Cleveland Scholarship program is precisely what the plurality in *Mitchell* v. *Helms* hypothesized:

> [I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.

530 U.S. at 809-810 (Thomas, J., plurality opinion) (citation omitted).

CONCLUSION

The opinion of the Court of Appeals for the Sixth Circuit should be *reversed.*

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Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL.,
Petitioners,

v.

DORIS SIMMONS-HARRIS, ET AL.,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE VERMONTERS FOR BETTER EDUCATION IN SUPPORT OF PETITIONERS

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15 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 1

I. THE CLEVELAND PROGRAM DOES NOT ENDORSE RELIGION. 3

A. Aid Flowing Directly to Children and Families Rather than to the Religious Schools They Choose to Attend Does Not Endorse Religion. 3

B. Selective Prohibition of Aid to Religious Schools Sends a Message of Disfavor Prohibited by the Establishment Clause. 5

II. THE CLEVELAND PROGRAM DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION. 6

A. Justice O'Connor's Deciding Concurrence in *Mitchell v. Helms* Reaffirmed the Constitutionality of the "Private Choice" Mechanism Approved in *Witters* and *Zobrest*. 6

B. Excluding Religious schools Under Program of Generally Available Aid Is Unconstitutional. 8

C. The Sixth Circuit's Percentage Test Is Unconstitutional and Irrational 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997 (1997) 8

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 115 S.Ct. 2440 (1995) 3

Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955 (1973) 6, 7

Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355, (1984) ..... 3 - 5

Marks v. United States, 430 U.S. 188, 97 S.Ct. 990 (1977) 6

Mitchell v. Helms, 530 U.S. 793, 120 S.Ct. 2530 (2000) 4, 6, 7, 10

Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062 (1983) 8

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) 4, 5, 7

Simmons-Harris, et al. v. Zelman, et al., 234 F.3d 945 (6th Cir. 2000) ..... *passim*

Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 106 S.Ct. 748 (1986) 4, 6, 7

Zobrest v. Catalina Foothills School Dist.,
509 U.S. 1, 113 S.Ct. 2462 (1993) 6, 7

Zorach v. Clauson, 343 U.S. 306,
72 S.Ct. 679 (1952) 2, 9, 10

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I ..... *passim*

INTEREST OF AMICUS CURIAE[1]

Vermonters for Better Education, Inc. ("VBE") is a nonprofit organization dedicated to improving educational options for all children in the state of Vermont. Vermont is one of only two states that offers local school districts the option of providing tuition to all resident high school students to attend the private or public schools outside the district in lieu of operating district public schools. VBE strongly supports legislation providing parents the opportunity to choose the best schools available for their children's education without discrimination based on religion.

INTRODUCTION

In its decision below, the Sixth Circuit concluded that the Ohio Pilot Project Scholarship Program violated the Establishment Clause because, in the court's opinion, the percentage of students attending religious schools (82%) was unacceptably high. *Simmons-Harris, et al. v. Zelman, et al.*, 234 F.3d 945, 959 (6th Cir. 2000). The court concluded that the high percentage resulted from the Ohio legislature's providing scholarships at the approximate tuition rate charged by religious schools. That rate was almost $5,000.00 per year less than per-pupil expenditures in public schools, and created a significant disincentive against public schools accepting Program students. In fact, no public schools participated *Id.*, 234 F.3d at 959.

The court therefore concluded that the Program "would

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent are filed with the Clerk of the Court herewith. This brief was authored by counsel for *amicus curiae* and was not authored or contributed to by counsel for a party or by any other person or entity, either in whole or in part. Costs of submission of this brief in this Court have been underwritten by *amicus curiae*.

approve the actual diversion of government aid to religious institutions in endorsement of religious education . . . ." *Id.*, 234 F.3d at 960. In essence, the court found the Program unconstitutional because religious schools competed too efficiently with public schools. Put another way, the court found that the Establishment Clause prohibited the Ohio legislature from authorizing scholarships in an amount equal to the market cost of private education.

As discussed below, even though the court tied the Program's constitutionality directly to the percentage of students enrolled in religious schools, it did not even acknowledge, much less consider, the elementary "real world" factors that resulted in those percentages. The court simply ignored the obvious question why religious schools' ability to provide superior education at lower cost should render a program unconstitutional.

Perhaps most troubling of all, defendants did attempt to present evidence of students enrolled in public schools or non-religious private schools under other programs, which would have dramatically lowered the relative percentage of students attending religious schools. *Id.*, 234 F.3d at 958. The court's narrow focus obviously dictated only one possible conclusion, yet it excluded the "bigger picture" as "irrelevant."

In contrast to the Sixth Circuit's arbitrary, flawed methodology which was inherently antagonistic to religious schools, this Court should employ a methodology "that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 684 (1952). The Establishment Clause should reflect a principled interpretation for the people's *protection*, not a vindictive "search and destroy" against students' freely choosing religious education.

I. THE CLEVELAND PROGRAM DOES NOT ENDORSE RELIGION.

A. Aid Flowing Directly to Children and Families Rather than to the Religious Schools They Choose to Attend Does not Endorse Religion.

The Establishment Clause prohibits "government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S.Ct. 1355, 1367 (1984) (O'Connor, J. concurring, citations omitted).

Whether impermissible endorsement exists is determined from the viewpoint of a "reasonable observer." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779 - 80, 115 S.Ct. 2440, 2445 (1995) (O'Connor, J., concurring in part and concurring in judgment). VBE respectfully suggests that the reasonable observer's viewpoint in this case is that of Cleveland's students and parents drowning in a failed school system, not that of the rarified, detached luxury exercised by the Sixth Circuit panel whose children will never stare into the abyss of poverty and for whom their decision has no direct, personal consequence. Were their children drowning in the same sea of failure as the parents and children of Cleveland, the Scholarship Program would look very much like a life preserver. They would not mistake it for a rosary.

Two principles require that the "reasonable observer" be well informed of the plight of the families involved in the Program. First, "[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context" of the Program. *Id.* As to "history," Cleveland has struggled for decades with tragic failure by poor and minority children.

During that time the idea of "educational choice" has struggled to overcome extraordinary political opposition from state and local governments which have tried literally every other option. Thus, a "reasonable observer" would view the Cleveland program not as an "endorsement" of nonpublic schools or of religious schools in particular, but rather as a means of last resort.

As to "context," the Program does not endorse religion because it focuses on the children and families themselves, not on the schools which they attend.

> Second, I believe the distinction between a per-capita school-aid program and a true private-choice program is significant for purposes of endorsement. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 692, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'CONNOR, J., concurring). In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools.

Mitchell v. Helms, 530 U.S. 793, 842, 120 S.Ct. 2530, 2559 (2000) (J. O'Connor, concurring.) The Court also said in *Rosenberger v. Rector and Visitors of the Un. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510 (1995), "The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Rosenberger*, 515 U.S. at 848, 115 S.Ct. at 2556 (citing *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 493, 106 S.Ct. 748, 755 (1986)) (O'Connor, J., concurring in part and concurring in judgment).

B. Selective Prohibition of Aid to Religious Schools Sends a Message of Disfavor Prohibited by the Establishment Clause.

Far from preserving government neutrality, the Sixth Circuit's selective prohibition of aid to religious schools constitutes an impermissible expression of official disfavor. As Justice O'Connor stated in pointed's *Lynch*, such disapproval sends the message that the Program's participants are "outsiders, not full members of the . . . community." Such selective exclusion is not "neutrality" toward religion, but "hostility." *Lynch*, 465 U.S. at 673, 15 S.Ct. at 1359 (O'Connor, J., concurring). The Court rejected a similar selective prohibition in *Rosenberger*.

> [G]overnment regulation may not favor one speaker over another. . . . Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

515 U.S. at 829, 115 S.Ct. at 2516 (emphasis added).

It is difficult to imagine a more hostile message than that communicated by a government which provides funding for students to choose schools complying with viewpoint-neutral educational criteria, yet specifically prohibits choosing religious schools. Such discrimination, whether by the Sixth Circuit, a state university, or any other governmental entity, clearly "targets" religion for specific disfavor and is unconstitutional.

II. THE CLEVELAND PROGRAM DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

A. Justice O'Connor's Deciding Concurrence in *Mitchell v. Helms* Reaffirmed the Constitutionality of the "Private Choice" Mechanism Approved in *Witters* and *Zobrest*.

Citing *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990 (1977), the Sixth Circuit claimed that it followed Justice O'Connor's narrower concurrence announced in *Mitchell*, 530 U.S. at 836. *Simmons-Harris*, 234 F.3d at 957. It read the Justice's opinion to say that cases should be decided on "factual similarity" to other precedents. It then announced that *Committee for Public Education v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2995 (1973) was most factually similar to this case because both cases considered roughly the same percentage of religious schools participating in the program in question.

The Sixth Circuit's characterization of Justice O'Connor's concurrence is grossly misleading. The program at issue in *Mitchell* provided aid directly to religious schools on a "per capita" basis. The plurality held that such aid was permissible so long as it was equally available regardless of religious viewpoint - to the "religious, irreligious, and areligious . . . . alike." 530 U.S. at 809, 120 S.Ct. at 2541.

Justice O'Connor 's factual distinction was addressed to the plurality's reliance on *Witters* and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 113 S.Ct. 2462 (1993). Justice O'Connor stated that unlike the "per capita" aid in *Mitchell*, the aid in those cases went to the individual recipient or parents, who in turn decided which school to attend - *exactly* the mechanism employed by the Ohio legislature in this case.

> Specifically, we decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use. See *Witters*, 474 U.S., at 488, 106 S.Ct. 748; *Zobrest*, 509 U.S., at 10, 12, 113 S.Ct. 2462. Accordingly, our approval of the aid in both cases relied to a significant extent on the fact that "[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters, supra*, at 487, 106 S.Ct. 748; see *Zobrest, supra*, at 10, 113 S.Ct. 2462 ("[A] government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents"). This characteristic of both programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution. See, *e.g., Witters, supra*, at 486-487, 106 S.Ct. 748; see also *Rosenberger, supra*, at 848, 115 S.Ct. 2510 (O'CONNOR, J., concurring) (discussing *Witters*).

Mitchell, 530 U.S. at 841, 120 S.Ct. at 2558.

The Sixth Circuit's "factual" distinction is even more disingenuous because in *Mitchell*, a total of 46 schools participated, of which 41, or 89%, were religiously affiliated. *Id.*, 530 U.S. at 803, 120 C.Ct. at 2538. That percentage is, of course, higher than the percentage of religious schools in *either Nyquist* or this case.

The court then reasoned that because 82% percent of the schools in the Cleveland Program were religious, parents did not have a "genuinely independent and private choices of aid recipients." *Simmons-Harris*, 234 F.3d at 955. Again, the court was wrong. Neither *Witters*, *Zobrest*, *Allen*, nor any other "private decision" cases have held that the percentage of students attending religious school "trumps"individual choice.

In fact, the Supreme Court has explicitly rejected these irrational results. "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Agostini*, 521 U.S.203, 230, 2117 S.Ct. 1997, 2013 (citing *Mueller v. Allen*, 463 U.S. 388, 401, 103 S.Ct. 3062, 3070 (1983)).

Further, the court arbitrarily restricted its consideration of the range of educational options in this case. Program participants obviously still have the option to attend public schools free or charge to them. Their choices to attend community schools or public schools outside the district are no different now than they were before the Program was passed. The Program's only effect is to *add* more educational options - not limit them.

Students' cost to continue attending Cleveland public schools or community schools is exactly what it was before - "$0.00." And accepting the Sixth Circuit's conclusion that the Ohio legislature set the Program scholarship amounts equal to tuition charged by parochial schools, *Simmons-Harris*, 234 F.3d at 959, the cost to Program students to attend religious schools is likewise "$0.00." Thus, there is absolutely no net economic incentive or disincentive to choose the Program schools vis-a-vis the students' other choices.

B. Excluding Religious schools Under Program of Generally Available Aid Is Unconstitutional.

So long as the "private choice" mechanism noted by Justice O'Connor is present, an aid program is constitutional if it provides religiously neutral eligibility criteria and making benefits "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 232,117 S.Ct. at 2014.

Unquestionably, the Scholarship Program complies with these requirements. Yet the Sixth Circuit invalidated the Program by scrutinizing the religious nature of the Program beneficiaries' choices in direct contradiction to the requirement that government must remain religiously neutral.

Such a result is not only unconstitutional, but is ultimately irrational. The result of a"maximum percentage" is "cosmic hot potato," rendering aid programs constitutionally deficient during periods of religious ascendance when enrollment in religious schools is relatively higher, but finding them perfectly acceptable during periods of religious decline when enrollment is relatively lower.

C. The Sixth Circuit's Percentage Test Is Unconstitutional and Irrational.

The Sixth Circuit found it dispositive that nonsectarian schools did not participate in the Program because religious schools provided education at lower cost.

> The school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions, and the Cleveland program limits the schools to which a parent can apply the voucher funds to those within the program. Practically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs.

Simmons-Harris, 234 F.3d at 959. A "reasonable observer" could conclude from these statements that religious groups, far from subverting the constitutional, are instead the only groups providing education for the poor to any meaningful degree.

In the rational world of *Zorach*, in which religions prosper based on the zeal of their adherents, willingness to give and

sacrifice to help the poor is a boon, not a bane. It is hardly a shock that in programs designed to help the poor, the poor end up choosing the religious providers who for years have been the only ones willing to do just that. It is perverse to declare a program unconstitutional because religious schools accomplish more efficiently the very objectives the program is trying to encourage - education for the poor.

That a particular percentage of Program beneficiaries choose religious over public or non-sectarian schools simply reflects the overall preferences of the class of the beneficiaries and the competitive efficiency of the religious schools. Voiding the Program because many potential beneficiaries are religious penalizes them for having successfully exercised the very right which *Zorach* protects -- the right to flourish based on their zeal and the attraction of their religious teaching!

CONCLUSION

The Court should affirm the Cleveland Program because it satisfies the basic requirements acknowledged by at least six justices in *Mitchell*: (1) the qualification criteria are religiously neutral and (2) religious schools receive Program funds, if any, only as a function of the independent choices of parents and students. Finally, the Court should specifically note that the Sixth Circuit's selective discrimination against religious schools and viewpoints offends the Constitution.

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On Writ of Certiorari to the
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BRIEF OF AMICUS CURIAE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THIS IS NOT A SCHOOL AID CASE; SCHOOL CHOICE PROGRAMS ARISE FROM WHOLLY SECULAR ECONOMIC ANALYSIS AND WHOLLY SECULAR POLITICAL PHILOSOPHIES REGARDING REGARDING FREEDOM OF CHOICE 3

II.. THE COURT SHOULD USE THIS CASE TO ESTABLISH A BROAD, SIMPLE, CLEAR RULE ON SCHOOL CHOICE, SO THAT THE NATION CAN PROCEED WITH EDUCATION REFORM 6

III. THE CLEVELAND SCHOOL CHOICE PROGRAM IS NOT AN ESTABLISHMENT OF RELIGION 14

CONCLUSION 20

TABLE OF AUTHORITIES

CASES Page(s)

Agostini v. Felton, 521 U.S. 203 (1997) 12, 15

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STATUTES

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Sect. 3313.978(A) 17

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INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Director of the U.S. Commission on Civil Rights Linda Chavez, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the Reader's Digest and former Director of the Voice of America Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we seek to defend the liberty interests of parents and students in attending the school of their choice.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief has been granted by the parties. Their letters of consent are enclosed with this brief.

SUMMARY OF ARGUMENT

The natural tendency of legal analysts is to view this case as a school aid case. But school choice programs do not arise as an attempt to provide aid to parochial or other religious schools. They stem from a wholly secular economic analysis and wholly secular political philosophies regarding freedom of choice.

At a minimum, this makes clear that the purpose behind school choice programs is not to aid or benefit religion but to advance education. But it also indicates something more. We have come pretty far afield of any soundly based notion of an establishment of religion if the courts are to strike down on establishment grounds a secular economic policy showing great promise of improving education, where religious actors and institutions merely participate on the same terms as everyone else.

The nation badly needs a broad, clear, simple rule on the constitutionality of school choice, so that it can proceed with education reform. This case is the perfect rule for establishing such a rule.

We, indeed, urge the Court to adopt the following, broad, clear, simple, two-part test for determining the constitutionality of school choice programs.

--The program, in its full context, must allow choice among the broad range of alternative accredited schools in the jurisdiction at issue, including public or private schools, and secular as well as religious schools.

--The choice is freely exercised by parents on behalf of their children (or adults on behalf of themselves) and not dictated by administrators or other government officials.

This rule follows clearly from a now well-established line of precedents of this Court. Consequently, it would be sound constitutional law while freeing the country to consider potentially highly beneficial secular education reform.

The Cleveland school choice program is not an establishment of religion either under the two-part test above or under the rule articulated in *Agostini* and reflected in other recent decisions of this Court. The Sixth Circuit below ignored *Agostini* and related recent decisions and instead relied on the outdated and clearly distinguishable *Nyquist* case. Moreover, it stumbled into a major factual error regarding the Cleveland school choice program, which actually favors secular public schools over private religious ones rather than visa versa.

ARGUMENT

I. THIS IS NOT A SCHOOL AID CASE; SCHOOL CHOICE PROGRAMS ARISE FROM WHOLLY SECULAR ECONOMIC ANALYSIS AND WHOLLY SECULAR POLITICAL PHILOSOPOHIES REGARDING FREEDOM OF CHOICE

The natural tendency of legal analysts is to view this case as a "school aid" case. The program at issue here is analyzed as an initiative to provide aid to private schools, including religious ones, and the question is whether the

program is a constitutional means of doing so. The court below analyzed the case in this way.

But this is not a school aid case. School choice programs do not arise as an attempt to provide aid to religious or other private schools.

Rather, school choice programs arise from a thoroughly secular motivation and perform a thoroughly secular function. These programs grew out of a secular economic analysis of the best means for addressing the problems of education.[2] The point of school choice is to improve education performance in part by creating competition for public schools, forcing them to improve or lose students. Choice in any event would allow parents and students to gravitate to the schools that performed the best, improving overall education results. Most importantly, low income and minority students would be able to choose schools that offered a sound education, enabling them to escape a life of poverty.

Moreover, through the resulting education marketplace, innovative new education ideas could be tried across the country on a decentralized basis. The market would then embrace those that were proven to work best. The market

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[2] *See, e.g.*, Chubb and Moe, *Politics, Markets and American Schools* (1990); Friedman, *Capitalism and Freedom* (1962); Boaz, The Public School Monopoly, in David Boaz, ed. *Liberating Schools: Education in the Inner City* (Washington, DC: Cato Institute, 1991); Hoxby, School Choice and School Productivity (Or, Could School Choice Be A Tide That Lifts All Boats?, Harvard University, forthcoming in EDUCATION NEXT, Winter 2001; Harmer, *School Choice: Why You Need It – How You Get It* (Washington, DC: Cato Institute, 1994).

would also offer a diversity of education choices to the public, allowing different parents and students to choose the school that worked best for them. As discussed in Section II, growing social science research indicates this sound economic framework may, in fact, be quite effective in improving education performance and results.

The school choice movement is also grounded in a secular political philosophy that favors freedom of choice in its own right. In this view, an education system that allows parents and students to choose their school from the full range of public and private, religious and non-religious schools is far superior for that reason alone to a system where the government assigns the student to a school that the government chooses. Through this choice, parents have much greater control over the education of their children. They can choose a school that provides the education content and methods they prefer. Moreover, because of the power of that choice, schools will be force to serve the parents' preferences and desires.

This is the rationale for school choice programs. They are not an attempt to aid religion. They really have nothing to do with religion, other than allowing the religious to participate on the same terms as everyone else. School choice programs are an economic policy, a secular tool to achieve secular results. They are an expression of a wholly secular, libertarian-oriented, political philosophy. The most prominent advocate of school choice today is Milton Friedman, a Nobel prize winning economist who first advanced the foundation for school choice decades ago.[3]

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[3] *Capitalism and Freedom, supra.*

At a minimum, this makes clear that the purpose behind school choice programs is not to aid or benefit religion. The purpose is to advance educational performance, through a framework based on sound economics, and educational freedom of choice and control for parents and students. Moreover, the primary effect of any school choice program involving the broad range of school alternatives, public and private, religious and non-religious, is not to advance religion. Rather, it is to improve education performance through a better economic policy, and enhance educational freedom.

But this analysis suggests something more. We have come pretty far afield of any soundly based notion of an establishment of religion if the courts are to strike down on establishment grounds a secular economic policy showing great promise of improving education, where religious actors and institutions merely participate along with everyone else on the same terms. Historical establishments were highly coercive and discriminatory against those who did not choose the favored religion. Striking down totally inclusive secular school choice programs on establishment grounds would not be truthful to this history. Nor would it serve any valid or defensible principle of public policy.

II. THE COURT SHOULD USE THIS CASE TO ESTABLISH A BROAD, SIMPLE, CLEAR RULE ON SCHOOL CHOICE, SO THAT THE NATION CAN PROCEED WITH EDUCATION REFORM

The nation badly needs a broad, simple, clear rule on the constitutionality of school choice, so that it can proceed with education reform. This case is the perfect vehicle for establishing such a rule.

The problem and failures of our public schools have been a central concern of policymakers all across our country for at least 20 years. An enormous amount of funding is devoted to education in the U.S. each year, over 7% of GDP, with the great majority of that spent on public education.[4] Yet, the performance of public schools in terms of academic achievement has been considered poor as measured by national and international tests, and other measures.[5] Indeed, on some international tests, U.S. students perform more poorly the longer they are in school.[6]

The problems are most acute in our nation's lowest income areas, particularly among minority students. The most recent national test results show that over half of black and Hispanic 4th graders in the U.S. cannot read at the most basic level.[7] Moreover, the gap in achievement between black and white students has been widening for almost 10

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[4] U.S. Department of Education, *Digest of Education Statistics 1998* (*http://nces.ed.gov/pubs99/digest98/d98t031.html*).

[5] See, e.g., National Center for Education Statistics, *The Nation's Report Card: Fourth Grade Reading 2000;* National Center for Education Statistics, *NAEP 1998 Reading Report Card for the Nation;* National Center for Education Statistics, *NAEP 1998 Civics Report Card for the Nation;* Frase, et al., Pursuing Excellence: A Study of U.S. Fourth-Grade Mathematics and Science Acheivement in International Context, *Findings from the Third International Mathematics and Science Study,* Office of Education Research and Improvement, U.S. Dept. of Education (1997); Bourque, et al., 1996 Science performance Standards: Achievement Results for the Nation and the States, *Findings from the National Assessment of Educational Progress,* Office of Education Research and Improvement, U.S. Dept. of Education (1997).

[6] Mulis, et al., *Mathematics and Science Achievement in the Final Year of Secondary School* (1998); Mulis et al., *Mathematics Achievement in the Primary School Years* (1997); Martin et al., *Science Achievement in the Primary School Years* (1997).

[7] National Center for Education Statistics, *The Nation's Report Card: Fourth Grade Reading 2000.*

years.[8] Low income and minority schools are also often plagued by violence, physical deterioration, high drop out rates, and drug and alcohol abuse.

To address these critical problems, a strong national movement has developed in favor of school choice programs. These programs allow parents and students to use state funds, or relief from tax payments, in various forms to finance education at the school of their choice, public or private, religious or non-religious.[9] This case involves the classic form of providing such funding – school vouchers. The rationale behind such school choice programs, the exact means by which they are to address and solve the nation's education problems, are discussed in full detail in Section II.

The school choice movement has focused on the greatest problem – failing inner city schools where many mostly minority children suffer the loss of the essential opportunity for a basic education. That focus is represented in this case, as the school choice is provided primarily to families with children in failing inner city schools in Cleveland.

The school choice experiments and programs that have been adopted are now being extensively studied across the country. These studies indicate that school choice does indeed have great potential for improving educational performance, particularly for the most vulnerable low-income and minority children.[10]

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[7] National Center for Education Statistics, *The Nation's Report Card: Fourth Grade Reading 2000.*
[8] Id.
[9] See, e.g., Rees, *School Choice: What's Happening in the States 2000.*
[10] Peterson and Hassel, eds., *Learning from School Choice* (1998); Hoxby, The Effects of Private School Vouchers on Schools and Students,

However, efforts to adopt school choice programs are bogged down all over the land in confusion over the constitutionality of such programs under the Establishment Clause. Opponents seek to stifle legislative consideration of school choice initiatives on these constitutional grounds.[11] Even those who want to support such reform are uncertain as to what is legally permissable, and are often stymied as a result.

When a school choice initiative is adopted, it is then smothered in litigation over the constitutional issues. This case is illustrative of the educational as well as administrative and financial problems this creates. Soon after adoption of the Cleveland school choice program, opponents sued in state court to stop it. In addition to the expense of defending the suit, administrators were left uncertain as to whether the program would continue and

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Program (2000); Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland (1999);* Indiana University, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program (1996-1999);* Neal, The Effects of Catholic Secondary Schooling on Educational Acheivement, 15 *Journal of Labor Economics* 98 (1997); Evans and Schwab, Do Catholic Schools Make a Difference?, *The Quarterly Journal of Economics* (1995);Coleman, Public Schools, Private Schools, and the Public Interest, 64 *The Public Interest* 1 (1981); Peterson, Myers and Howell, Harvard University Program on Education Policy and Mathematica Policy Research, *An Evaluation of the New York City School Choice Scholarship Program: The First Year* (http:/data.fas.harvard.edu/pepg/NewYork-First.htm.).
[11] See, e.g., *Commonwealth of Pa. Legis. Jrnl.*, Dec. 11, 1991, 175th Sess. at 1928, June 16, 1995, 179th Sess. at 1464.

whether they would have to scramble to make alternative educational arrangements for the students involved in it. Worst of all, uncertainty was created for parents and students in the program as to whether it would continue.

The state trial court upheld the program, but then the appellate court reversed it, stimulating further confusion and uncertainty. The Ohio Supreme Court stayed the appellate court decision and later upheld the program on Establishment Clause grounds. But it found a defect in the program under the state Constitution and required the legislature to reenact it to cure the defect.

Whereupon, the plaintiffs then sued in Federal court. Just hours before the 1999-2000 school year was to begin, they won an injunction against the program from the Federal District Court. Of course, this created havoc for administrators, students and parents. Four days later the District Court decided to let students in the program continue, and 2 months later this Court stayed the District Court injunction until a Sixth Circuit appellate decision was completed. Confusion and uncertainty among administrators, parents and students abounded.

The District Court ultimately ruled the program unconstitutional, and the Sixth Circuit affirmed. That decision is now before this Court for review, and administrators, parents, and students in Cleveland still do not know whether the program can continue, 6 years now after it has been adopted. School choice programs in Arizona, Illinois, Wisconsin and Florida have all been similarly disrupted by litigation uncertainty.

To end this confusion and uncertainty, the Court should use this case to establish a definitive, broad, simple, clear rule on the constitutionality of school choice. Legislators and other policymakers can then decide whether to adopt school choice on the merits, free of legal concerns. When school choice is adopted, it would then proceed without crippling litigation harassment. Even if the Court's rule sharply constricts school choice, policymakers would then know what they can and can't do and would be freed to consider the appropriate alternatives. In short, a definitive ruling is urgently needed so education reform can proceed.

Moreover, to achieve these results, the rule must be based on simple and clear principles. It must avoid intensively fact based issues that vary from case to case. Rules turning on how religious different schools are or what particular funds ultimately finance are prescriptions for a crippling litigation morass. The sound principles of Establishment Clause jurisprudence which have long been recognized by this Court do not require such an unworkable rule.

This case is ideal for such a broad and definitive rule. It presents a well-thought out, comprehensive school choice program based on the classic voucher concept. The program at issue here is quite representative of school choice programs advancing across the country. All state law questions have already been decided in this case by the Ohio Supreme Court. The factual record is thoroughly and completely developed. The constitutional question is as clearly framed as it is ever going to be.

We, indeed, urge the Court to adopt the following broad, simple, clear, two-part test for determining the constitutionality of school choice programs:

--The program, in its full context, must provide for choice among the broad range of alternative, accredited schools in the jurisdiction at issue, including public and private, and religious and secular schools;

--The choice is truly exercised by parents on behalf of their children (or adults on behalf of themselves), and not dictated by administrators or other government officials.

We believe this rule follows clearly from the line of this Court's cases in *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Mitchell v. Helms*, 530 U.S. 793 (2000). School choice programs in accordance with this rule would again be general secular education reform programs designed for the secular goals of improving educational performance and enhancing educational freedom of choice. They would again arise from a wholly secular economic analysis and a wholly secular political philosophy regarding freedom of choice.

Moreover, a school choice program following this rule would be strictly neutral not only between all religions, but between religion and non-religion. It would not serve to aid, benefit, advance or endorse religion. It would simply allow religious actors and institutions to participate in a general secular program on the same terms as everyone else. By providing the funding to families and then allowing them to decide how it is used, the government is simply advancing

education, and is wholly separated from any connection to religion. Any advancement of religion results from the free choice of private citizens, just as when a retiree uses part of his Social Security benefits for a contribution to his church.

Such a program also does not involve any religious coercion. Parents and students are free to avoid any religion in their education, or to choose any religiously affiliated institution they may prefer. Taxpayers are mandated only to support education in general, and any involvement with religion results only from the private choice of each individual family. As a result, taxpayers are required to provide no more benefit to religion than they do when required to support national defense, police, fire protection, and public transportation, all of which benefits the religious as well as the general public. Because the religious are merely allowed to participate in general secular school choice programs along with everyone else on equal terms, taxpayer support for such programs cannot be considered support for religion. To hold otherwise would require the exclusion of the religious from every general secular government program or activity, which would be hostility toward religion, not neutrality.

Finally, such a rule would be faithful to history, as it does not involve the highly coercive and discriminatory establishments of religion that were known at the time of the framers.

Adopting such a broad, clear, simple and definitive rule in this case would consequently be good constitutional law, and would free the country to consider potentially highly beneficial, secular education reform.

III. THE CLEVELAND SCHOOL CHOICE PROGRAM IS NOT AN ESTABLISHMENT OF RELIGION

Based on the now well-established precedents of this Court, the Cleveland school choice program cannot possibly be considered an establishment of religion.

The Cleveland school choice framework has two key features. First, it allows the broadest possible choice of schools. Parents may choose neighborhood public schools, public schools supplemented by personal tutoring financed by the voucher program, suburban public schools that may choose to participate in the voucher program, magnet schools, which are public schools that accept students without regard to neighborhood, community, or "charter", schools, which are independently run public schools, private non-religious schools, and private religious schools. Indeed, they may choose home schooling as well without any public financing. As Judge Ryan states in dissent, "It is difficult to imagine a statute that could afford it's voucher recipient's a broader spectrum of educational choice." App.51.

The second key feature is that the vouchers are provided to the parents and they then sign them over to the schools that they choose for their children. As a result, the choice among the broad array of options noted above is independently made by parents, and not dictated by administrators or other government officials.

This, of course, follows precisely the two part rule we advanced in Section II. But the program also clearly meets

the *Lemon*[12] test, as modified by *Agostini*. First, the purpose here was clearly to improve education, not to aid or benefit religion. The program arose out of a school desegregation case in Federal court in Ohio. Because of the disastrous educational performance of the Cleveland public schools, the court transferred control of the school district to the state of Ohio under a mandate to reform the system to improve performance. The school voucher program was part of the response of the state to this mandate.

Moreover, under the *Agostini* criteria, the program clearly does not have the primary effect of advancing religion. These criteria are:

> (1) whether the public financing in the program results in government indoctrination;
> (2) whether the program defines its recipients by reference to religion;
> (3) whether the government financing creates an excessive entanglement between government and religion.

521 U.S. at 234.

As Judge Ryan notes, a long line of precedents of this Court establishes that there is no indoctrination of religion where the funds go to parents and students who make a "genuinely independent and private choice" to direct their share of the funds to a particular private religious school. App. 50-51. *Mueller, Witters, Zobrest, Agostini, Mitchell.* Justice O'Connor emphasized this point in her concurring opinion in *Mitchell*, saying that when government funds flow to a religious school as a result of "independent decisions

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[12] *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

made by numerous individuals..., no reasonable observer is likely to draw from the facts...an inference that the state itself is endorsing a religious practice or belief." 120 S.Ct. at 2559.

Of course, as discussed above, this is exactly how the Cleveland school choice program works. The vouchers are provided to the parents and they make a genuinely independent and private choice to direct the funds to the school they prefer.

The Ohio voucher plan also clearly does not define its recipients by reference to religion. Recipients become eligible for the plan if they reside in the Cleveland public school district, which has been chosen for the new program because of its dismal educational performance. Those eligible are granted a first priority to participate in the program if their family income is less than 200% of the poverty line. The voucher plan also prohibits participating schools, including private, religious schools, from using any religion test for admission. Clearly, eligibility for the program is defined wholly in terms of religiously neutral, secular criteria, with no reference to religion.[13]

[13] No one in this litigation has suggested that the Ohio plan involves an excessive government entanglement with religion. Indeed, in the plan the government is kept a step away from religion, as the vouchers again go to the parents and they make their own independent choice regarding attendance at any religious school.

Therefore, the Ohio voucher plan is constitutional under *Agostini,* decided just four years ago.

The majority opinion below, however, all but ignored *Agostini*, and held that the almost 30 year old decision in *Committee for Public Educ. v. Nyquist,* 413 U.S. 756 (1973) governs this case. But that case is clearly factually distinguishable and doctrinally outdated.

What we want to emphasize, however, is that the majority below made a second major error. It factually misread the state voucher statute to discern an incentive in the program favoring private religious schools, which does not exist. The statute caps the tuition that may be charged for low income students in the program at $2,500 per year. RC[14] 3313.976(A)(8); 3313.978(A). This includes a maximum of $2,250 from the voucher and $250 paid by the student's family. This is the most that private religious schools can obtain under the program for each low-income student.

The Sixth Circuit concluded that the reason no suburban public school had agreed to participate in the voucher program was that such funding was inadequate for their cost structure. But the much leaner and cost effective private religious schools could operate under this funding limitation. Consequently, in the Court's view, the program was structured to favor participation by the private religious schools, depriving families of a true choice of schools. (App. 29).

[14] "RC" refers to the Ohio Revised Code.

But exactly contrary to the decision of the Sixth Circuit, the statutory scheme provides much more funding for the choice of public schools and is actually skewed to favor those schools over private religious schools. If a family in the Cleveland voucher program chose a suburban public school, that school would receive not only the $2,250 paid by the voucher. It would also receive the state's regular funding allocation for each student in the public schools, which was an additional $4,294 during the 2000-2001 school year. RC 3317.03(I)(1), 3327.061, 3317.08(A)(1), 3317.02(B),(N). Consequently, the suburban public schools would have received $6,544 for each voucher student they enrolled last school year, compared to $2,250 for a private religious school.

In addition, several non-religious private schools participate in the voucher program. But these schools have the additional option of registering as community, or charter, schools, an option not available to private religious schools. Community schools receive over $4,500 in funding per student each year, and offer Cleveland parents another full schooling choice. RC 3317.02(B),(N); Affidavit of Steven Puckett, para. 14; Declaration of David P. Zanotti.[15] Of course, Cleveland parents can also always choose the Cleveland public schools, which received $7,097 in state funding per student in the last school year. Id.

Finally, a low-income family that chooses a private religious school under the voucher program must pay 10% of the school's tuition up to $250 per year. All families above

[15] All nonpublished materials cited in this brief are admitted into the record.

this income level must pay still more, as the vouchers will pay only 75% of school tuition up to a maximum payment of $1,875, leaving the families responsible for all costs above that. But families pay nothing if they choose a private non-religious school in the community school program, a Cleveland public school, or a suburban public school.

Consequently, the Sixth Circuit read the statutory framework applying to the choices of parents in the Cleveland school system exactly backwards. Rather than favoring private religious schools, the statutory framework disfavors those schools. In contrast, the Ohio Supreme Court did not misread the state's statutory framework and found no incentive favoring the choice of private religious schools.

Finally, we urge the Court to consider that the Federal government has long followed the same education policy established in the Cleveland school choice program. Under the GI Bill, the Federal government has long provided education assistance for veterans to attend the school of their choice for higher education or technical training. Under that program, veterans can use federal funds to attend religious schools and even obtain religious training, like the student in *Witters* receiving funding under still another Federal education choice program.

If these programs are constitutional, and we think they clearly are, then so is the Cleveland school choice program. While these Federal programs apply to the education of adults, adults make the choice of schools in the Cleveland voucher program as well, as parents are the ones responsible for exercising the choice in that program, not their minor children. There is no Establishment Clause distinction

between adults choosing schools for their own education and adult parents choosing schools for the education of their children. The applicable Establishment Clause principles are the same in either case.

CONCLUSION

The American Civil Rights Union urges the Court to reverse the Sixth Circuit decision below and uphold the constitutionality of the Cleveland school choice case.

Respectfully Submitted,

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No. 00-1751

SUSAN TAVE ZELMAN, *et al.*,
Petitioners

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents

Nos. 00-1777 and 00-1779 are
shown on inside of cover

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

~~Motion of~~ Hugh Calkins ~~for Leave~~
~~to file~~ Brief as *Amicus Curiae*,
~~and Brief~~, in Support of Petitioners

Hugh Calkins
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Cleveland, Ohio 44118

28 pp

No. 00-1777
HANNA PERKINS SCHOOL, *et al.*,
Petitioners

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents

No. 00-1779
SENEL TAYLOR, *et al.*,
Petitioners

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents

Motion for Leave to File Brief *Amicus Curiae* In Support of Petitioners

Hugh Calkins hereby moves, pursuant to Supreme Court Rule 37.2, for leave to file a brief in support of Petitioners as *amicus curiae*. He requested consent from counsel for all parties by mail and fax on October 16, 2001. Consents have been received and forwarded to the Clerk from counsel for the State Petitioner, from Petitioners Senel Taylor *et al.*, and from Respondents. Despite repeated follow-up inquiries, no word has been received from David J. Young, Esq., counsel for Petitioners Hanna Perkins School *et al.* This motion is therefore necessary.

STATEMENT OF *AMICUS* INTEREST

Hugh Calkins, the *amicus*, was a law clerk to Mr. Justice Frankfurter in the 1950-51 term of this Court. Since 1975 he has been a member of the Council of the American Law Institute. He was an elected member of the Cleveland Board of Education from 1965 to 1969. In 1969 he was appointed by President Johnson Chair of the National Advisory Committee on Vocational Education. Upon retirement from the practice of law in 1990, Calkins obtained a teaching certificate and taught in Cleveland elementary schools, and a middle school,

for four years. Following that experience, Calkins has devoted his energies to improving education in Cleveland in four principal ways. He has stimulated and helped finance improvement projects in Cleveland schools. He has encouraged improved pre-school and child care/education for children 1 to 5. He has researched and advanced proposals for improved school finance. He assisted in the formation of a charter school in inner-city Cleveland, and served as Chair of its Board of Trustees for three years.

The interest of the *amicus* in this case is three-fold. (1) The *amicus* believes that the decision of the Court of Appeals for the Sixth Circuit was erroneous, and that the Cleveland voucher plan is a valid and valuable component of an array of programs designed to improve educational opportunity in Cleveland. He further believes that similar programs in other cities with high rates of educational failure would be valid and helpful in overcoming America's critical big city educational problem. (2) The *amicus* believes that the private choice argument relied on by Petitioner raises issues which are not presented by the facts of this case, and should not be adopted by

this Court as the ground for its decision in this case. (3) The *amicus* believes it may be useful to this Court for the *amicus* to apply the "endorsement" approach of Justice O'Connor, which now represents the holding of this Court on this issue, to this case, and to point out weaknesses and dangers inherent in making "private choice" by itself a decisive criterion.

Respectfully submitted,

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November 2, 2001

In the Supreme Court of the United States

No. 00-1751
SUSAN TAVE ZELMAN, *et al.*,
Petitioners
v.
DORIS SIMMONS-HARRIS, *et al.*,
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On Writ of Certiorari
to the
United States Court of Appeals
for the Sixth Circuit

Brief of Hugh Calkins as *Amicus Curiae*,
in Support of Petitioners

Hugh Calkins
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QUESTION PRESENTED

Should the validity under the Establishment Clause of a voucher plan which attempts to provide improved education to low-income students in a school district characterized by high rates of educational failure be determined:

(a) by using a "private choice" standard, which would validate state-wide plans as well, or

(b) by using the endorsement standard advanced by Justice O'Connor, which could limit the decision to low-income students or school districts providing unsatisfactory education?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT ON CONSENTS, AUTHORSHIP AND MONETARY CONTRIBUTION 1

INTEREST OF *AMICUS CURIAE* (See motion to which this brief is appended.)

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. Under The Endorsement Guideline Of Justice O'Connor, The Cleveland Voucher Plan Is Valid, Since The Plan's Limitation To A School District Which Is Not Educating Acceptably The Majority Of Its Students Itself Establishes That The Plan Does Not Constitute An Endorsement Of Religion. For The Plan To Constitute An Endorsement Of Religion, The Plan Would Have Had To Apply Throughout The State Of Ohio 4

II. Parent Choice Is An Unsatisfactory Criterion For Judging Cases Under The Establishment Clause For Three Reasons Which Confirm The Usefulness of the Endorsement Guideline Of Justice O'Connor 6

A, A single test is inherently unsatisfactory 7

B. Absence of Free Choice 7

C. The Difficulty Of Allowing Government Support For All Religious Sects, Or For Some But Not All Sects 9

III. While No Single Rubric Resolves The Application Of The Establishment Clause To Government Support Of Sectarian Schools, A Serviceable Guideline Is Found In The "Endorsement or Discouragement" Guideline Advanced By Justice O'Connor 10

A. Justice O'Connor's Statement of the Guideline ..10

B. Justice O'Connor's Guideline Represents The Holding Of This Court In *Mitchell v. Helms* 10

IV. Under Established Supreme Court Jurisprudence, This Court Will Not Formulate A Rule Of Constitutional Law Broader Than Is Required By The Precise Facts To Which It Is To Be Applied 12

Conclusion 14

Appendix 15

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U.S. 203 (1997) 11

Ashwander v. Valley Authority, 297 U.S. 288 (1936) 2, 12, 14

Board of Ed. Of Kiryas Joel Schl. Dist.v. Grumet, 512 U.S. 687 (1994) 7

Good News Club v. Milford Central School, 121 S. Ct. 2093 (2001) 12

Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'r 12

Lynch v. Donnelly, 465 U.S. 668 (1984) 10

Marks v. United States, 430 U.S. 188 (1977) 3, 11

Mitchell v. Helms, 530 U.S.___, 120 S.Ct. 2530 (2000) 3, 10, 11

Santa Fe Ind. Schl. Dist. v. Doe, 530 U.S. 290 (2000) 12

Wallace v. Jaffree, 472 U.S. 38, 69 10

Constitution of United States of America

Amendments, Article I, Establishment Clause . . *passim*

Statute

Ohio Revised Code Section 3313.975 5

Miscellaneous

Excerpt from *New York Times* article dated October 20, 2001 .....9, 15

STATEMENT ON CONSENTS, AUTHORSHIP AND MONETARY CONTRIBUTION

This brief *amicus curiae* is submitted in support of Petitioners in accordance with Rule 37.2(a) of the Rules of this Court. All parties have consented to the submission of this brief, through communications filed with the Clerk of the Court, except one. A motion for leave to file is therefore attached. Hugh Calkins authored this brief in its entirety, and no other person has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF *AMICUS* INTEREST

The Statement appears in the motion to which this brief is appended, and is not repeated here.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to establish that in support-to-sectarian-school cases, the only satisfactory guideline will be one which permits some balancing of factors. The simplistic, absolute rule proffered by Petitioners delegates to parents the resolution of important Constitutional issues. The "endorsement/discouragement" guideline advanced by Justice O'Connor requires the Court to reach an informed judgment based on the facts of the particular case.

In this case there are two salient facts. One is the unsatisfactory educational performance of Cleveland public schools. The other is that the program designed by Ohio as a partial response to that performance is limited to Cleveland, although it might permissibly be extended to other districts in Ohio and elsewhere which are failing to educate large numbers of their young people.

The ground advanced by Petitioners, however, would validate support to sectarian schools even where the public schools were providing very satisfactory education. A state program to provide funds to sectarian schools under such circumstances presents a very different issue which this Court should not resolve in this case. A fundamental principle of this Court's jurisprudence is that it will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ashwander v. Valley Authority, 297 U.S. 288, 347(1936)* (Justice Brandeis, concurring).

Petitioners are asking this Court in this case to do just that. The ground on which Petitioners are seeking reversal of the judgment below is that the Cleveland voucher plan is a "true private choice program," and

"True private choice programs, *by their very nature, cannot* have the forbidden 'primary effect' of the government 'advancing religion.' That is because, when students or parents decide where aid will be applied, any religious 'advancement' that occurs is attributable to private choices, not governmental action....Accordingly, this Court's decisions hold, contrary to the Sixth Circuit, that when individuals determine whether and how much money flows to religious institutions, it is no more troubling than when a government employee donates her paycheck (all derived from public funds) to a church." (citations omitted and emphasis supplied) Petition for Writ of Certiorari filed by attorneys for the State of Ohio p. 21

The fact that Petitioners cannot see a difference between this case and a church contribution from a government paycheck dramatizes how little judicial discretion is allowed in the private choice ground on which they rest their case.

The first difficulty with the position the Petitioners are urging on the Court is that it is incorrect to assert that the private choice standard is already established by the decisions of this Court. It is not. In *Mitchell v. Helms,* 530 U.S. ___, 120 S.Ct. 2530 (2000) Justice O'Connor agreed that private choice, which she subsumed under the term "neutrality," was a significant factor. She protested, however, that the rule advanced in the plurality opinion was a rule of "unprecedented breadth" which she did not accept as a "single and sufficient test" for establishing Constitutionality of school aid. *Mitchell v. Helms, supra,* at 2556 and 2557. See also the discussion at page 15 of *Marks v United States,* 430 U.S. 188 (1977), in which this Court adopted a principle under which the Justice O'Connor endorsement test, and not the new Justice Thomas formulation, represents the current judgment of this Court.

The second difficulty is that. in the real world of parent choice, a parent's decision on what school to select is powerfully influenced by a rational parental desire to find a classroom dominated by middle class, and not low-income, students. Middle class students are often found in tuition-charging schools. A government program which subsidizes attendance at tuition-charging schools, especially if the schools are permitted to select students by admissions tests and charge tuition in excess of the subsidy, is likely to enhance the segregation by family income level which already exists among schoolchildren in this country as a result of neighborhood segregation. Such a program, which would be valid under a "private choice" rationale, is therefore hard to justify as sound educational policy, and its enactment is likely to be considered an endorsement of religion.

The final difficulty, and a highly topical one, is that, if parent choice validates all government aid to schools, it will be difficult to find a principled ground consistent with entanglement and free exercise concerns to exclude from a government tuition subsidy program those schools, possibly financed by oil-rich countries abroad, which teach their students doctrines quite antithetical to American values – for instance, that close association with persons outside of the sect is immoral. The reality of this concern is confirmed by the material in the Appendix.

The bottom line is that there is no simple talisman, which will resolve Establishment Clause cases. It is wise jurisprudence to decide each case on a ground tied to the facts of the case, which is as narrow as the circumstances permit.

In this case the crucial facts are the extent of educational failure in the Cleveland Municipal School District, and the fact that by its terms the plan is limited to that district.[1] Those facts demonstrate that the plan responds to an educational crisis and does not constitute an endorsement of religion. Therefore, the plan is valid under the Establishment Clause.

ARGUMENT

I. Under the Endorsement Guideline of Justice O'Connor, The Cleveland Voucher Plan Is Valid, Since The Plan's Limitation. To A School District That Is Not Educating Acceptably The Majority Of Its Students Itself Establishes That The Plan Does Not Constitute An Endorsement Of Religion. For The Plan To Constitute Such An Endorsement, It Would Have Had to Apply Throughout The State Of Ohio.

[1] Cleveland is the only Ohio District as to which a District Court has ordered a transfer of control to the State Superintendent. In view of the loss of interest nationwide in pursuing racial desegregation in the courts, it is unlikely that another such district will emerge.

Without doubt, the Cleveland voucher plan has important educational characteristics. It provides Cleveland youngsters and their parents with an important alternative to attending Cleveland Municipal School District schools. Most participating children enroll in parochial and other church-related schools. Other students in those schools, who do not participate in the voucher plan, are paying significant tuition and typically are of middle class, rather than low-income, backgrounds. It was reasonable for the Ohio Legislature to conclude that low-income students, enrolling in the more diversified student bodies of such parochial and church related schools, and exposed to a traditional sectarian curriculum, would receive a better education than had they remained in the Cleveland neighborhood schools.

Religious characteristics of the Cleveland voucher plan are also clear. The size of the subsidy is more than enough to cover the variable costs of adding students to existing classrooms with existing teachers, especially if the schools have the low cost structure of most church-related schools. The fact that a high proportion of the voucher students are enrolled in preexisting, church related schools, and not in newly created schools (Brief of State Appellants in Court of Appeals p. 8), and the further fact that non-church-related voucher schools have converted to charter status once that status was made available (Brief of State Appellants in Court of Appeals p. 11) are evidence that the voucher is attractive to supplement the income of the existing schools, but inadequate to sustain new private schools. Religious characteristics of the plan are that it provides financial support to parents who could not otherwise send their children to fill otherwise empty seats in church-related schools. See Ohio Rev. Code Section 3313.975.

The issue before this Court, therefore, is: which of the characteristics of the program establish its real character? Does the plan communicate a response to an educational need, or an endorsement of religion?

On this question, there is no better indicator than the terms of the plan itself. The Ohio Legislature chose to limit the plan to the Cleveland Municipal School District. Educational conditions in that district were so deplorable that a District Judge had directed the takeover of the District by the State Superintendent of Public Instruction. The District failed to meet any of the State's 18 minimum performance standards. (Brief of United States in Support of Petition for Certiorari p. 4) If the purpose of the plan had been to encourage church- related education, it wouid have made no sense to have limited the plan to Cleveland. To the contrary, the limitation demonstrates the genuineness of the legislative purpose to relieve what is probably the most critical educational problem in the State.

What is true of purpose is also true of endorsement. Providing some financial support to some church-related schools in Cleveland is not the message communicated by the plan. That it attempts to provide a better education where educational improvement is critically needed is the character it conveys. No one would confuse this effort to provide better education where it was so badly needed with an endorsement of religion.

The Cleveland voucher plan is therefore valid under the Establishment Clause.

II. PARENT CHOICE IS AN UNSATISFACTORY CRITERION FOR JUDGING FINANCIAL SUPPORT FOR SECTARIAN SCHOOL CASES UNDER THE ESTABLISHMENT CLAUSE FOR THREE REASONS. THEY CONFIRM THE USEFULNESS OF THE ENDORSEMENT GUIDELINE OF JUSTICE O'CONNOR.

A. A single test is inherently unsatisfactory

"Experience proves," Justice O'Connor wrote in her concurring opinion in *Board of Ed. Of Kiryas Joel Village Schl. Dist. V. Grumet*, 512 U.S. 687, 720 (1994), "that the Establishment Clause, like the Free Speech Clause, cannot be easily reduced to a single test." There are different categories of cases involving government support to sectarian schools, which may call for different approaches.

The private choice standard advocated by Petitioners is a one-rule-fits-all kind of standard. It leaves no room for different approaches in all cases in which pure parent choice exists.

B. Absence of free choice

Proponents of the "private choice" criterion for resolving government aid to sectarian school cases contend that the aid which is allotted by parent choice is not government aid to the school because the parent makes an independent, unpressured decision where her child will go to school. The situation is said to be similar to a parent receiving a tax refund or a government salary, and choosing to spend it on sectarian school tuition.

The contention has a logical basis. "Private choice" is clearly a relevant factor in determining whether an Establishment Clause violation has occurred. It is when it is considered to be, by itself, the controlling factor, that trouble arises.

To rebut a possible argument that education in Cleveland Metropolitan School District schools is so unsatisfactory as to limit free choice, Petitioner State of Ohio argues in its reply brief in support of its petition for a writ that Cleveland parents can choose a Cleveland magnet or community school, as well as a voucher sectarian school. Their choice is therefore said to be "free." This rebuttal overlooks a major qualification on freedom of choice.

There has for years existed in this country, and there exists today, a powerful and rational pressure from parents to seek for their children a school in which classmates will be predominantly middle class. The desire to escape from schools in which children are mostly of low-income backgrounds explains much of the flight to the suburbs which has been in progress for decades, and much of the widespread anger over the efforts of courts in the past two decades to replace the neighborhood school pattern with a busing pattern designed to achieve racial and economic integration.

The attitude of parents is rational. Every athlete knows that to improve his skill he should play with those who are a little better than he. It is often stated that students learn more from other students than from anyone else. The persistence of the idea that truly able students should be in separate classrooms for advanced students is confirmation that parents act sensibly when they seek high-performing ability groups for their children. Modern academicians, seeking to help low income students through association with higher income students, often claim that the higher income students learn as much in a classroom with low income students as they would in a class restricted to the able. What is important for present purposes is that the academicians are not believed by parents. Nearly all parents seek the best for their children, and the best education, they are convinced, is in classrooms with slightly more advanced classmates.

Because success in school is closely related to the educational level of the parents, and their educational level is closely associated with family income, schools which charge tuition are more likely than no-tuition schools to attract students from the middle class, and to repel students from low income families. It follows that, if the present tuition barrier to enrollment in tuition-charging schools were to be significantly reduced but not eliminated by a vouchers- for-all plan, many middle class families, but few low income families, would enroll their children in the tuition-charging schools.

The effect of the vouchers-for-all plan would therefore be to encourage a segment of American society – families with sufficient income to pay the difference between the school's tuition and the amount of the voucher – to enroll their children in tuition-charging schools, many of which would be religiously affiliated. The loss to the public schools of these more successful students would diminish the quality of education in the public schools. The inequality in educational opportunity thus created might support a challenge to the plan on Equal Protection grounds. It would certainly invite challenge under the Establishment Clause, on the ground that the educational merit in the plan, while arguable, was not strong enough to overcome the conclusion that the program constituted an endorsement of religion.

C. The difficulty of allowing government support for all religious sects, or for some but not all sects.

The third reason why parent choice is an unsatisfactory criterion for applying the Establishment Clause to government support for schools today is illustrated by a recent news story in the *New York Times*. Excerpts are included as the Appendix to this brief. The *Times* reported on October 20, 2001 that a fundamentalist group in Saudi Arabia which practiced an "austere" form of Islam known as "Wahhabism" was attempting to recruit U.S. Moslems to their group. According to the *Times*, Wahhabism teachings have inspired the violent extremism of Osama bin Laden and the Talaban government that harbors him in Afghanistan. Interacting very closely with non-Muslim society is among the acts forbidden by Wahhabism.

The *Times* reported that this group spent $10,000,000 in two years in the 1980's building mosques in the United States in an effort to recruit U.S. Muslims to its views. The *Times* attributed declining mosque construction activity in recent years to declining oil revenues in Saudi Arabia.

A plausible scenario relevant to this case is the possibility that the Wahhabis conclude that a better way to recruit American Moslems to their cause is to put their money into the construction of schools with gymnasiums, swimming pools, laboratories and an auditorium, and to urge Moslem families to enroll their children. The financial burden on the Wahhabis and the parents would be reduced by a vouchers-for-all plan. Those who advocate private choice as the controlling Establishment Clause criterion would have difficulty finding any ground on which payment of the vouchers to the Wahhabi schools could be denied without raising acute issues of entanglement and free exercise.

Fortunately, a majority of this Court remains committed to the salutary principle that the Establishment Clause forbids government support to religion, which constitutes an endorsement of religion.

III. While No Single Rubric Resolves The Application Of The Establishment Clause To Government Support Of Sectarian Schools, A Serviceable Guideline Is Found In The "Endorsement or Discouragement" Guideline Advanced By Justice O'Connor.

A. Justice O'Connor's Statement of the Guideline

In her concurring opinion in *Lynch V. Donnelly,* 465 U.S. 668, 690 (1984), and again in *Wallace v. Jaffree*, 473 U.S. 38, 69 (1985), Justice O'Connor advanced concepts of endorsement and neutrality as guidelines for applying the Establishment Clause in school support cases. If the government action constitutes an endorsement, or a discouragement, of religion, the action is invalid.

B. Justice O'Connor's Guideline Represents The Holding Of This Court In *Mitchell v. Helms*

The endorsement concept was tested most recently in *Mitchell v. Helms*, 530 U.S. ___, 120 S.Ct. 2530 (2000). This case concerned the validity of a portion of the Elementary and Secondary Education Act under which a public authority may loan educational equipment to church-related schools for use in implementing secular programs. Writing for a plurality of four, Justice Thomas propounded revised criteria to govern school financial support Establishment Clause cases. Under these criteria, a government program would be valid if it "does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Mitchell v. Helms, supra,* at 2540.

Justice Thomas argued that his formulation was derived from the Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997). Justice O'Connor, however, was the author of the *Agostini* opinion, and concurred in *Mitchell*. She stated in her concurring opinion in *Mitchell* that the Thomas formulation was a "rule of unprecedented breadth." *Id.*, at 2556. She asserted that neutrality, which became a paramount criterion in the Thomas formulation, was only one of several factors leading to the *Agostini* conclusion. Id. at 2557. The *Agostini* and the *Mitchell* programs were valid, because there was no evidence, and no presumption, that the remedial teachers or the borrowed equipment would be used to indoctrinate children in religion. Id. at 2568.

It therefore appears that Justice Thomas' view, as expressed in *Mitchell v. Helms,* does not represent any holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977), holds that, when no opinion is joined by a majority of the Court, the narrowest ground supported by at least five justices represents the holding of the Court. Justice O'Connor's endorsement guideline therefore now represents the holding of the Court on these issues.

IV. UNDER ESTABLISHED SUPREME COURT JURISPRUDENCE, THIS COURT WILL NOT FORMULATE A RULE OF CONSTITUTIONAL LAW BROADER THAN IS REQUIRED BY THE PRECISE FACTS TO WHICH IT IS TO BE APPLIED.

Especially when it is interpreting the Constitution, this Court decides only the case before it, and does not lay down rules which would decide, not only that case, but others in which the facts are not yet clearly understood and the issues have not been fully explored in briefs and argument and in the decisions below. As Mr. Justice Brandeis stated, concurring in *Ashwander v. Valley Authority,* 297 U.S. 288, 347 (1936), "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N.Y. & P.S.S. Co. v Emigration Commissioner,* [113 U.S. 33 (1885)]."

Justice Brandeis' limiting principle has been followed by members of the Court in recent cases. See *Good News Club v. Milford Central School,* 121 S. Ct. 2093, 2115 (2001), in which Justice Stevens, dissenting, stated that he would not "reach out" to decide an Establishment Clause question which had not been considered by the courts below; cf *Santa Fe Independent School District v. Doe,* 530 U.S. 290, 321 (2000), in which Chief Justice Rehnquist criticized the majority for deciding an issue before the relevant outcome of an election on use of school facilities was known.

The case at bar involves a voucher plan limited to a school district in which it is conceded by all that substantial educational improvement is needed. The facts relevant to determining the validity of the Cleveland plan are well known, and the issues relating to its validity have been extensively briefed.

If this plan is upheld on the ground advanced by Petitioners, however, it is likely that this Court's decision will

be relied on by states to create voucher plans applicable to all districts, including many which are providing acceptable education.

This Court should avoid deciding this case on grounds that would be so broad as to apply to a voucher plan extending to educationally successful districts. The effect that such a plan would have on the religious preferences of U. S. citizens is unknown. No one has approximated the number of parents who would take advantage of such a plan, or the number of denominations and ethnic groups which would create schools for their own children in response to such legislation.

No one has resolved whether such voucher schools could exclude students on the basis of ethnicity or religion — after all, they would be private, often sectarian schools, and to avoid the "entanglement" issue the authorizing legislation would impose a minimum of regulation on schools admitting voucher students. The size of the voucher, and the right of the school to charge tuition in excess of the voucher or employ admission tests, are important unknowns. The effect of a possible statewide voucher plan on public schools is speculative. This Court should not decide in this proceeding the validity of a statewide plan about which so little is known.[1]

CONCLUSION

For these reasons, this Court should reverse the Court of Appeals, and hold that the Cleveland voucher plan is valid because its limitation to a district desperately needing educational improvement causes it to pass the "endorsement" test. The Court should not approve the "parent choice solves the problem" approach taken by the Petitioners. In the words of Justice Brandeis, concurring, this Court should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ashwander v. Valley Authority, supra.*

Respectfully submitted,

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November 2, 2001

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[1] It is noteworthy that references to "failing schools," "underperforming schools," unacceptable school performance,low-income families," "disadvantaged children," and "districts subject to federal court orders" appear no less than 15 times in the brief *amicus curiae* filed by the United States in support of the granting of certiorari. The guidance the United States seeks from this Court relates to programs "enacted in response to specific educational crises in failing public schools." Brief for the United States in Support of Petition for Certiorari p. 18. Clearly, the United States is not thinking of a statewide plan.

Appendix

Extract from Article by Blaine Harden published on p. 1 of *New York Times* on October 20, 2001under headline: "Saudis Seek U.S. Muslims for their Sect."

In a costly and quietly insistent campaign to spread its state religion, Saudi Arabia has been trying for decades to induce American Muslims to become followers of the puritanical Islamic sect that sustains the power of the Saudi royal family.

By building mosques across the country, sending Americans to the Middle East to be trained as imams and promoting pilgrimages to Mecca, the Saudis have spent hundreds of millions of dollars in an effort to stamp their austere version of Islam on the lives of Muslims in the United States.

That version is called Wahhabism, although the Saudis are loath to use the term in referring to their proselytizing in this country. As practiced in Saudi Arabia, Wahhabism denies equal rights to women, and its teachings have inspired the violent extremism of Osama bin Laden and the Taliban government that harbors him in Afghanistan.

"In America, the Saudis don't call it Wahhabism because they don't want to have all the albatrosses associated with the sect," said Earle H. Waugh, a professor of religion atthe University of Alberta, who is the author of several books about Muslims in North America. "But they have a strong mission tradition, and they have used their money to export their ideology to America. Wahhabism says that Islam is the superior religion and must always be so."

Despite all their efforts, the Saudis' approach to Islam appears not to have found widespread acceptance in the United States and in fact seems to have faded in popularity

here in recent years, perhaps because it is too rigid for a multiethnic society like America's. Experts estimate that of the two million American Muslims who attend mosques regularly, no more than 25 percent, and perhaps many fewer, adhere to the strictures of Wahhabism.

As the Saudis themselves explain, their beliefs reject aspects of Western culture that they see as deviating from fundamental teachings of the Koran. Mingling of the sexes, living in a community where alcohol is consumed, eating pork and interacting very closely with non-Muslim society are forbidden.

"A knowledgeable Muslim will find it hard to integrate into a non-Islamic society of the United States," explained Muhammad al-Alahmari, a Saudi who is chairman of the Islamic Assembly of North America, an organization based in Ann Arbor, Mich., that sends copies of the Koran to prisons and libraries.

About half the group's money, Mr. Alahmari said, comes from the Saudi government, with the rest coming from private donors, most of them Saudi.

A number of prominent religious scholars describe Wahhabism as a particularly rigid minority Islamic sect that is intolerant of other forms of Islam, unwilling to accommodate other religions and likely to create a narrow view of the world among its followers.

In the 1970's and 80's, when Saudi Arabia was flush with oil money, the United States experienced a boom in the founding of mosques. About 57 percent of the country's 1,200 mosques were built in those years, academics estimate.

Records of the Saudi-controlled Muslim World League

show that during a two-year span in the 1980's, the organization spent about $10 million in the United States on mosque construction, said Yvonne Y. Haddad, a professor of the history of Islam at the Georgetown center.

Mr. Alahmari, the Saudi charity official based in Ann Arbor, estimates that half the mosques and Islamic schools in the United States have been built with the help of money from Saudi Arabia. The Saudi royal family has directly contributed to the construction of a dozen mosques, including the $8.1 million King Fahd Mosque in Culver City, Calif.

Although the Saudi Embassy official maintained that "there are absolutely no strings attached" to Saudi spending, several scholars and American Muslims said the money had often involved a quid pro quo.

"At several mosques around Los Angeles, they would dole out money month by month until something happened that they didn't like, such as boys and girls mixing together in religious classes," said Mr. Akbarut, a member of the Islamic Center of Southern California. He said the Pasadena mosque where he prays had refused money from the Saudis.

The training of Americans, especially African-Americans, as imams in Saudi Arabia has also had a clear ideological purpose, said Faheem Shuaibe, imam at a large, predominantly black mosque in Oakland, Calif. More than 200 African-American imams have been trained in Saudi Arabia, he said.

"There was a very deliberate recruitment process by the Saudis, trying to find black Muslims who had a real potential for Islamic learning and also for submission to their agenda," said Mr. Shuaibe, who has frequently traveled to Saudi Arabia. "They taught Islam with the intent to expand their influence. A principal target was to stop the indigenous

Muslim leadership in America from tinkering with the religion."

Estimates of the percentage of American Muslims who worship in mosques that adhere to Wahhabism vary widely. Just as Saudis do not describe their faith as Wahhabism, conservative imams in America reject that label for their mosques. Several scholars said they did not know of a single mosque in this country that identified itself with the Saudi sect.

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In The

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Petitioners,

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DORIS SIMMONS-HARRIS, et al.,

Respondents.

And Related Cases

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF AMICUS CURIAE FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS SUPPORTING PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 4

I. THE LOWER COURTS' CHARACTERIZATION OF THE CATHOLIC SCHOOLS WAS BASED PARTLY UPON A FALLACIOUS INFERENCE FROM FALSE OR MISLEADING PREMISES..... 4

A. The Fallacious Inference 6

B. The Faulty Premises 10

II. AUTHENTIC CATHOLIC DOCTRINE ON EDUCATION: SCHOOLING IN "AN ATMOSPHERE ANIMATED BY A SPIRIT OF LIBERTY AND CHARITY BASED UPON THE GOSPEL" 11

III. THE ATMOSPHERE OF LIBERTY AND CHARITY BASED UPON THE GOSPEL WHICH ANIMATES CATHOLIC SCHOOLS DOES NOT UNDERMINE THE AUTONOMY OR INTEGRITY OF TEACHING SECULAR SUBJECTS ... 14

A. Instruction And Training In The Catholic Faith 14

B. Personal Vocation 16

C. Teachers As Moral Exemplars: Gospel Charity 19

TABLE OF CONTENTS – Continued

Page

D. The Inference Stated As The Proposition That Secular Subjects Are Infected With Religion Is Unproved. Evidence Given For It In The Cases Amounts To A Violation Of The "Content Neutrality" Commanded By The First Amendment 21

IV. CATHOLIC DOCTRINE FORBIDS "INDOCTRINATION," AS THAT TERM IS USED IN THE CASES: GOSPEL LIBERTY 25

V. CATHOLIC SCHOOLS ARE COMPLEMENTS TO, AND NOT COMPETITORS OF, THE PUBLIC SCHOOLS. OUR TRADITIONS CALL FOR FREE AND FRUITFUL COLLABORATION BETWEEN PUBLIC AUTHORITY AND PRIVATE INSTITUTIONS, INCLUDING CHURCHES, IN ENSURING THE BEST EDUCATION FOR ALL CHILDREN 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Aguilar v. Felton, 473 U.S. 402 (1985) 29

Board of Education v. Allen, 392 U.S. 236 (1968) 6, 7, 8, 11, 13, 21

Bob Jones University v. United States, 461 U.S. 574 (1983) 2

Bowen v. Kendrick, 487 U.S. 589 (1988) 5

Bradwell v. State, 83 U.S. 130 (1872) 26

Buck v. Bell, 274 U.S. 200 (1927) 26

Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) 18

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 5, 6

Employment Division v. Smith, 494 U.S. 872 (1990) 2, 4, 18

Everson v. Board of Education, 330 U.S. 1 (1947) 6, 21

Frazee v. Illinois, 489 U.S. 829 (1989) 2

Grand Rapids School District v. Ball, 473 U.S. 373 (1985) 29

Helms v. Picard, 151 F.3d 347 (5th Cir. 1998) 8

Jones v. Wolf, 443 U.S. 595 (1979) 2

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1983) 4, 24

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Meek v. Pittenger, 421 U.S. 349 (1975).....8, 10

Mitchell v. Helms, 530 U.S. 793 (2000).....4, 8, 15, 19

Pierce v. Society of Sisters, 268 U.S. 510 (1925).....7, 27

Plessy v. Ferguson, 163 U.S. 537 (1896)..... 26

School District of Abington v. Schempp, 374 U.S. 203 (1963)..... 22

Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)..... 2

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).....6, 8

Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) 4, 5, 13, 14

Stone v. Graham, 449 U.S. 39 (1981)..... 22

Thomas v. Review Board, 450 U.S. 707 (1981) 2

Tilton v. Richardson, 403 U.S. 672 (1971) 25

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)..... 23

Wolman v. Walter, 433 U.S. 229 (1977) 6

CHURCH DOCUMENTS:

Catechism of the Catholic Church (1994) 27

1983 Code of Canon Law..... 14

John Paul II, *Encyclical Letter Veritatis Splendor* (1993)..... 20

TABLE OF AUTHORITIES – Continued

Page

John Paul II, *Encyclical Letter Evangelium Vitae* (1995)..... 29

Romans 2:14-15..... 20

The Catholic School On The Threshold Of The Third Millenium: Statement by the Congregation for Catholic Education (1997).....13, 19

VAT. II, *Christus Dominus* (Decree Concerning The Pastoral Office of Bishops) (1965)..... 14

VAT. II, *Dei Verbum* (Dogmatic Constitution on Divine Revelation) (1965)..... 14

VAT. II, *Dignitatis Humanae* (Declaration on Religious Freedom) (1965).....27, 28

VAT. II, *Gravissimum Educationis* (Declaration on Christian Education) (1965).....12, 18, 19

VAT. II, *Lumen Gentium* (Dogmatic Constitution of the Church) (1965)..... 17

MISCELLANEOUS:

Charles Leslie Glenn, Jr., *The Myth of the Common School* (University of Massachusetts Press 1988).... 12

Nat Hentoff, *God in School*, Washington Post, August 7, 1999, at A19..... 17

Timothy A. Mitchell, *A History Lesson*, Newsday, July 2, 1990, at 40..... 19

INTEREST OF THE AMICUS CURIAE[1]

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil rights organization. The League's headquarters is in New York City. Its cooperating affiliates across the country assist in activities national in scope. The Catholic League aims to expose and correct stereotypes of Catholic belief and of the Church in the media, in popular culture, and in government actions. In this way the League seeks to protect individual Catholics as well as the Church against defamation and discrimination.

This litigation, like all this Court's cases involving public aid to parochial schools, involves a predominant number of Catholic schools. The decision of the Sixth Circuit should be reversed because it depended upon the District Court's characterization of the Catholic schools involved as "pervasively sectarian." The characterization is not only mistaken. It rests upon a grave misunderstanding of Catholic doctrine on education, on religious freedom, and of the mission and purpose of Catholic schools. The lower courts also ignored important relevant Catholic doctrines, especially as they are found in the authoritative teachings of the Second Vatican Council (1962-1965).

The Catholic League files this brief to promote this Court's understanding of Catholic elementary and secondary schools.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, nor its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This Court has stated on many occasions that the central aim of the Religion Clauses is to forestall state-sponsored indoctrination. Whenever the government – directly or indirectly, subtly or overtly – prescribes the meaning and content of religious belief, this core command is violated. The government may not set up a church, compose a prayer which all are bound to recite, discriminate against a religion it deems false or inconvenient, or favor another it deems true or helpful. Nor may the government base adverse treatment of believers upon its – the government's – definition of what they believe. This Court has consistently stated that civil authorities are bound to accept a religious institution's definition of its doctrine and beliefs. See, e.g., *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. (1976); *Jones v. Wolf*, 443 U.S. 595 (1979). This Court has consistently interpreted the Free Exercise Clause to require the government to accept a sincere believer's statement of what he believes, no matter how strange or singular those beliefs may seem to others, including judges. See, e.g., *Thomas v. Review Board*, 450 U.S. 707 (1981); *Frazee v. Illinois*, 489 U.S. 829 (1989). And the government is bound to accept the implications and inferences drawn by believers, even where they appear to be illogical or unwarranted. See *Thomas, Frazee*.

Of course, none of these holdings implies that believers are entirely free to act upon their beliefs. The common good often requires that religious conduct be regulated. See, e.g., *Employment Division v. Smith*, 494 U.S. 872 (1990). Sometimes a particular religious practice may be the basis of discriminatory treatment by the government. See *Bob Jones University v. United States*, 461 U.S. 574 (1983) (alleged racist practices warranted withdrawal of the college's tax exempt status). But the Religion Clauses lose much of their meaning unless the government is under a constitutional duty to get it right, to

accurately identify and to understand the pertinent religious beliefs or practices. It may be constitutionally legitimate for government to discriminate among churches or religious schools due to their engagement in political campaigning or in racially discriminatory practices. But the Religion Clauses impose a high burden of proof: the government must show by clear and convincing evidence that the beliefs and practices of the religious group, as the believers state and interpret them, are racially discriminatory, or do amount to electioneering. Civil authorities are competent to decide, within limits, what questions to ask about a religion and its practice in order to care for the common good. But the answers must be those of the faithful, not of the magistrate.

The judgment of the Sixth Circuit must be reversed for failure to discharge this constitutionally imposed duty. The District Court's characterization of the Catholic schools in this case as "pervasively sectarian," upon which the Sixth Circuit implicitly but necessarily relied, rests upon a misunderstanding of the mission and practices of Catholic schools. The misunderstanding was so gross as to amount to unconstitutional stereotyping.

The courts' principal errors were two. They were, unfortunately, interdependent, and the combined effect was disastrous. One error was to expound record material concerning the schools' mission and practices without consulting, much less deferring to, authoritative Catholic definition and interpretation of key concepts. The court ignored altogether other pertinent Church teachings. As a result, the courts below struck down the vouchers program on the basis of a state version of Catholicism. Were the pertinent Catholic teachings allowed to speak for themselves, it would have been clear that the schools involved here are not "pervasively sectarian," as this Court has specified the meaning of the term.

The second error was the lower courts' complacent reliance upon this Court's declarations, in the mid-1970's, that Catholic schools were then "pervasively sectarian."

The courts correctly held themselves to be bound by Supreme Court authority. They properly rejected the opportunity to anticipate a modification or overruling by the Supreme Court of one its own precedents. But the lower courts were bound to apply the 1970's statements on "pervasively sectarian" in light of this Court's 1990's church-state rulings, especially *Smith* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1983). Nor did the lower courts heed the admonitions of this Court in *Mitchell v. Helms*, 530 U.S. 793 (2000) about the prejudice and perniciousness surrounding the characterization "pervasively sectarian." *Id.* at 828-829. Failing to do so, the courts relied upon aspects of Catholic schools' practices which this Court has declared to be constitutionally sacrosanct, and no licit basis for government discrimination.

The combined effect was a decision discriminating against Catholic schools based upon a caricature, and upholding state discrimination based upon what are, in truth, constitutionally forbidden grounds.

ARGUMENT

I. THE LOWER COURTS' CHARACTERIZATION OF THE CATHOLIC SCHOOLS WAS BASED PARTLY UPON A FALLACIOUS INFERENCE FROM FALSE OR MISLEADING PREMISES.

The District Court found that of fifty-six participating schools, forty-six, or about 82 percent, were (as of the start of the 1999-2000 school year) religiously affiliated. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 836-837 (N.D. Ohio 1999). More than 60 percent are Roman Catholic. Given these statistics, the court expressly found that "parents do not have a genuine choice between sending their children to sectarian or nonsectarian schools because sectarian schools overwhelmingly predominate."

Id. at 864. This case, the court reasoned, was thus "virtually indistinguishable" from the tuition reimbursement program struck down in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), in which the majority of benefited schools were also sectarian.

The predominance of sectarian schools in this Ohio voucher program, the court argued, means that the voucher aid "directly benefits the religious functions of participating sectarian institutions because it cannot be said that aid only flows to religious institutions as a result of the independent and private choices of the recipients." *Id.* "A program," the court concluded, "that is so skewed toward religion necessarily results in indoctrination attributable to the government and provides financial incentives to attend religious schools. For both of these reasons, the court finds the Program to be in violation of the Establishment Clause." *Id.* at 865.

From start to finish, the court's argument rests upon the view that the "sectarian" schools involved are "pervasively sectarian." For the "predominance" of religiously affiliated schools in the voucher program could not raise an Establishment concern unless "pervasively sectarian." In its opinion the District Court explicitly pays homage to *Bowen v. Kendrick*, 487 U.S. 589 (1988): " 'One way in which direct government aid might have that [primary] effect [of impermissibly advancing religion] is if the aid flows to institutions that are "pervasively sectarian." ' " 72 F. Supp. 2d 834 (quoting *Bowen*, 487 U.S. at 609-10 (Rehnquist, C.J.)). By essentially affirming the District Court's reasoning, the Sixth Circuit relied equally upon the "pervasively sectarian" view, as Judge Ryan noted in dissent: "The majority . . . attempts to support its view . . . by utilizing the transparent argument that this statute should be struck down because the religious

schools in the program are too religious." *Simmons-Harris v. Zelman*, 234 F.3d 945, 969 (6th Cir. 2000).

The reliance of the lower courts upon the characterization of the sectarian schools in the Ohio voucher program as "pervasively sectarian" is both inaccurate and unwarranted. Once deconstructed, their argument is left without a foundation.

A. The Fallacious Inference

The lower courts naturally sought guidance from this Court's cases on school aid, decisions which have been, as a matter of fact and as a matter of explicit analytical reliance, about Catholic schools.[2] The District Court and (implicitly) the Sixth Circuit adopted this Court's view, expressed often in the 1970's, that Catholic primary and secondary schools are "pervasively sectarian." The term never acquired another referent: no college (Catholic or

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[2] In *Everson*, Justice Rutledge reminded the Court (330 U.S. at 31) that all the affected pupils attended Catholic schools. Ninety-five percent of the students in the Rhode Island program invalidated in *Lemon* attended Catholic schools in the Pennsylvania program; ninety-six percent were church-related schools, and "most" of them were Catholic. 403 U.S. at 608, 610. "Practically all" of the affected students in *Nyquist*, the Court wrote, were Catholic. 413 U.S. at 78. In *Meek*, the Court recognized that seventy-five percent of the affected Pennsylvania schools were church related, and further observed that the beneficiaries of the challenged program there were mostly Catholic. See 421 U.S. at 364. In *Wolman*, the figure, according to the Court, was ninety-two percent enrolled in Catholic schools. 433 U.S. at 234. Interestingly, *Bd. of Education v. Allen*, which upheld aid to nonpublic schools, is an exception: the Court's opinion did not explicitly refer to the percentage of beneficiaries who were Catholic. The *Allen* court said only that twenty-two percent of all New York's school children – some 900,000 – attended nonpublic schools. 392 U.S. at 248, n.9.

otherwise) has ever been deemed by this Court to be "pervasively sectarian," and no non-Catholic K-12 school has figured independently in the decided cases.

Although this Court did not use the phrase, the concept of "pervasively sectarian" first figured in a denial of aid to private schools in 1971, in *Lemon v. Kurtzman*, 403 U.S. 602. The precise meaning of "pervasively sectarian" was elusive, but its analytical function was clear: it was the characterization necessary to render unconstitutional *all* "direct" aid to (at least) the educational function of Catholic schools. "Pervasively sectarian" meant that (somehow) religious training was everywhere in the school, or nearly so. Deeming a school "pervasively sectarian" made possible the conclusion that any aid, even if ostensibly limited to secular activities of the Catholic school, inescapably advanced religion.

The *Lemon* Court abandoned the conclusion, stated just three years earlier in *Allen*, that the secular education in religious schools was autonomous from religious training. *Allen* said also, relying upon *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), that the state had a legitimate interest in the competent teaching of nonreligious subjects in parochial schools. See *Allen*, 392 U.S. at 245. The *Allen* Court never denied, although it did not explicitly affirm, that the Catholic schools in *Pierce* (or in *Allen*) had an integrated, religious mission. They were, the opinion for the Court by Justice White repeatedly said, "parochial" schools. The Court chose nevertheless to rest its analysis not upon the overall mission or identity of the schools, but upon the autonomy of secular training in them.

Beginning in *Lemon*, this Court shifted the focus of its church-state analysis from the public good – secular instruction – provided by parochial schools, to the overall

"mission" of those schools. At the same time, the Court decided to consider them not simply as private or parochial (as had *Allen*), but precisely as Catholic.

The unexplained shift in focus was unfortunately carried through by a fallacious argument. Although writing separately for himself in *Lemon*, Justice Brennan's expression of the new focal point was adopted by the Court in *Meek*: "The secular education those [Catholic] schools provide goes hand in hand with the religious mission which is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Meek*, 421 U.S. at 366 (quoting *Lemon*, 403 U.S. at 657 (Brennan, J., concurring)). More recently, the Fifth Circuit adopted this view in *Helms v. Picard*, 151 F.3d 347, 355 (5th Cir. 1998), only to have it rejected by a plurality of the Supreme Court in *Mitchell v. Helms*, 530 U.S. 793 (2000). By contrast, the Sixth Circuit in the present case explicitly eschewed the *Mitchell* plurality in favor of Justice O'Connor's concurrence: "[Justice O'Connor] found 'the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and . . . unnecessary to decide the instant case.' " 234 F.3d at 957 (citing 530 U.S. at 836-839). In effect, the Sixth Circuit returned to the *Meek* view, necessarily considering the *Meek* statement – let us call it Proposition 1 – inconsistent with *this* statement – call it Proposition 2 – from *Allen*: "the processes of *secular* and *religious training* are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the *teaching of religion*." 392 U.S. at 248. [emphasis added, in both cases.]

The truth is, however, that Proposition 1 and Proposition 2 are not inconsistent. They may both be true. And, if "religious mission" is defined according to Catholic – not

state – doctrine, they both *are* true. But, since *Lemon*, the cases have mistakenly inferred from the "religious mission" of Catholic schools – a proposition here granted – that the teaching of secular subjects in them was characteristically infected with religious indoctrination, or with (however stated) some inadmissible sectarian influence.

A glance at the Propositions 1 and 2 suggests the overlooked possibility: secular education, delivered in its full integrity and as competently as in public schools, is part of Catholic schools' "religious mission."

Some courts have meant to say, when they committed themselves to Proposition 2, that Catholic schools' "religious mission" requires (or licenses or is otherwise responsible for) teaching math or geography or civics in an inadmissibly "sectarian" fashion. But *that* is the proposition which needs to be proved. It is the missing premise, and surely does not follow from what Catholics mean when they say, in so many words, that their schools have a religious mission.

For Catholic hospitals, social services agencies, and schools are all considered by Catholics to be "institutional ministries." They all have a specifically Catholic mission or identity. This is as true of Catholic colleges (which, again, have never been held to be "pervasively sectarian") as it is of Catholic grade schools. But this hardly implies that surgeons at Catholic hospitals do sectarian surgery, or that physics professors at Catholic colleges teach Catholic physics. Mother Teresa of Calcutta ran hospices, and surely they had a religious mission. They were nevertheless hospices. Up until a few years ago religious brothers of Holy Cross supplied from farms near South Bend fresh food for the dining halls at Notre Dame. These dedicated men had a specific mission within the overall religious mission of the University of Notre

Dame. But they were still farmers. There was nothing sectarian about their soybeans.

The *Meek* Court drew attention to the alleged compound of secular and sectarian when it said that "the very purpose of many of these schools is to provide an integrated secular and religious education". 421 U.S. at 366. Granted. But "integrated" need not mean, and in Catholic usage does not mean, the introduction of doctrine into math or geography class. The *Lemon* Court noted that the District Court in that case had concluded that "the parochial school system was an integral part of the religious mission of the Catholic Church." 403 U.S. at 609. Granted. Hospitals and colleges are, too. Neither has been deemed "pervasively sectarian."

Nothing said here implies that it *cannot* be the case that secular subjects in some religious school are vehicles for indoctrination, or that *all* secular subjects *are* autonomous from religious instruction in *all* types of religious schools. A school which taught *as* science the biblical account of a seven-day creation would, to that extent, "sectarianize" (to invent a term) science. But Catholics do not believe in a young earth; they do not teach Creation Science. One simply cannot infer from the fact that a Catholic school (or college or hospital or orphanage) has an integrated purpose and a Catholic identity – call it a "religious mission" – that all or most (or much, in some cases) that happens therein is tantamount to religious instruction.

B. The Faulty Premises

There are two premises in Proposition 1. One is that Catholic schools have "a religious mission." The other is that this "religious mission" is the "only reason" for their

existence. Assuming that Catholic schools have a "religious mission" (given the generality of the term, it is clear that they do), it is odd to add that it is the "only reason" for their existence. It is odd because once one states the "mission" of a Catholic school – or of any other institution, for that matter – one has stated its reason for existence. That is generally what a "mission" amounts to.

One reading of the statement that the schools have a "religious mission" that is the "only reason" for their existence, is that instruction in doctrine predominates in the school. Taken most straightforwardly, this statement would imply the unconstitutionality of Catholic schools' state certification, within the terms of compulsory attendance laws. It would be like certifying a vacation bible school as a summer session of required elementary education. But no one argues that Catholic schools should be decertified. Catholic schools deliver the curriculum, and other services, required by public authority. This part of *Allen* has never been questioned. Moreover, if indoctrination were the predominant function of the Catholic school, non-Catholics would have little reason to enroll, and few would. But Catholic schools, especially in urban areas, enroll substantial numbers of non-Catholic students, in some cases, a majority.

II. AUTHENTIC CATHOLIC DOCTRINE ON EDUCATION: SCHOOLING IN "AN ATMOSPHERE ANIMATED BY A SPIRIT OF LIBERTY AND CHARITY BASED UPON THE GOSPEL."

It is surely not the "mission" of Catholic schools to "indoctrinate" pupils, or (to use less loaded terms) to transmit the faith to children, less is it the "only reason" for their existence. Historically, a separate Catholic school system was started to protect Catholic children from the

scandal of aggressive Protestantism in the public schools. See generally Charles Leslie Glenn, Jr., *The Myth of the Common School* (1988). Today many see in the Catholic school a disciplined, value-centered environment which, apart from the special opportunity to learn the Catholic faith, is sufficient reason to enroll.

The mission of Catholic schools is first and foremost, to be a school. Here is the mission of a school – any K-12 school – as the Church authoritatively describes it:

> Nurturing the intellectual faculties . . . is its special mission. It develops a capacity for sound judgment and introduces the pupils to the cultural heritage bequeathed to them by former generations. It fosters a sense of values and prepares them for professional life. By providing for friendly contacts between pupils of different characters and backgrounds, it encourages mutual understanding. Furthermore, it constitutes a center in whose activity and growth not only the families and teachers but also the various associations for the promotion of cultural, civil and religious life, civic society, and the entire community should take part.

VAT. II, *Gravissimum Educationis* (Declaration on Christian Education), § 5. [Hereafter, GE].

The "special function" of the *Catholic* school – i.e., that which distinguishes it from other schools – is "an atmosphere animated by a spirit of liberty and charity based upon the Gospel." GE § 8. *This*, according to the bishops and cardinals assembled at the Second Vatican Council, speaking in union with the Pope, is the "prototype," to which "all schools which are in any way dependent upon the Church should conform so far as possible." GE § 9.

In its December 1997 document, *The Catholic School on the Threshold of the Third Millennium*, the Vatican Congregation for Catholic Education (the highest Church authority, other than the Pope, on Catholic schools) said the "goal" of the Catholic school is "the promotion of the [whole] human person," including the intellectual, moral and spiritual spheres. See § 9. The Catholic school mission statements quoted by the District Court in this case echo this aim: "an integral part of the school program is instruction in religious truths and values. These values permeates [sic] the whole atmosphere of the school." 72 F. Supp. 2d at 838 (quoting St. Rocco School Handbook at 3). But they must be understood according to the mind of the Church, not the mind of the civil authorities.

Here, then, is an authentically Catholic articulation of an alternative to "pervasively sectarian:" "an atmosphere animated by a spirit of liberty and charity based upon the Gospel." *This* is the Catholic meaning – and given the cases, the only relevant constitutionally available meaning – of "religious mission." Can one infer from the pervasive spirit of liberty and charity that secular teaching is, after all, "so intertwined" with religion that aid to Catholic schools impermissibly advances religion? Does this "atmosphere" supply the premise missing from Proposition 1?

There are three main components of the atmosphere of liberty and charity. Together with explicit instruction in the Catholic faith and practice – which is done in separate, distinct religion classes – they constitute the distinguishing Catholic component of the Church's K-12 schools. Neither one alone, nor all combined, gives rise to the inference that secular subjects are infused with sectarian content. In fact, they demonstrate precisely the correctness of *Allen*; that is, of Proposition 2.

III. THE ATMOSPHERE OF LIBERTY AND CHARITY BASED UPON THE GOSPEL WHICH ANIMATES CATHOLIC SCHOOLS DOES NOT UNDERMINE THE AUTONOMY OR INTEGRITY OF TEACHING SECULAR SUBJECTS.

A. Instruction And Training In The Catholic Faith.

The District Court examined ample evidence of the fact that Catholic grade schools engage in a substantial amount of religious education and training. There are religion classes, sacramental preparation, regular worship, and some religiously oriented extracurricular activities. 72 F. Supp. 2d at 837-838. But no case has held that the presence of a sizable amount of explicit religious training makes a school "pervasively sectarian." Petitioners do not seek to make this the first.

That the faith is taught basically explains why, despite the autonomy of secular subjects, Catholic schools are subject to the authority of the Church's pastors. It is an article of the Catholic faith that wherever the faith is taught, there is episcopal responsibility. This is true at the college level. Yet no Catholic college has ever been deemed "pervasively sectarian." According to the law of the Catholic Church, the bishop of Cleveland, for example, is responsible for the teaching of the faith in that place. See 1983 *Code of Canon Law* § 375, et seq. This extraordinary authority is based upon the solemn belief of Catholics, based upon the Gospel, that Jesus transmitted to the Apostles His own divine authority, and that the Apostles left bishops as their successors. Bishops therefore teach with the authority of Christ. See VAT. II, *Dei Verbum* (Dogmatic Constitution on Divine Revelation), § 7.

According to Church law the bishop is responsible for the welfare of Catholics in his territory. VAT. II,

Christus Dominus (Decree Concerning The Pastoral Office of Bishops), § 11. But this does not mean that he is involved in all the Church's local activities, or that all the Church does under his authority has to do with religion itself. The physical plant of a large archdiocese like Cleveland is the size of a small city. The many people responsible for servicing the plant perform tasks which are indistinguishable from those performed by, say, their municipal counterparts, even if the former work under the Archbishop's supervision.

The *Lemon* Court spoke of how "religious authority" pervaded the whole school system. 403 U.S. at 617. The District Court involved in *Mitchell* noted that the schools operated under the "general supervision" of the local bishop and the parish pastor, and counted such episcopal oversight as evidence of an illicit religious-secular compound. Petition at 143a. But on a proper understanding of Catholic doctrine, it is the counting which is illicit. The bishop possesses, it is true, a general supervisory role. But that arises, and has little meaning apart, from his special competence as authoritative teacher of the faith. It is either question begging or a form of illicit double counting to add his authority to the explicit teaching of religion as evidence of "pervasive sectarianism." His authority is an implication of what no one denies: Catholic schools teach the Catholic faith.[3] Again, however, this Court has never held that that alone renders a school pervasively sectarian.

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[3] The bishop may also hold legal title to all the church buildings in the locale, including grade schools. If so, then his authority pervades the schools for another reason independent of the integrity of secular teaching.

B. Personal Vocation

The atmosphere of liberty and charity in Catholic schools prominently includes teachers who live out and thereby witness to their *personal vocation*. What is the meaning of this crucial term?

Probably no concept was more central to the renewal of the Church accomplished at the Second Vatican Council in the mid-1960's than that of "personal vocation." Prior to that time "vocation" was widely understood to refer to the callings of priests, nuns, and brothers to the specifically religious life of chastity, poverty, obedience. But the Council reinvigorated the traditional teaching, then obscured, that everyone has a vocation. All lay persons – bricklayers, policemen, housewives, doctors, retirees – have a vocation, a specific calling from God to participate in building up good on earth, and thereby storing up material for heaven. The critically important thing is that vocation attaches religious meaning and significance – indeed, the highest kind, for it has to do with what God is calling one to do with one's life – to what are usually very mundane tasks:

> But by reason of their special vocation it belongs to the laity to seek the kingdom of God by engaging in temporal affairs and directing them according to God's will. They live in the world, that is, they are engaged in each and every work and business of the earth and in the ordinary circumstances of social and family life which, as it were, constitute their very existence. There they are called by God that, being led by the spirit to the Gospel, they may contribute to the sanctification of the world, as from within like leaven, by fulfilling their own particular duties.

VAT. II, *Lumen Gentium* (Dogmatic Constitution of the Church), § 31.

The Holy Cross Brothers who cultivated soybeans near South Bend had a personal vocation. So did all the other Catholic farmers in the area, as did the truckers who carried the produce to campus, and the food service workers who prepared it. This notion of personal vocation is basically identical to what then Vice President Gore meant when he said "The purpose of life is to glorify God." See Nat Hentoff, *God in School*, Washington Post, August 7, 1999, at A19. Mr. Gore did not mean that he would, or that anyone should, ceaselessly preach Christian doctrine. He meant that one should, and that he would, glorify God by doing well those tasks – secular ones – entrusted to him. Given the deep Christian convictions of so many Americans throughout our history, one may suppose that many members of Congress, governors, presidents, and judges have performed their constitutional duty as a calling from God, and as a way to praise God.

The aim of much recent Catholic theology of work and of Catholic engagement with contemporary culture – an engagement whose Latin term, *aggiornamento*, stands as one description of the Council's whole project – is to sanctify ordinary daily tasks. "Sanctification" is to do exactly what the non-Catholic person next to one does, but to do it well in order to serve God, to do it with a supernatural purpose added to the ordinary purpose of getting the job done. One may conclude that God wants one to be a farmer, a secretary, a toll collector, or a president. In each case one fulfills one's vocation by being the best secretary, or president, one can be.

The Declaration on Christian Education attaches the "highest importance" to the "vocation" of teachers, who

"help parents in carrying out their duties and act in the name of the community by undertaking a teaching career." GE § 5. The Declaration does not here mean the Roman Catholic "community" but the civil community. This is one reason why the sense of religious calling (or "vocation") which Roman Catholics (and members of other religious groups) experience teaching secular subjects *cannot* distinguish the "pervasively sectarian" school: it does not distinguish between public and private school teachers. A Catholic teaching in a public school would be living according to her personal vocation as much as a teacher in a Catholic school.

An additional, and more fundamental, reason why this important concept cannot be used to distinguish a "pervasively sectarian" school is that it would be unconstitutional to do so, a violation of the Free Exercise Clause, as interpreted by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993). Those cases stand for the proposition that where an action is generally prohibited, the Constitution does not require different treatment for believers who engage in the activity for religious reasons, or for the religious significance they see in or attach to it. The cases also stand for this corollary: where public authority generally permits an activity – say slaughtering animals – it may not discriminate against persons who would engage in the activity for religious reasons or for the religious significance they see in or attach to it. "It would doubtless be unconstitutional," the *Smith* Court said, "to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf." 494 U.S. at 877-78.

From these cases, one thing is perfectly clear: it would violate the Free Exercise Clause for the government to discharge or otherwise discriminate against a public school math teacher on the ground that the math teacher, like former Vice President Gore, was known to consider teaching math his calling from God. It follows that the presence of a similarly dedicated math teacher in a Catholic institution, or even a number of such devout teachers, cannot justify discrimination against that school.

C. Teachers As Moral Exemplars: Gospel Charity

The Second Vatican Council said that teachers "should bear testimony by their lives and their teaching to the one Teacher, who is Christ." GE § 8. This "testimony" is not preaching or explicit instruction in the faith. It is the silent "witness" one gives by living out one's personal vocation, by living a life of Christian charity. The more recent document on schools in the new millennium states: "teachers and educators fulfill a specific Christian vocation and share an equally specific participation in the mission of the Church to the extent that it 'depends chiefly on them whether the Catholic school achieves its purposes.' " *The Catholic School on the Threshold of the Third Millenium* § 19 (quoting GE § 8).

Catholic teachers are, in light of these authentic teachings, required to be examples of the morally upright life. In the 1960's the Archbishop of New Orleans publicly excommunicated – declared outside the Church – three ardent segregationists. See Timothy A. Mitchell, *A History Lesson*, Newsday, July 2, 1990, at 40. The District Court involved in the *Mitchell* case cited a policy of the Archdiocese of New Orleans by which teachers and principals might be discharged for a public lifestyle contrary to

church teaching. Similar policies are no doubt in effect in Cleveland, and in other dioceses throughout the country. We should thus expect that no segregationist or racist would find employment in New Orleans' Catholic schools, or in Cleveland.

That teachers are expected to exhibit good character is not a peculiarly Catholic policy. All teachers, if not most employees of all types, are expected to be of good character. That good character is expected to pervade Catholic schools is therefore no evidence of a suspect sectarianism. It is probably true that a few moral norms to which Catholic teachers must conform are not standards to which their public counterparts must conform. An adulterous relationship, for example, could lead to dismissal in a Catholic school but perhaps not in all public schools. But this, too, is not evidence of "sectarianism." For the Church teaches, as a matter of doctrine, that moral norms such as the prohibition of adultery are "written on the hearts" of all persons, that neither revelation nor the teaching authority of the Church is necessary to know that adultery, for example, is wrong. See Romans 2:14-15; John Paul II, Encyclical Letter *Veritatis Splendor*, §§ 75-9 (1993). Catholics believe that the immorality of such acts is part of the common patrimony of humanity, part of the natural moral law. And it is surely true that representatives of all the great religious traditions in America – Christian, Jewish, Muslim, Mormon – could, and do, accept them as valid.

It is and has always been the doctrine of the Church that in matters of what is today called "lifestyle," *everything* she teaches can be known by reason alone. If respondents wish to show that instead the Church teaches what is unreasonable, or what reason cannot know – and that therefore the good character of Catholic

teachers is a "sectarian" presence in the schools – then respondents (or anyone else who adopts that position) will have to prove it. They will have to engage, and refute, rational arguments by Catholics and others that justify Catholic teachings. That task has not been attempted in this case.

D. The Inference Stated As The Proposition That Secular Subjects Are Infected With Religion Is Unproved. Evidence Given For It In The Cases Amounts To A Violation Of The "Content Neutrality" Commanded By The First Amendment.

Catholic schools, Justice Douglas said in his concurrence in *Lemon*, "give the church the opportunity to indoctrinate its creed delicately and indirectly, or massively through doctrinal courses." *Lemon*, 403 U.S. at 630-31 (Douglas, J., concurring). Justice Rutledge, dissenting in *Everson*, said that religious and secular teaching are "commingled," causing the entire Catholic school to be "permeated" with religion. *Everson*, 330 U.S. at 47 (Rutledge, J., dissenting). Justice Douglas, dissenting in *Allen*, speculated about a "creeping sectarianism [which] avoids the direct teaching of religious doctrine but keeps the student continually reminded of the sectarian orientation of his education." *Allen*, 392 U.S. at 260 n.9 (Douglas, J., dissenting). He speculated that "[s]ome parochial schools may prefer those texts which are liberally sprinkled with religious vignettes." *Id.* He cited no evidence of the preference, and the texts challenged in *Allen* were approved by the state for use in public schools. But we are evidently invited to imagine students doing math problems with rosary beads, or practicing diagramming sentences drawn from the Baltimore Catechism. If and

when the record is compiled in a lawsuit – but, mercifully, not before – courts may have to grapple with the question of how many "vignettes" is one too many.

That number is surely much greater than zero. This Court had said that even *public* schools are not constitutionally required to ban the study, much less the mention (in "vignettes" or otherwise), of religion. *Schempp* invalidated devotional reading of the Bible in public schools. The *Schempp* Court stressed, however, that the Establishment Clause did not evict religion from the curriculum. See *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963). Integrated into the teaching of history, civilization, ethics, comparative religion and the like, the Ten Commandments may appropriately be taught. See *Stone v. Graham*, 449 U.S. 39, 42 (1981). The teaching of these cases is that public schools may not teach any sectarian doctrine as true. But the cases also mean that teaching about religion, say, through story telling or "vignettes," is not to be confused with prohibited indoctrination. For this reason, the many examples adduced by Justice Douglas of "creeping sectarianism" – which signers of the Declaration of Independence and the Constitution were Catholic, that Sir Edmund Hillary left a crucifix on Mt. Everest – do not count as evidence of "indoctrination." A *public* school teacher so inclined might just as well mention such curiosities. These "vignettes" may remind younger members of a particular minority group of the secular achievements of their forebears, accomplishments which may be consciously slighted in the public schools. In any event, such cultural and ethnic awareness is not peculiar to Catholic schools.

Justice Douglas' spirited assertions are generally wide of the mark. But they nevertheless express an important truth: many subjects required by state licensing

authorities – history, civics, and English – do not permit elimination of the personal interpretations of the teacher. No complete "objectivity" or "neutrality" is possible; insisting otherwise is either naive or an exercise in ideology. Depending upon the subject, upon student sophistication, and upon the ambition of the course, questions legitimately arise within classes in secular subjects which cannot be answered without reference to *some* point of view, *some* interpretive guide, *some* set of evaluative criteria, *outside* the subject. What caused the American Civil War? Did the Vietnam War conclude with an honorable peace? Should a literature course include Huckleberry Finn? If so, what should the teacher say about its portrayal of African-Americans? What did this Court mean when it said in *Brown v. Board of Education*, 347 U.S. 483 (1954), that African-Americans educated in segregated schools suffered psychological harm from the experience?

Where the state requires certain subjects to be taught, and where those subjects call for subjective treatment by individual teachers, a teacher's "take" does not smudge the subject's autonomy or integrity. The subject is completed, not compromised, by the added perspective.

Justice Douglas consistently used religiously loaded – which is to say, very Catholic – examples, including the Crusades and the Inquisition. But he had a point: there *will* be interpretation and evaluation by teachers of some mandated subjects. But what, exactly, is supposed to follow from that fact? The Justice seems to have thought that there were (wrong) sectarian answers, and (right) objective answers, to the inevitable interpretative questions. But objectivity is not possible here. And, as this court squarely held in *West Virginia State of Education v. Barrette*, there can be no politically "orthodox" answer. 319 U.S. 624, 642 (1943). What then could distinguish the

parochial school teacher's viewpoint as "sectarian" – as a basis for discriminatory treatment – from the public school teachers "objective" viewpoint?

It is true that teachers in Catholic schools may deal with the inevitable subjective elements of a course in a way consonant with Catholic teaching. This is one reason why practicing Catholics are preferred as teachers in Catholic schools. But to discriminate against institutions which adopt a particular viewpoint on debatable interpretations of required subjects such as history, civics, and literature, is to violate the viewpoint neutrality required by the First Amendment. See *Lamb's Chapel*, 508 U.S. 384 (1993).

The Catholic school is obviously not a government forum of any kind. But *Lamb's Chapel* is still closely analogous. Here we have a situation where the government certifies a school and requires it to teach certain courses. Those subjects, then, are much like the designated topics available for treatment in the nonpublic forum in *Lamb's Chapel*. The rule of that case applies: "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." 508 U.S. at 394 (quoting *Corneliau v. NAACP*, 473 U.S. 788, 806 (1985)). The government here is not "suppressing" speech. But the reason why it may not suppress speech in a government forum is the reason why it may not discriminate at all against viewpoints on required subjects: the First Amendment's required neutrality.

IV. CATHOLIC DOCTRINE FORBIDS "INDOCTRINATION" AS THAT TERM IS USED IN THE CASES: GOSPEL LIBERTY

"Indoctrination" is a term more often used in the cases than explained in them. This Court has often treated "inculcation" as a synonym. "Indoctrination" might therefore mean "teaching," the transmission of a particular body of thought – Catholicism – through lengthy instruction. If this simple meaning is the intended one, Catholic schools do not come close to "pervasively" indoctrinating students. No one asserts that Catholic schools teach religion most of the time – save in an extended, less wholesome, meaning of "indoctrination," to which we now turn.

The case containing this Court's most informative expression of what "pervasively sectarian" means did not involve primary and secondary schools, but Catholic colleges. In deciding that Catholic colleges were not "pervasively sectarian," Chief Justice Burger, writing for a plurality in *Tilton v. Richardson*, 403 U.S. 672 (1971), opined that college students were "less impressionable" and "less susceptible to indoctrination" than younger pupils. College students' "skepticism" equipped them to resist indoctrination. The "internal discipline" and "academic freedom" of higher education courses limited the opportunity for "sectarian influence." Finally, the Chief Justice observed that church colleges sought "to evoke free and critical response from the students." *Tilton*, 403 U.S. at 672.

The Chief Justice clearly sought to unfavorably compare, along all these lines, Catholic K-12 schools to Catholic colleges. He made explicit in *Tilton* what was often implicit, or evidently presupposed, in the K-12 cases: religious "indoctrination" was not the simple teaching of

Catholicism. The "indoctrination" characteristic of the lower schools traded upon pupils' lack of freedom and critical reflection. It did so in two ways. Either the students were commanded to believe – and that was that – or they were manipulated into believing, through a kind of brainwashing rather than through free assent. "Indoctrination" was heavy-handed, or insidiously subliminal.

The many judicial observations of Catholic schools offered to show "indoctrination" have appealed to popular stereotypes of Catholics (generally, not just children) as regimented followers, being commanded by their hierarchical masters. Caricatures so gross, and so harmful to another ethnic, racial, or religious minority, are not easily located in the U.S. Reports. (At least in cases that retain respectability. Cf. *Bradwell v. State*, 83 U.S. 130 (1872); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896); *Buck v. Bell*, 274 U.S. 200, 207 (1927)).

The judicial caricature of Catholic belief and practice requires only the following two-part rejoinder. One is that the role of liberty in any grade school child's education is limited and conditional. The state *compels* them to attend school. The state *compels* all schools, including Catholic schools, to teach certain secular courses. America's grade school children are, finally, present in a U.S. History class, for instance, because the state *compels* them to be present.[4] The liberty which permits some children to

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[4] We should not pretend that public schools do not seek to mold student's minds and hearts about a great many things. Students do not learn the virtues of socialism or racism in American primary schools, and that is a good thing. We cannot pretend that the students have any choice but to be present as they are taught that George Washington was the father of the country and that Martin Luther King was a great civil rights leader.

attend Catholic, rather than state schools, is not the liberty of any child. It is the liberty of parents. Their constitutional right to choose nonpublic schools this Court first recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This liberty the Catholic school respects even more than the state school, at least for parents who wish their children to receive an integrated education. This parental liberty has been from time out of mind the foundational moral imperative of Catholic educators. Parents, the Church has always taught, have the primary duty and therefore the right to direct the education of their children. All educators, including those running Catholic schools, are bound to view themselves as assisting parents to discharge, as the Catechism of the Catholic Church (§ 2221) states, this "primordial and inalienable" right and duty.

The parochial-school-aid cases are suffused with the specter of "indoctrination." Yet – and it does not go too far to term this omission shocking – in no case has this Court noticed the authoritative teaching of the Church on the most relevant subject: religious freedom. The Vatican Council in 1965 published *Dignitatis Humanae*, (Declaration on Religious Freedom) [Hereafter DH]. There, in solemn form, the Council Fathers speaking in union with Pope Paul VI, said that every human person has the right to religious freedom. Everyone is entitled to be free – by divine ordination – from coercion in religious matters. For God so created people and the rest of the world that "the truth cannot impose itself except by virtue of its own truth, or it makes its entrance into the mind at once quietly and with power." DH, § 1. "In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows

that he is not to be forced to act in a manner contrary to his conscience." DH, § 3.

These moral constraints upon the presentation of the faith do not pertain only, or even particularly, to the state, as if Catholic educators were free to coerce (or regiment or "indoctrinate") where the state is not. The morality of free religious belief protects everyone, and it constrains everyone. The pertinent moral norm is this:

> In spreading religious faith and in introducing religious practices everyone [including religious communities] ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or a kind of persuasion that would be dishonorable or unworthy. . . . [DH § 4 emphasis added.]

Were Catholic educators to command belief or manipulate children into accepting the faith, they would be acting immorally. A Catholic school which "indoctrinated" its pupils would not be Catholic.

V. CATHOLIC SCHOOLS ARE COMPLEMENTS TO, AND NOT COMPETITORS OF, THE PUBLIC SCHOOLS. OUR TRADITIONS CALL FOR FREE AND FRUITFUL COLLABORATION BETWEEN PUBLIC AUTHORITY AND PRIVATE INSTITUTIONS, INCLUDING CHURCHES, IN ENSURING THE BEST EDUCATION FOR ALL CHILDREN.

The history of the parochial school in America is inseparable from the history of majority groups' deep suspicion of Catholics – of their beliefs, of their ethnicity, and especially of their acceptance of our democratic way of life. This Court's treatment of the parochial school aid question has been colored by this ambient suspicion. The cases paint public and parochial schools as intense rivals for the hearts and minds of children, helplessly pulled

either toward the American way, or into a very different world, with ominously alien values.

This Cold War is over, too. Whether there was ever a basis in fact for the anti-Catholic fears which have so checkered our history, there is no longer. Catholic Americans have for centuries demonstrated their patriotism, by shedding their blood and by pledging their allegiance. The Church's commitment to democracy and freedom, moreover, is now firmly established as a matter of authoritative teaching. See generally John Paul II, Encyclical Letter *Evangelium Vitae* (1996).

Since this Court last invalidated a parochial school aid program in 1985 (*Aguilar v. Felton*, 473 U.S. 402; *Grand Rapids School District v. Ball*, 473 U.S. 373), there has developed a renewed appreciation for the role of religion in our public life, for the educational achievements of parochial schools, and for the value of free choice as a central element of our constitutional liberties. A plurality in *Mitchell* strongly criticized the characterization "pervasively sectarian," and for good reason: "[H]ostility to aid to pervasively sectarian schools has a shameful pedigree . . . it was an open secret that 'sectarian' was code for 'Catholic.' " 530 U.S. at 828. "This doctrine, born of bigotry, should be buried now." *Id.* at 829. These developments call for revisiting the concept of "pervasive sectarianism," and for abandoning it, at least as applied to Catholic schools. Then the free and fruitful collaboration of public authority and private institutions, characteristic of social services and health care, may come to the assistance of our nation's children, Catholic and non-Catholic alike.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent Of Public Instruction, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

And Related Cases

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

ABBREVIATED SUMMARY OF THE CASE..... 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THIS CASE WILL DECIDE WHETHER AMERICA'S CITIES CAN DEVELOP A DYNAMIC MARKET IN K-12 EDUCATION WHERE SCHOOL CHOICE AND COMPETITION IMPROVE SCHOOLS' PERFORMANCE AND TURN URBAN CHILDREN INTO THE WELL-EDUCATED ADULTS CITIES NEED TO THRIVE AGAIN 5

A. Cities Can Succeed Only If All Their Core Markets, Including K-12 Education, Are Allowed To Function..... 5

B. Government's Policy of Granting a Finance Monopoly to City K-12 School Systems, Rather Than Allowing an Education Market to Flourish, Is the Primary Reason Urban School Systems Fail..... 7

C. The Lack of a Market in K-12 Education is an Aberration..... 11

II. WISCONSIN AND OHIO HAVE RECAST THEIR PROGRAMS THAT HISTORICALLY SENT STATE PER-PUPIL AID PAYMENTS ONLY TO PUBLIC SCHOOLS INTO EVEN-HANDED PROGRAMS THAT PERMIT MILWAUKEE'S AND CLEVELAND'S POOR PARENTS TO DIRECT AID TO THE PARENTS' CHOICE OF A PUBLIC, PRIVATE, OR PAROCHIAL SCHOOL 16

TABLE OF CONTENTS – Continued

Page

III. THE PURPOSE AND PRIMARY EFFECT OF WISCONSIN'S AND OHIO'S SCHOOL CHOICE PROGRAMS HAS BEEN TO PUT INTENSE COMPETITIVE PRESSURE ON THE PUBLIC SCHOOLS TO IMPROVE THEIR PERFORMANCE AND TO GIVE DISSATISFIED PARENTS ADDITIONAL EDUCATIONAL OPTIONS, NOT TO HELP OUT PAROCHIAL SCHOOLS 19

IV. ESTABLISHMENT CLAUSE PRINCIPLES AND PRECEDENTS DO NOT BAR EITHER WISCONSIN'S OR OHIO'S EVEN-HANDED PROGRAM OF LETTING LOW-INCOME PARENTS DECIDE TO DIRECT STATE PER-PUPIL AID TO THEIR CHOICE OF A PUBLIC, PRIVATE NON-SECTARIAN, OR PAROCHIAL SCHOOL..... 23

V. CONCLUSION: THE COURT SHOULD RESPECT STATE DECISIONS TO CREATE EVEN-HANDED EXPERIMENTS IN SCHOOL CHOICE THAT WILL CREATE A DYNAMIC URBAN MARKET IN K-12 EDUCATION AND HELP INVIGORATE OUR NATION'S BIG CITIES 29

APPENDIX A: U.S. Urban Public School Systems.... 1A

APPENDIX B: City of Milwaukee: Total Crime Index: 1950-2000 ..... 1B

APPENDIX C: U.S. Welfare (AFDA/TANF) Caseloads: 1950-2000..... 1C

APPENDIX D: U.S. Central City Poverty Rates: 1969-1999 ..... 1D

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) ..3, 25, 27, 28, 30

Aguilar v. Felton, 473 U.S. 402 (1985) 27

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Meek v. Pittenger, 421 U.S. 349 (1975)..... 24

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TABLE OF AUTHORITIES – Continued

Page

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Page

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INTEREST OF THE AMICI CURIAE

Mayor Rudolph W. Giuliani of New York, as chief executive of the city with the largest public school system in the country, has proposed several pilot programs for publicly funded school choice programs modeled upon the Milwaukee plan. Mayor Giuliani has also collaborated in a successful privately funded school choice program. Mayor John O. Norquist of Milwaukee is chief executive of the city with the largest publicly funded school choice program in the United States. Mayor Norquist has long supported school choice in order to stimulate the Milwaukee Public Schools to improve, provide Milwaukee parents with more educational options, and transform Milwaukee's overall educational system into a reason for living in Milwaukee. Each mayor oversees a city whose public education system has many excellent teachers and principals as well as many fine individual schools, but which has consistently failed as a whole to educate successfully the great majority of the city's children.[1]

The mayors joining in this brief support the petitioners in this case. Both mayors have supported the adoption of a new policy (which, in the case of Milwaukee, has become law) that permits low-income parents to direct state per-pupil education assistance to the parent's choice of a public, private non-sectarian, or parochial school. They seek a dynamic market in K-12 urban education that will put intense competitive pressure on their public school systems to improve and that will

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[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief.

provide the poor with educational alternatives they cannot now afford, thus helping their cities to revive. While each mayor may not subscribe to all particulars of every argument set forth, they agree that the Establishment Clause, as construed by the Court, does not prohibit the kind of school choice program that Wisconsin and Ohio have adopted.

ABBREVIATED SUMMARY OF THE CASE

Both Wisconsin's and Ohio's school financing systems are complex, but they share one key feature. Historically, both allowed parents to direct the state's per-pupil aid only to public schools. In the 1990's, however, first Wisconsin and later Ohio added the unique feature around which this case swirls. Both states gave school choice to low-income parents in their biggest cities with the most troubled public school systems, Milwaukee and Cleveland. The Milwaukee Parental Choice Program (MPCP), Wis. Stat. Sec. 119.23, as amended, and the Cleveland Pilot Project Scholarship Program (CPPSP), Ohio Rev. Code 3313.974-3313.979, authorized low-income parents to direct a portion of the state's per-pupil aid payment to their choice of a public school, private nonsectarian school, or parochial school.

The Wisconsin and Ohio programs meet the Neutrality Test requirement that a state neither endorse a school, nor otherwise apply overt or subtle pressure on parents or students to attend or refrain from attending it, either because it is or is not a religious school. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Mitchell v. Helms*, 530 U.S. 793 (2000). This case

hinges on three additional Establishment Clause concerns that have emerged from the Court's decisions in *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); and *Agostini v. Felton*, 521 U.S. 203 (1997). These cases make clear that state education aid programs that provide school choice are permissible if they (1) allow the parent or student to direct state aid even-handedly, as on a level playing field, to all types of schools, including public as well as private schools, and giving equal treatment to non-sectarian and parochial schools; (2) have a secular purpose; (3) have a primarily secular effect.

This brief *amicus curiae* will show that both the Wisconsin and Ohio school choice programs meet all relevant Establishment Clause standards in their effort to create a well-functioning market of competing urban schools, improve city children's educational performance, and help cities themselves to revive

SUMMARY OF THE ARGUMENT

Although the legal issue in this case is narrow, its reach is momentous. It will decide whether the states, by injecting choice and competition into urban K-12 education, can create an effective market in K-12 schooling that succeeds in adequately educating most city children, an outcome America's cities desperately need in order to thrive again.

America's big cities are poised on the brink of recovery. Government, which dispersed their populations,

spread out their landscapes, and damaged their core markets during the post-war era, has reversed many of the policies on crime, welfare, and urban design that triggered urban decline. As a result, cities and their markets have begun to rebound. The one huge, seemingly immovable obstacle to recovery is cities' K-12 education systems: powerful and unresponsive monopolies, to which states give virtually all public funds for K-12 education, and which fail to educate successfully most poor and near-poor students while driving middle class parents to suburbs (where their purchasing power gives them a wide selection of schools).

A few states – first Wisconsin, and later Ohio – finally acted to restructure urban education, in an attempt to rescue the education of big-city children and the cities they inhabit. Both states' legislatures ended the monopoly over state per-pupil payments that, historically, public school districts alone enjoyed. They substituted, in Milwaukee and Cleveland, a system of school choice that lets low-income parents direct state per-pupil aid to whatever school the parents believe will best educate their children: public, private non-sectarian, or parochial.

The Court has consistently construed the Establishment Clause in a manner that permits state legislatures, the laboratories of our democracy, to pursue this type of bold (if controversial) experiment. Both the Wisconsin and Ohio programs are neutral and even-handed as to the educational choices parents make. Both state programs create a level playing field that includes public as well as private schools (if anything, favoring public schools over non-public ones) and that treats private non-sectarian and parochial schools the same. Both programs meet the

Lemon tests for secular purpose and primary secular effect.

The Court should reverse the judgment of the 6th Circuit Court of Appeals, and allow states to proceed with well-crafted school reform plans that inject choice and competition into urban education, revive our cities' moribund markets in K-12 schooling, and permit America's cities to complete their rebirth.

ARGUMENT

I. THIS CASE WILL DECIDE WHETHER AMERICA'S CITIES CAN DEVELOP A DYNAMIC MARKET IN K-12 EDUCATION WHERE SCHOOL CHOICE AND COMPETITION IMPROVE SCHOOLS' PERFORMANCE AND TURN URBAN CHILDREN INTO THE WELL-EDUCATED ADULTS CITIES NEED TO THRIVE AGAIN.

This case will do far more than determine whether several thousand vulnerable children in Milwaukee and Cleveland receive a decent education. It will ultimately decide whether American cities can develop a dynamic and productive market in K-12 education, which our cities desperately need to thrive again.

A. Cities Can Succeed Only If All Their Core Markets, Including K-12 Education, Are Allowed to Function.

Cities can succeed – cities can accomplish their mission of creating wealth and civilization[2] – only if government protects their fundamental structure and nurtures

[2] The Latin word *civitas* is the root word for both cities and civilization.

their core markets.[3] Population density and proximity define a city's structure. Four core markets, shaped by the city's structure, drive its economy. The urban labor market is the primary reason adults come to cities and remain there: to exchange their labor for the highest wages paid by thousands of competing nearby employers. The urban consumption market relies on the basic structure of a city – the physical proximity between buyers and sellers, and the grid of streets lined with shops – to match buyers' wants with sellers' supplies, and to stimulate the competition that drives down price and improves quality through rising productivity. The urban market for allocating capital depends on a city's population density and proximity, as well as its network of sidewalks, streets, streetcars, subways, trains, and multiple gathering places, to optimize the flow of information between investors and firms and to rationally allocate capital.[4]

The fourth core urban market is education. Schools are the primary mechanism for converting raw youth into a value-adding workforce (whose pursuit of employment then sustains the virtuous urban cycle of smooth labor exchange, efficient consumption, and rational allocation of capital). Because (1) the student population in a city is both huge and concentrated, (2) the number of schools is large, and (3) the two key ingredients for a market, wide choice and intense competition, are both possible, cities provide an ideal venue for connecting a diverse student

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[3] See John O. Norquist, *The Wealth of Cities: Revitalizing the Centers of American Life* (Addison, Wesley, 1998), for a more detailed discussion of urban structure and markets and the impact of government policy on cities' success.

[4] Norquist, pp. 18-20.

population to the best-fitting schools and turning them into highly-educated adults.[5]

Cities *ought* to have excellent K-12 schools. Rather than flee cities because of their schools, middle class parents should be flocking *into* cities to take advantage of the wide array of superb K-12 choices and superior educational performance that arise from intense urban school competition. But flocking *into* big cities to get an excellent education happens in the United States only when it comes to higher education. No middle class or wealthy family moves to New Haven, Chicago, or Washington, D.C., to enroll their children in those cities' K-12 school systems. Yet parents from across the nation (and around the world) gladly send their children to New Haven to attend Yale; to Chicago's south side to enroll at the University of Chicago; or to Washington, D.C. to attend Georgetown. Why don't big cities K-12 schools succeed like their world-class universities?

B. Government's Policy of Granting a Finance Monopoly to City K-12 School Systems, Rather Than Allowing an Education Market to Flourish, Is the Primary Reason Urban School Systems Fail.

The main reason why America's big cities have failing K-12 school systems but world-class universities is the difference between how government structures and finances urban K-12 schools versus how it structures and finances urban universities. Federal and state government provide massive funding to both big-city K-12 schools and big city universities. But government, the

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[5] Norquist, pp. 20-21.

dominant financier of K-12 education, requires that virtually all K-12 spending must go to public schools. Government funding for higher education, by contrast, permits a high degree of school choice. The GI bill, the federal Pell Grant program, and state tuition grant programs give aid directly to students, who then choose whether to direct the money to a public, private nonsectarian, or parochial school.[6]

It is no coincidence that "choice-rich" urban universities do such a splendid job while "choice-poor" K-12 school systems fail to educate a huge portion of urban children. Choice stimulates competition. Competition improves outcomes. As Thomas Jefferson wrote: "I have thought it better for the public to go to market for whatever it wants which is to be found there."[7] By denying choice to the vast majority of urban children, choking off inter-school competition, and suppressing the K-12 education market, government has condemned urban K-12

[6] *Amicus* Norquist, for instance, while a resident of the State of Illinois, used an Illinois Tuition Grant scholarship to attend Augustana College, a private Lutheran College located in Rock Island, Illinois. Later, as a Wisconsin State Senator, Norquist helped craft the Wisconsin Legislature's Tuition Grant program, under which a qualifying Wisconsin resident receives a scholarship that can be turned over to a public school like the University of Wisconsin, a private non-religious school like Lawrence University in Appleton, or a private school with a major religious affiliation such as Marquette University in Milwaukee.

[7] Thomas Jefferson to William B. Bibb, 1808, *The Writings of Thomas Jefferson*, Memorial Edition, Lipscomb and Bergh, editors, 1903-04, Vol. 12, p. 107.

school systems to failure in their attempt to educate most city children.[8]

New York City, with its 1,100,000 public school students from almost every nation on earth, is a prime example of the deficiencies of the present monopolistic public education system. The Mayor appoints only two of the seven member of the New York City Board of Education, which in turn appoints the Chancellor who runs the daily operations of the school system. The Chancellor presides over a huge bureaucracy of 3,700 central administrators (3,500 more than in the 1950s when the system served the same number of children far more successfully) as well as over 32 semi-autonomous local school boards with an additional 1,200 administrators. This structure diffuses responsibility to such an extent that no one is ultimately answerable to the citizenry, particularly to the parents who entrust their children's education to the system.

As a consequence of this unwieldy structure, the City school system has slowly deteriorated over the past 30

[8] The social and economic problems that urban children bring to school, the inequitable funding of both city and rural education, and other factors contribute to the problem. But most urban teachers and principals are committed and competent, and many individual urban schools overcome their students' handicaps and their own lack of resources to produce well-educated pupils. The problem with urban education lies in the system as a whole. Like other large monopolies, urban K-12 school systems are incapable of improving their performance across the board because their student populations are captive and no one in the system faces a significant financial incentive to do better personally or, more importantly, ensure that the school does better.

years, with costs rising almost in direct proportion to falling test scores. From fiscal year 1997 to fiscal year 2001, spending for operating costs alone rose from $8.1 billion to almost $12 billion. The average amount spent per pupil since 1970 has increased by 48% in constant dollars. Yet although the City spends 30% more per pupil than the national average and its pupil-to-teacher ratio has fallen from 30:1 in the 1950s to 12:1 in the 1990s, school performance has deteriorated as sharply as in virtually all other big-city school districts.

In 2000, only 40% of elementary school students scored at an acceptable performance level on the citywide reading test, and only 33% performed acceptably on the math test. At the high school level, no more than 50% of public school students complete their studies within the normal four years, and only 58% receive a traditional high school diploma in seven years. In 1998, the most recent year for which data is available, only 16% of City students passed all five parts of the State Regents exam, compared to 59% for the remainder of New York State. City public school students also score lower on national standardized tests. Even though only 35% on average took the SAT between 1996 and 1999, compared to 73% of New York State students, City students consistently scored about 40 points lower than the state average.[9]

[9] Emanuel Tobier, "New York City Public Schools: The Facts About Spending and Performance," Manhattan Institute for Policy Research, Civic Bulletin No. 26, May 2001. Elementary student results on statewide reading and math tests are different but also low. See Appendix A.

Since 1989, the New York State Education Department has been issuing a list of low performing public schools that are targeted for corrective action and run the risk of being closed if significant improvements are not made. Nearly 90% of the schools placed on this SURR list (Schools Under-Registration Review) have been located in New York City, even though only 20% of the schools in the state are New York City public schools. Presently 98 of 114 schools on the list come from the City's five boroughs. A disproportionate number of the children attending these schools are African-American or Hispanic, and the schools have a disproportionate number of teachers who are not fully certified and have less than five years of experience in the classroom.[10]

New York City is not unique in its inability to provide most of its children an adequate education. As Appendix A illustrates, America's big-city public schools systems across the board have low graduation rates. The great majority of urban students in Milwaukee and Cleveland also perform poorly on standardized reading and math tests. The education finance monopoly takes a terrible toll in the thwarted dreams of our nation's most vulnerable children.

C. The Lack of a Market in K-12 Education is an Aberration.

For most of American history before 1945, government respected cities' essential urban features, population density and proximity. Government did not disrupt

[10] Joseph P. Viteritti, "The Tip of the Iceberg: SURR Schools and Academic Failure in New York City," Manhattan Institute for Policy Research, Civic Report No. 16, July 2001.

most of cities' core markets. The exception was K-12 education. Government, the dominant financier of K-12 education, has funded only public schools since the mid-19th century, suppressing for 150 years the growth of a market in urban K-12 education.

Only after our country won World War II did government policy across the board become hostile to America's cities. For the next 50 years, government policies helped to decimate cities' population, undermine their proximity, and injure all four urban markets. Government's failure to contain crime, especially during the period 1960-1990, inflicted enormous harm on cities' density and labor markets.[11] Welfare policy also damaged cities' labor markets, as government expanded AFDC and related welfare programs that paid poor parents more *not* to work than

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[11] From 1950 to 1990, crime in America's cities climbed steeply. Appendix B depicts the trend in Milwaukee, where the Total Index Crime increased sevenfold from under 8,000 to over 55,000 reported crimes. Law enforcement officials in many cities focused so intensively on fighting "serious" crime that they stopped clamping down hard on "low level" criminal conduct like graffiti, public disturbances, street prostitution and other types of public disorder. But it is precisely the lack of public order that creates an environment conducive to crime, frightens ordinary citizens, and drives those who can to leave disorderly city neighborhoods for safer territory. See James Q. Wilson and George L. Kelling, "Broken Windows," *The Atlantic Monthly*, March 1982, pp. 29-38. The resulting depopulation of many U.S. cities, and especially the exodus of so many middle class families, helped create a new "spatial mismatch" between inner-city jobseekers and suburban job vacancies, which increased unemployment and disrupted the normal workings of the job market. See William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (University of Chicago Press, 1987).

to take a job.[12] Government "urban renewal" and transportation policies meanwhile brutalized America's cities, obliterating entire working class neighborhoods in order to construct monstrous, dysfunctional housing projects, and ramming big multi-lane roads through some of the densest neighborhoods in the United States. Finally, government continued throughout the 1945-90 period to deny school choice, thwart competition and suppress cities' natural markets in K-12 education.

Not until the 1990s did government begin to reverse its destructive policies, except in education. In the 1990s, police and prosecutors began to adopt effective crime-fighting techniques, including the "broken windows" strategy of law enforcement, under which the police concentrate not only on "serious" crimes (like murder, rape, and robbery) but on "quality of life" offenses (like graffiti, public drunkenness, etc.). Reinforced by a generally good national economy, these new techniques produced dramatic reductions in urban crime. The sharp drop in crime in turn helped to improve the urban labor

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[12] From 1950 to 1994, the Aid to Families with Dependent Children (AFDC) caseload rose from under 1 million to nearly 5 million families. Appendix C depicts the trend. Paralleling the growth of AFDC, central city poverty rates (after an initial decline in the early 1960s due to improvements in the Social Security program for retirees) also rose. Appendix D shows the growth in the central city population below the federal poverty line from 12.7% in 1969 to 21.5% by 1993. The growth in welfare and poverty also harmed cities' consumption markets. Although even the poorest urban neighborhoods often have greater purchasing power per square mile than the most affluent suburb, the rise in AFDC and poverty from the mid-1960s to the mid-1990s reduced that purchasing power.

market by inducing some retailers and manufacturers to return to the city.[13]

In the mid-1990s, government also reversed course on welfare, replacing AFDC with a new system that encourages work and supports workers. Instead of paying the poor *not* to work and thus disrupting the labor market, government began to help low-income adults to find and sustain employment within the labor market.[14] The 1990s also witnessed a major reversal of government policy on the design of cities. Government stopped

[13] Appendix B depicts the reduction in Total Index Crime in Milwaukee from 1990 to 2000 from over 55,000 to under 45,000 reported crimes. See Wilson and Kelling, "Broken Windows" and "Making Neighborhoods Safe," *The Atlantic Monthly*, February 1989, pp. 46-52 for a fuller description of the "broken windows" approach to reducing crimes by restoring public order.

[14] The new federal program, Temporary Assistance to Needy Families (TANF), limits cash payments, requires work activity, and directs states to connect impoverished parents to the labor market. During the 1990s, the federal government also dramatically expanded the Earned Income Tax Credit, which supplements low-wage workers' earnings, and funded child care and health insurance for low-income workers. The new policy, coupled with the economic boom of the 1990s, quickly shrunk America's welfare roles by half between 1994 and 2000, from over 5 million families to under 2.5 million families. See Appendix C. In some states caseloads dropped even more: Wisconsin's caseload dropped by 80%. While a troubling fraction of the former AFDC population has ended up in homeless shelters and food pantries, the great majority of welfare recipients ended up in jobs. Poverty in the U.S. in general declined between 1993 and 1999, and central city poverty fell from 21.5% to 16.4% of the central city population. See Appendix D.

building wretched housing projects, and chose instead to demolish some and reconfigure others with traditional city street grids.[15] A new appreciation of the classic urban form took hold among city planners and elected officials. Middle class Americans rediscovered the intimacy and excitement of big cities. Young adults and retired couples – virtually all, sadly, without school-age children – began to move into city lofts and condominiums.

Urban education stands apart as the one area where government during the 1990s failed to repair the damage its policies have inflicted on cities. Government refused to give up on the monopoly model of organizing and financing K-12 schools. Its failure to resuscitate the natural urban market in K-12 education undermines the progress that America's cities made during the 1990s on every other front.

Recognizing the states' role as America's experimental laboratories, first Wisconsin's and then Ohio's legislature finally ventured in the mid-1990s to end the historic monopoly over per pupil state aid for K-12 students that each state had granted to public schools. Both states passed laws that gave educational choice to the poorest city students in Milwaukee and Cleveland, allowing their

[15] The nationally televised demolition of the Pruitt-Igoe housing project in St. Louis in 1972 prefigured other less notorious demolitions. Milwaukee's rehabilitation of its Hillside housing development, which involved rebuilding the old city street grid, installing ornamental street lights, adding porches onto most units, and building an addition to the Boys and Girls Club, won several national awards.

parents to direct state per pupil aid to whatever K-12 schools their parents thought would best educate their children regardless of whether the school is public, private non-sectarian, or parochial. The larger issue in this case is whether the Court will let states proceed to forge the missing link – the creation of a dynamic market in K-12 education – without which the revival of America's great cities will never be complete.

II. WISCONSIN AND OHIO HAVE RECAST THEIR PROGRAMS THAT HISTORICALLY SENT STATE PER-PUPIL AID PAYMENTS ONLY TO PUBLIC SCHOOLS INTO EVEN-HANDED PROGRAMS THAT PERMIT MILWAUKEE'S AND CLEVELAND'S POOR PARENTS TO DIRECT AID TO THE PARENTS' CHOICE OF A PUBLIC, PRIVATE, OR PAROCHIAL SCHOOL.

The Wisconsin and Ohio school aid formulas are extremely complex. The Milwaukee Parental Choice Program (MPCP) and the Cleveland Pilot Project Scholarship Program (CPPSP) added to the complexity by allowing low-income parents in Milwaukee and Cleveland to direct a portion of the aid to the parents' choice of a public, private non-sectarian or parochial school. The bottom line, however, can be reduced to a simple chart:[16]

[16] The chart is compiled from the following sources: Memo from Bob Lang, Director, Wisconsin Legislative Fiscal Bureau, to Members of the Wisconsin Legislature, "2000-01 Estimated State Support for School Districts," February 15, 2001; Wisconsin Department of Public Instruction, "Milwaukee Parental Choice Program (MPCP): MPCP Facts and Figures for 2001-2002"; Ohio Rev. Code at 3317.02(B); and Ohio Rev. Code 3313.974-3313.979.

Type of School	State Aid Per Student (2000-2001)
Milwaukee:	
Public	$5,670 in "general school aids" plus categorical aid
Private Non-Sectarian	$5,326
Parochial	$5,326
Cleveland:	
Public-Cleveland City School District	$4,294 "base formula amount" plus: • cost of doing business adjustment • categorical aid • extra payment if student is enrolled in a tutoring program
Public-suburban district	$4,294 "base formula amount" plus: • cost of doing business adjustment • categorical aid • extra $2,250
Private Non-Sectarian	$2,250
Parochial	$2,250

Under both programs, the public school district stands to gain or lose its entire base per pupil payment ($5,670 in "general school aids" in the case of Milwaukee, or $4,294 in "base formula payment" in the case of Cleveland, using 2000-2001 school year dollars) whenever a parent chooses to enroll or disenroll a student in one of the district's public schools. A private non-sectarian or parochial school stands to gain or lose a percentage of the state's base per-pupil payment (approximately 94% or $5,326 in the case of Milwaukee, and 52% or $2,250 in

Cleveland) should the parent instead choose to enroll or disenroll the student in a non-public school.

The two states' approaches differ in some of their details, but the key feature they share is the only one that matters for Establishment Clause purposes. Only as part of a general statewide program that allows a parent to freely direct a minimum state per-pupil aid payment to the parent's choice of a public school may Milwaukee's or Cleveland's low-income parents send state dollars to a private secular or religious school.[17]

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[17] As early as the 1970s, the Wisconsin Legislature started creating programs that allowed parents to send their children to and direct a portion of the state's per pupil aid payment to "non-traditional" public or private non-sectarian schools. In 1976, the Wisconsin Legislature allowed minority students, mostly from Milwaukee, to carry state aid to suburban schools. Wis. Stat. Secs. 121.845-121.87. In 1985 the legislature permitted at-risk students, of whom Milwaukee has a disproportionate share, to carry state aid to private, non-sectarian schools. Wis. Stat. Sec. 118.153. In 1990, the original Milwaukee Parental Choice Program (MPCP) became law, permitting a very small number of low-income Milwaukee children to attend – and direct state aid to – private, non-sectarian schools. The 1991 Post-Secondary Enrollment Options (now Youth Options) program, which permits high school students to attend college classes, Wis. Stat. Sec. 118.37, renumbered Wis. Stat. Sec. 118.55; the 1993 legislation authorizing charter schools, Wis. Stat. Sec. 118.40; the recent Open Enrollment law that allows all Wisconsin children to transfer to other public school districts, Wis. Stat. Sec. 118.51; and the even more recent law that authorized the University of Wisconsin-Milwaukee, the Milwaukee Area Technical College, and the City of Milwaukee to grant charters to schools, Sec. Wis. Stat. 118.40 (2r); all permit parents of Wisconsin children – in some cases, Milwaukee children only – to direct state education aid to either a public or private non-sectarian school if the parents believe the alternative is a better choice. Ohio has similarly given Cleveland

III. THE PURPOSE AND PRIMARY EFFECT OF WISCONSIN'S AND OHIO'S SCHOOL CHOICE PROGRAMS HAS BEEN TO PUT INTENSE COMPETITIVE PRESSURE ON THE PUBLIC SCHOOLS TO IMPROVE THEIR PERFORMANCE AND TO GIVE DISSATISFIED PARENTS ADDITIONAL EDUCATIONAL OPTIONS, NOT TO HELP OUT PAROCHIAL SCHOOLS.

Both Wisconsin's and Ohio's rationale for school choice rested on two secular objectives:

First, to put intense pressure on the public school system to dramatically improve its educational effectiveness by compelling it to compete for students.

Second, to give parents and students who are dissatisfied with their traditional public school assignments a wider array of alternatives that meet the students' educational needs.

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parents the option to enroll their children in certain "non-traditional" public or private non-sectarian schools. In 1999-2000, 16,184 Cleveland students took $7,097 each to "magnet" schools, while 2,087 brought $4,518 per pupil to "community" (charter) schools. While these programs expanded parental choice and marginally reduced the Milwaukee and Cleveland public school districts' monopolies, they were a very narrow partial measure. Some students did not qualify, and the number of available seats in alternative non-public schools was very limited. Above all, the main source of alternative schooling – parochial schools – were excluded. The Wisconsin and Ohio Legislatures therefore decided, consistent with *Nyquist*, that in order to create intense competitive pressure on all schools and maximize the number of educational options, state aid should be made available regardless of the public/nonpublic or sectarian/non-sectarian nature of the school.

The Wisconsin record is quite clear that both of these secular purposes constituted the motivation for amending the Milwaukee program to include more students and add the option of parochial schools.[18] Ohio's secular intent is also plain.[19]

In both states, the new policy achieved its secular purpose and produced a primarily secular effect. There is widespread consensus in Wisconsin and among scholars that the expansion of the MPCP to additional students and parochial schools succeeded in putting intensive competitive pressure on Milwaukee Public School to improve the public schools for the vast majority of Milwaukee's school children who continue there.[20]

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[18] As the Wisconsin Supreme Court stated, "[T]he secular purpose of the amended MPCP . . . is virtually conceded." *Jackson v. Benson*, 218 Wis.2d 835 at 857, 578 N.W. 2d 602 at 612 (Wisc. 1998), *cert. denied*, 525 U.S. 997 (1998).

[19] As the Court declared in *Mueller*, "A state's decision to defray the cost of educational expenses incurred by parents – regardless of the type of schools their children attend – evidences a purpose that is both secular and understandable." 463 U.S. at 395.

[20] See Caroline M. Hoxby, Harvard University and National Bureau of Economic Research, "School Choice and School Productivity (Or, Could School Choice Be a Tide That Lifts All Boats," Conference on the Economics of School Choice, Islamorada, FL, February 22-24, 2001, p. 40. ("Overall, an evaluation of Milwaukee suggests that public schools have a strong, positive productivity response to competition from vouchers. The schools that faced the most potential competition from vouchers had the best productivity response. In fact, the schools that were most treated to competition had dramatic productivity improvements. . . . [T]he productivity effects of competition may be understated because the control group of schools was a slightly unfair comparison group with fewer poor and minority students.") See, also, Sam Schulhofer-Wohl,

Under pressure from school choice, Milwaukee Public Schools went all out to improve its quality and appeal. Among other steps, Milwaukee Public Schools has (1) shut down and reconstituted dozens of failing schools; (2) negotiated with its teachers union an exciting new program to "counsel out" teachers whose skills or attitudes no longer justify their remaining in the classroom; (3) decentralized to the school level much of the responsibility for teacher hiring, school budgeting, and curriculum; (4) replicated specialty schools that historically turned students away because of space shortages (e.g., doubled the number of Montessori schools); (5) approved a massive neighborhood school initiative that will increase the number of schools that students can walk to; (6) converted numerous half-time K-4 kindergartens to full-time; (7) converted a large number of K-6 elementary schools to K-8; (8) embarked on a major expansion of before-school and after-school child care and recreation programs; (9) approved a record number of its own charter schools, including both conversions of regular public schools into charter schools and contracts with non-profit organizations; and (10) launched a massive citywide effort to publicize its successes to prospective and current parents.

"Choice Program Pushed Schools to Improve, Study Says," *Milwaukee Journal Sentinel*, April 24, 2001, and "Competition Helps MPS," editorial, *Milwaukee Journal Sentinel*, April 25, 2001 ("[Hoxby's] work does reinforce an impression shared by many observers, including this newspaper's Editorial Board, that school choice has prompted innovation within the Milwaukee Public Schools.")

The critics of school choice claimed that competitive pressure would cause Milwaukee Public Schools to fall apart soon after the expanded MPCP became law. Nothing of the sort happened. Notwithstanding a decline in the total citywide school age population from 151,710 in 1996 to 150,256 in 2001, Milwaukee Public Schools decisions to improve its quality, expand its programs, and reach out to parents and students in response to competitive pressure caused the public school district's enrollment to grow from 106,910 in 1996, to 107,905 in 2001.[21]

The second purpose for expanding Milwaukee's school choice program, i.e., to create more educational options, also came true. The Milwaukee program has made it possible for nearly 11,000 low-income children to attend over 100 private non-sectarian and parochial schools that previously were beyond their reach.[22]

Empirical evidence of the positive pressure the Cleveland program has placed on the Cleveland City School District to improve has not yet emerged. Both Milwaukee's experience and competitive theory, however, strongly suggest that Cleveland's public schools will seek to improve in response to the thousands of students who use the Cleveland program to attend non-sectarian and parochial schools. During the 1999-2000 school year,

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[21] Richard W. Moore, Director, and Susan Bergerson, Census Supervisor, Milwaukee Public Schools, "Comparative Statement of Annual School Census" in "City of Milwaukee Child Census," June 30, 2001. During the 1996-2001 period, the number of students attending private schools actually dropped from 27,934 to 26,479 even as the number participating in the MPCP grew from under 500 to approximately 9,600.

[22] Wisconsin Department of Public Instruction, "Milwaukee Parental Choice Program," p. 1.

approximately 3,800 Cleveland students used the CPPSP to attend 10 non-sectarian and 46 parochial schools. The second secular effect of the CPPSP is self-evident: the program enables thousands of poor Cleveland school children to take advantage of educational options their parents could otherwise not afford.

IV. ESTABLISHMENT CLAUSE PRINCIPLES AND PRECEDENTS DO NOT BAR EITHER WISCONSIN'S OR OHIO'S EVEN-HANDED PROGRAM OF LETTING LOW-INCOME PARENTS DECIDE TO DIRECT STATE PER-PUPIL AID TO THEIR CHOICE OF A PUBLIC, PRIVATE NON-SECTARIAN, OR PAROCHIAL SCHOOL.

This Court, in its ruling in *Nyquist*, reserved the question of whether the Constitution might tolerate "some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." 413 U.S. at 756, n. 38 (1973). The school choice financing system that Wisconsin and Ohio have evolved presents exactly the kind of "public assistance . . . made generally available" that the *Nyquist* case pointed to.

Both states have created a system of state per-pupil aid payments, certainly a type of "public assistance." These per-pupil aid payments attach to every K-12 student in the state and "follow" *each* K-12 student to every public school district in Wisconsin or Ohio, which is surely what the Court meant in describing such public assistance as being "made generally available." Finally, both states have decided, in the case of each state's most troubled school district, that a percentage of the per-pupil aid that it provides to all students who attend public school (i.e., 94% in Milwaukee, 52% in Cleveland) may

alternatively be directed to a private non-sectarian or a parochial school. This makes such aid generally available "without regard to the sectarian-non-sectarian, or public-nonpublic nature of the institution benefited."

This case thus confronts the Court with the question *Nyquist* did not answer. Does the Establishment Clause tolerate a state K-12 education financing program, similar in economic structure to the federal GI Bill or Pell Grant programs for higher education, under which the state gives parents the right to direct per pupil aid to their choice of a public, private non-sectarian, or parochial school?

The first test, the Neutrality Test, requires that a state school choice plan that includes parochial schools must never endorse a school, or otherwise create any overt or subtle pressure on parents or students to attend or refrain from attending the school, either because it is, or is not, a religious school. *Everson*, 330 U.S. 1 (1947); *Rosenberger*, 515 U.S. 819 (1995); and *Mitchell*, 530 U.S. 793 (2000). Neither state program violates this fundamental obligation of state neutrality. The two programs' neutrality is not compromised by the fact that they allow taxpayer dollars to go to religious schools. In *Mitchell*, this Court overruled two prior cases, *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977), which struck down programs providing educational material and equipment to private and religious schools on the ground that they had the primary effect of advancing religion because the material and equipment constituted direct aid. The *Mitchell* Court held that, if aid is neutrally available and, before reaching or benefiting any religious school, first passes, either literally or figuratively, through the hands of numerous private citizens who are

free to direct the aid elsewhere, the government has not provided any support of religion for Establishment Clause purposes. Such is the case here.

The Courts' decisions over the years also suggest that, to satisfy the Neutrality Test a school choice program must create a level playing field for all three types of schools: public, private non-sectarian and parochial. When read together, *Nyquist*, *Mueller*, 463 U.S. 388 (1983); *Witters*, 474 U.S. 481 (1986); *Zobrest*, 509 U.S. 1 (1993); and *Agostini*, 521 U.S. 203 (1997), indicate that when state education aid is considered as a whole, aid for K-12 and even college students may not exclude the public schools and go only to private schools of both types, or otherwise discriminate against public schools in favor of private ones, any more than an aid program may discriminate against private non-sectarian schools in favor of parochial schools or vice versa. The beneficiaries of state per-pupil aid must be able to direct to public schools at least the same dollar amount that they send to nonpublic schools, and private non-sectarian and parochial schools must be treated identically.

The major breakthrough in the emergence of this level playing field requirement occurred in 1983 in *Mueller*, when the Court approved a Minnesota provision granting a tax deduction to parents for tuition, textbooks, and transportation. Unlike the New York law struck down in *Nyquist*, which benefited only private non-sectarian or parochial school children, the Minnesota program upheld in *Mueller* made assistance available to both public and nonpublic school populations, a fact the Court found to be significant in reaching its decision. *Mueller* is also a landmark ruling because it reinforced the idea of

parental choice and breathed new life into the child benefit concept. Justice Rehnquist wrote for the majority that, where "aid to parochial schools is only a result of decisions of individual parents, no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion or on religion generally," 463 U.S. at 399.

In 1986, in a decision that continued this line of analysis, a unanimous Court held in *Witters* that there was no Establishment Clause violation when a blind student used a public scholarship to attend a Bible college. The reasoning in *Witters* focused on the fact that, again unlike the circumstances in *Nyquist*, the aid given here was made available to all students, not just those in non-public secular or sectarian schools. Justice Marshall, writing for the majority, indicated that, while some of this aid would find its way to religious schools, the benefit is "only the result of the genuinely independent private choices of aid recipients." 474 U.S. at 487. In a concurring opinion, Justice Powell, who wrote for the majority in *Nyquist*, outlined three factors that, until this day, set the criteria for determining whether aid to religious schools passes constitutional muster: (1) the program is neutral on its face regarding religion, (2) funds are equally available to public and private school students, and (3) any aid to sectarian institutions is the result of private choices by individuals. 474 U.S. at 491.

In 1993, in *Zobrest*, the Court reversed a Ninth Circuit decision and upheld the right of a parochial high school student to receive the services of a sign language interpreter under the provisions of the Individuals with Disabilities in Education Act. The same services were

available to public school children, but the student's parents chose to send him to a religious school. Citing *Mueller* and *Witters*, Chief Justice Rehnquist and a majority of the Court declared:

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed toward religion" . . . it follows under our prior decisions that provision of that service does not offend the Establishment Clause. 509 U.S. at 10.

If there was any doubt of the direction the Court was taking in its deliberate refinement of the principles that guide its Establishment Clause decision-making, the question was resolved in 1997 in *Agostini*. Reversing *Aguilar v. Felton*, 473 U.S. 402 (1985), a decision that had prevented public school teachers from providing federally supported remedial services to poor children on the premises of parochial schools, the Court in *Agostini* affirmed the principle of a level playing field in state aid for public, private non-sectarian, and parochial schools.

The New York tuition reimbursement program struck down in *Nyquist* reimbursed low-income parents $50 to $100 per child *only* where they sent their children to non-public schools. New York's tax relief program granted tax relief *only* to middle-income parents of non-public school children. By contrast, like the programs upheld in *Witters*, *Zobrest*, and *Agostini*, the Wisconsin and Ohio school choice programs are part of a larger, comprehensive state per-pupil education aid program that provides assistance at either a public or non-public school, and treats non-sectarian and sectarian schools the same. Wisconsin's program, taken as a whole, allows at least $5,326 (in 2000-01) to be directed equally to all three types of schools: public, private non-sectarian, or parochial.

Ohio's program, taken as a whole, likewise allows parents to direct at least $2,250 to a public, private non-sectarian, or parochial school. In both states, public schools actually receive more. There is no difference in treatment between the two types of private schools.[23]

The other relevant Establishment Clause tests, articulated in *Lemon*, require that the state program must have both a clear secular purpose and a primary secular effect that neither advances nor inhibits religion. Both Wisconsin's and Ohio's programs meet these tests. The record makes clear that both states' programs sought to achieve an improvement in educational outcomes for the states' most vulnerable students: Milwaukee's and Cleveland's low-income, mostly minority students who inhabit the impoverished centers of the states' biggest metropolitan areas, and whose education performance fell far behind their peers.

Similarly, both Wisconsin's and Ohio's programs achieved a primarily secular effect. The Milwaukee program has spurred Milwaukee Public Schools to compete

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[23] Obviously, there are administrative differences in both states between the transfer of the aid payment to a public school and its transfer to a private school. In the case of public schools, the parent signs over no voucher; in the case of private schools, the parent must co-sign a voucher. In the case of public schools, the money goes to the system, not the individual school; whereas in the case of private schools, the money usually goes directly to the school. In *Nyquist*, *Mueller*, *Witters*, *Zobrest*, and *Agostini*, however, the Court did not get hung up on such details. The key question must be: when the state's education aid program is viewed as a whole, has the state established a level playing field that treats all three types of schools – public, private non-sectarian, and parochial – alike in all *important* respects?

and improve. The Cleveland program puts pressure on Cleveland Public Schools to pursue reform in the way it educates the majority of children who remain in the system.

The second secular effect of the program also deserves mention. Both Wisconsin's and Ohio's programs give parents who were dissatisfied with the public schools the ability to enroll their children in alternative schools that meet their children's needs.

V. CONCLUSION: THE COURT SHOULD RESPECT STATE DECISIONS TO CREATE EVEN-HANDED EXPERIMENTS IN SCHOOL CHOICE THAT WILL CREATE A DYNAMIC URBAN MARKET IN K-12 EDUCATION AND HELP INVIGORATE OUR NATION'S BIG CITIES.

Reasonable people can certainly disagree about the policy merits of school choice. Many Americans, and not just those linked to the teachers' unions or the education bureaucracy, truly believe that the public finance monopoly so long enjoyed by public schools is essential for urban education. Conventional reforms, they assert, such as smaller class sizes, higher salaries, more computers, and new curricula, are all we need to improve urban school outcomes.

We respect their views, but disagree. More importantly, the state legislatures of Wisconsin and Ohio disagreed. Both states voted to replace monopoly with school choice in Milwaukee and Cleveland out of a conviction that only intense competition for public dollars among all urban schools will work to elevate the performance of all schools.

The Court cannot disturb the two state legislatures' shared policy (be it right or wrong) unless the Court concludes that the Establishment Clause denies states the legal right to enact an even-handed per-pupil aid policy that includes not only public and private non-sectarian schools but parochial schools. We see nothing in the Court's many decisions on the Establishment Clause that would bar this type of across-the-board school choice plan. Rather, case after case – from *Everson* and *Nyquist* through *Rosenberger, Mitchell, Mueller, Witters, Zobrest,* and *Agostini* – supports the validity of the Wisconsin and Ohio approach. Both programs are neutral. Both allow state aid to go to public as well as non-public schools; both treat non-sectarian and parochial schools alike. Both programs aimed to achieve a secular purpose; both produced a primarily secular effect.

The Court should adhere to this long line of precedents, reverse the Judgment of the Court of Appeals, and allow states and cities to proceed with well-crafted school choice plans that inject competition into urban education and hold out the promise of reviving America's cities.

Respectfully submitted,

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APPENDIX A

U.S. Urban Public School Systems

		Students Attaining Proficiency in....	
	Graduation Rate*	Elementary** School	High School
U.S. Cities	**56%**		
Milwaukee:			**(1)**
Graduating	**43%**		
Reading		**54%**	**35%**
Math		**37%**	**11%**
Cleveland:			**(2)**
Graduating	**28%**		
Reading		**34%**	**41%**
Math		**34%**	**29%**
New York City:			**(3)**
Graduating	**43%**		
Reading		**42%**	**40%**
Math		**52%**	**41%**

*1998 graduation statistics based on all students entering 9th grade in 50 largest school districts.
**Elementary results based on statewide reading and math tests taken by 4th graders. Wisconsin: 2000-01, Ohio: 1999-2000, New York City: 1999-2000 for English and 2000-01 for Math

(1) Grade 10 Wisconsin Knowledge & Concepts Examination for 2000-01
(2) Grade 12 Ohio State Reading and Math Proficiency tests for 1999-2000

(3) English and Math Regents Exams for 1997-98

Sources:

U.S. Cities: Jay P. Greene, "Graduation Rates in the United States," The Manhattan Institute for Policy Research, August 28, 2001, Table 6, p. 34.

Milwaukee: Office of Research and Assessment, Milwaukee Public Schools, "2000-01 Accountability Report for the Milwaukee Public Schools, Volume 1, District Report, Chart 8, p. 6 and Chart 17, p. 12.

Cleveland: Ohio Department of Education, "State of Ohio 2001 District School Report Card," Cleveland City School District, Cuyahoga County" p. 2.

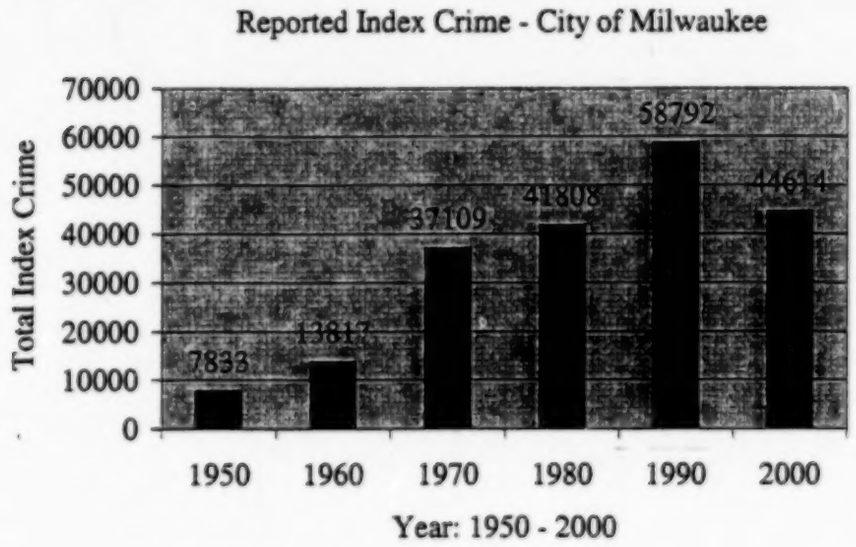
New York City: New York City Board of Education Division of Assessment and Accountability, "A Report on the Results of the CTB-Reading Test (CTB-R) Administration in New York City Including the Results of the State Grade 4 English Language Arts (ELA) Test," June 2000, Figure 5, p. 21.

New York City Board of Education Division of Assessment and Accountability, "Summary Report: Results of the 2001 State Elementary Assessment in Mathematics and the Intermediate Level Assessments in English Language Arts (ELA) and Mathematics," Figure 1, p. 3.

Joseph P. Viteritti, "State of the New York City Public Schools 2000," Manhattan Institute for Policy Research, Civic Report No. 13, Sept. 2000.

APPENDIX B

City of Milwaukee: Total Crime Index: 1950-2000

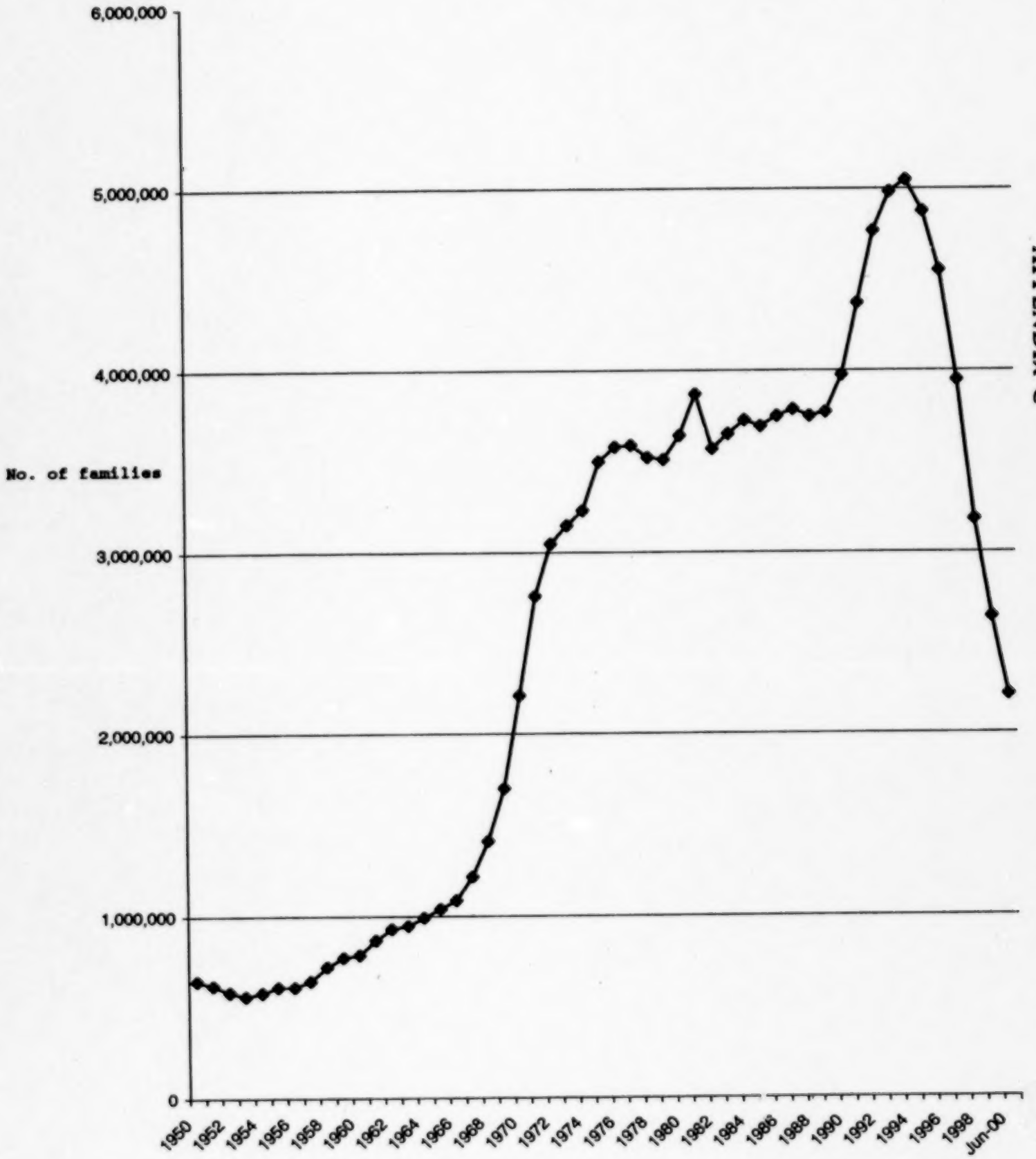


Source: Tom Everson
State of Wisconsin
Office of Justice Assistance
Uniform Crime Reporting Program (UCR)
October 13, 2001

Crime numbers consist of the standard Index Crimes used by the UCR program: murder, forcible rape, robbery, aggravated assault, burglary, theft, motor vehicle theft, and arson.

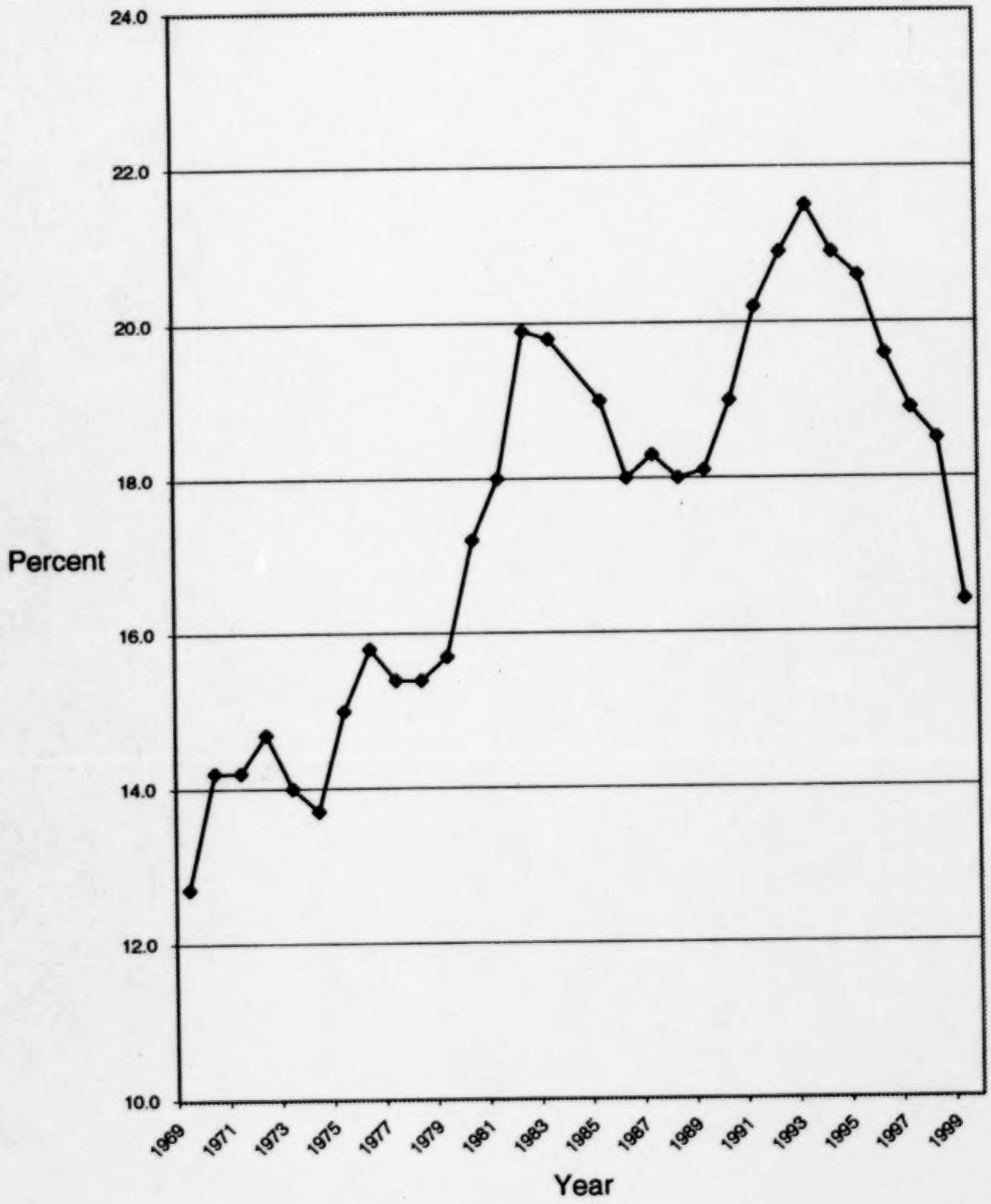
Note: Prior to 1980, arson figures were not included. An estimated 400 arsons per year have been added to all crime figures prior to 1980. Also, prior to 1975, only thefts with a stolen value of $50 or more were included. Estimates for thefts with a value of less than $50 have been added to all crime figures prior to 1975. As a result, all numbers in the graph are roughly comparable over time.

U.S. Welfare (AFDC/TANF) Caseloads: 1950-2000



Source: Administration for Children and Families, U.S. Department of Health and Human Services, http://www.acf.dhhs.gov/news/stats/3697.htm. Cash assistance to families was called Aid to Dependent Children (ADC) from 1936 to 1962, Aid to Families with Dependent Children (AFDC) from 1962 to 1996 and Temporary Assistance to Needy Families as of 1996. Unless noted, caseload numbers are average monthly.

U.S. Central City Poverty Rates: 1969-1999



Source: Current Population Survey, U.S. Bureau of the Census, U.S. Department of Commerce, "Historical Poverty Tables," Table 8: Poverty of People, by Residence: 1959-1999, http://www.census.gov/hhes/poverty/histpov/hstpov8.htm

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In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent of Public Instruction, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

And Related Cases

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF CHILDREN FIRST AMERICA, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does Ohio's Pilot Project Scholarship Program, which provides eligible Cleveland parents with tuition scholarships they may use at the participating religious or secular school of their choice, have the primary effect of advancing or endorsing religion, in violation of the Establishment Clause?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iv

Interest of Amici Curiae 1

Statement of the Case 2

Summary of Argument 8

Argument 11

I. A "true private-choice program" that neutrally provides aid to beneficiaries, who then make independent decisions directing that aid to religious or secular schools, does not have the "effect" of advancing or endorsing religion 11

II. The Scholarship Program qualifies as a "true private-choice program." 13

III. The Sixth Circuit erroneously concluded that the Program is *not* a "true private-choice program" because it failed to consider how the Program actually functions as part of Ohio's overall scheme for school choice in Cleveland 16

1. The low rate of participation in the Program by secular schools, and the low percentage of participating children enrolled in secular schools, are attributable to factors unrelated to the Program's design 17

2. When the Program is viewed in tandem with the Community Schools initiative, the proportion of school-choice students enrolled in secular schools increases dramatically 19

TABLE OF CONTENTS – Continued

Page

3. The Scholarship Program's tuition ceiling and eligibility requirements for participating schools do not skew the range of school choices available to Cleveland parents 20

IV. The *"Nyquist* rules" the Sixth Circuit distilled from *Nyquist* are inconsistent with this Court's subsequent decisions, but the Court need not overrule *Nyquist* to sustain the constitutionality of the Scholarship Program 24

Conclusion 29

TABLE OF AUTHORITIES

Page

CASES:

Agostini v. Felton, 521 U.S. 203 (1997) ..... *passim*

Bowen v. Kendrick, 487 U.S. 589 (1988) 10, 28

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 6, 27

Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) 3

Lemon v. Kurtzman, 403 U.S. 602 (1971) 11, 27

Marks v. United States, 430 U.S. 188 (1977) 12

Mitchell v. Helms, 530 U.S. 793 (2000) ... 8, 11, 12, 29, 30

Mueller v. Allen, 463 U.S. 388 (1983) 6, 26

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 13

Troxel v. Granville, 530 U.S. 57 (2000) 25, 30

Widmar v. Vincent, 454 U.S. 263 (1981) 28

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 6, 10, 12, 27

STATUTES:

R.C. 1314.03 5

R.C. 3313.976 ..... 4, 5, 15

R.C. 3313.977 14

R.C. 3313.978 ..... 4, 14

R.C. 3313.979 5

TABLE OF AUTHORITIES – Continued

Page

R.C. 3314.01 15

R.C. 3314.06 14

R.C. 3317.012 18

OTHER AUTHORITIES:

Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland*, J.A. 206a 5

Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *School Choice and Social Controversy: Politics, Policy, and Law* 25 (Sugarman and Kemerer eds. 1999) 22

INTEREST OF THE AMICI CURIAE[1]

Amici curiae Children First America and its local and regional affiliates are non-profit organizations whose primary mission is to promote school choice for low-income families through privately-funded tuition scholarships.[2] Over the past ten years, Children First America, the many partner organizations for which it serves as an

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[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. See S. Ct. Rule 37.6.

[2] In addition to Children First America, which is headquartered in Bentonville, AR, amici include the following affiliate organizations: A Brighter Choice Scholarships (Albany, NY); Alliance for Choice in Education (Denver, CO); Arizona Scholarship Fund; Arizona School Choice Trust; Children First Central Florida; Children First Columbus, OH; Children First Delaware County, PA; Children First Kansas; Children First Utah; Children First Virginia; Children's Educational Opportunities Horizon, (San Antonio, TX); Children's Educational Opportunities, (Austin, TX); Children's Educational Opportunities, (Oakland, CA); Children's Scholarship Fund Arkansas; Children's Scholarship Fund Baltimore, MD; Children's Scholarship Fund Chattanooga, TN; Children's Scholarship Fund Kansas City, MO; Children's Scholarship Fund Maine; Children's Scholarship Fund Portland, OR; DC Parents for School Choice, (Washington DC); Educate New Mexico; Education Freedom Fund, (Grand Rapids, MI); Educational CHOICE Charitable Trust (Indianapolis, IN); Helping Educate Responsible, Outstanding, and Enlightened Students, (Jacksonville, FL); Kids First Scholarship Fund (Minneapolis, MN); Memphis Opportunities Scholarship Trust, (Memphis, TN); Parents Advancing Choice in Education (Dayton, OH); Parents Challenge (Colorado Springs, CO); Partners Advancing Choice in Education (Columbia, SC); Scholarship Fund for Inner City Children (Newark, NJ); School CHOICE Scholarships (Louisville, KY); Star Sponsorship Program (Ft. Worth, TX); The Guardsman (San Francisco, CA); Washington Scholarship Fund (Washington, DC).

"umbrella," and other private-scholarship organizations have raised over $500 million and provided scholarships to more than 100,000 children. This year alone, more than 60,000 low-income children will benefit from a private tuition scholarship. Yet despite these successes, the demand from low-income parents seeking help in affording non-public schooling vastly outstrips the private funding available through amici and kindred organizations. For example, when the Children's Scholarship Fund offered 40,000 means-tested scholarships nationwide in 1999, over 1.25 *million* families applied or inquired. There is no realistic prospect that private charitable giving will generate the billions of dollars that would be needed to provide tuition grants on that scale. Consequently, Children First America's ultimate goal – giving every needy family an affordable choice between public and non-public schooling – cannot be realized solely through private philanthropy. In recognition of that fact, Children First America and its affiliates also work with school-choice advocates and legislatures nationwide to develop publicly-funded programs that provide direct financial aid to low-income parents to enhance their educational choices. Amici thus have a vital interest in the core constitutional issue in this case: whether the Establishment Clause forbids a neutral, evenhanded public tuition-grant program designed to benefit low-income children in a city whose public schools have a track record of failure.

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

The movement for school choice in the United States rests on these propositions: (1) every child, regardless of family income, should have access to an adequate elementary and secondary education; (2) public schools are

failing to provide a decent education to millions of children, especially children from low-income families who cannot afford private schooling; (3) as a matter of basic fairness these children and their families should be given the means to opt out of their failing public schools; (4) empowering poor families will also improve public schools by forcing them to compete with private schools for low-income students (as well as more affluent ones); and (5) the best way to foster these objectives is to give low-income parents educational "financial aid" that goes where their child goes, so that they can choose *among* private schools, as well as *between* public and private schooling. Virtually no one disputes the first two of these propositions, and the others are supported by a growing body of empirical research attesting to the benefits of increased school choice for both students who choose to exit the public system and students who choose to stay in it. *See* Affidavit of Paul E. Peterson, J.A. at 104a-117a.

While research can continue indefinitely, the window of opportunity for educating each year's cohort of children is all too short. Proponents of school choice have accordingly mobilized on two fronts: they have turned to private philanthropy to raise funds for private scholarships for low-income families, and they have sought to persuade voters and democratically elected legislatures to enact direct financial-aid programs for education. The considerable achievements of private-scholarship organizations are briefly described in our Statement of Interest. On the public financial-aid side, legislation providing means-tested scholarships to limited numbers of students in failing urban school districts has been adopted by Wisconsin (for Milwaukee) and Ohio (for Cleveland). An Establishment Clause challenge to Wisconsin's program was rejected by the Wisconsin Supreme Court in *Jackson v.*

Benson, 578 N.W.2d 602. Ohio's initiative – the Pilot Project Scholarship Program – is the subject of the Establishment Clause challenge in the present case.[3]

Ohio's General Assembly adopted the Scholarship Program in 1995, in an attempt to improve educational opportunities for low-income children in the fiscally and educationally troubled Cleveland City School District ("CCSD"). The Program provides scholarships to children residing within the CCSD for kindergarten through eighth grade, with preference given to students from "low-income families," defined as families whose income is below 200% of the poverty level. Ohio Revised Code ("R.C.") 3313.978(A). The vast majority of children receiving scholarships are from low-income families; indeed, 60% are from families whose income is at or below the poverty level. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999). The Program limits the tuition participating schools may charge low-income families to $2,500, and pays 90% of the school's actual tuition. R.C. 3313.976(A)(8); 3313.978(A). Hence the maximum scholarship amount is $2,250. Families whose income is above the "low-income" ceiling receive a lower tuition subsidy of $1,[illegible] or 75% of the school's tuition, whichever is less. *Id.* [illegible]dition, using the same eligibility criteria, the Prog[illegible]m provides an equal number of tutoring scholarships up to $500 to be used by families who elect to send their children to Cleveland public schools. R.C. 3313.978(B).

The Scholarship Program permits any private school, religious or secular, to participate if it is located in Cleveland and meets the state's minimum educational standards. R.C. 3313.976(A)(1),(3). It also permits *public* schools in districts adjoining Cleveland to participate, R.C. 3313.976(C) – and encourages their participation by

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[3] In a separate proceeding, the Ohio Supreme Court rejected respondents' Establishment Clause challenge to the Program. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

offering them the $2,500 voucher amount in addition to Ohio's base per capita aid of more than $4,000 per pupil. R.C. 1314.03(I)(1); R.C. 3313.979(B). Participating schools must give preference in admissions to low-income students, and are forbidden to discriminate on the basis of race, ethnicity, or religion. R.C. 3313.976(A)(4). Scholarships are payable to the parents of the eligible student, and may be used at whichever participating school the parents choose. R.C. 3313.979. After parents choose schools for their children, scholarship checks are mailed to the schools to be endorsed over by the parents. 72 F. Supp. 2d at 836.

Notwithstanding the failure of any adjoining public schools to enter the program, as of the 1998 school year 22% of participating students were enrolled in a non-religious school. By the time of the District Court's 1999 decision striking down the Program on summary judgment, however, there was a sharp decline in this statistic: only 4% of the 3,761 students in the Program were enrolled in one of the 10 secular schools then participating in the Program. An important reason for this decline was that Ohio's new Community School program – which provides independent public charter schools with the same $4,500-plus per student that Ohio contributes to other public schools in Cleveland – had begun to impact the mix of schools in the Program. Affidavit of Steven M. Puckett ¶14, J.A. 163a; Affidavit of Caroline M. Hoxby ¶¶4c, 5c-5d, J.A. 56, 60. Faced with a choice between continuing to operate as private schools eligible to receive Scholarship Program aid of $2,250, or reconstituting themselves as Community Schools and doubling their revenue, the Hope Academies – which had educated almost 15% of all the students in the Program – took the latter course. Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* ("Greene Study"), J.A. 206a, 209a.

The District Court ruled, and the Sixth Circuit affirmed, that the Scholarship Program has the impermissible effects of advancing and endorsing religion. 72

F. Supp. 2d 834 (1999); 234 F.3d 945 (2000). These conclusions rested largely on the facts that all of the schools then participating in the Program were private, that 82% of the 56 participating schools were religious, that 96% of the students then participating in the Program were enrolled in a religious school, and that the Program does not require that participating schools use the tuition grants exclusively for secular purposes. 234 F.3d at 949. In treating those facts as determinative, the Court of Appeals held that this Court's decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) was controlling, rather than its subsequent decisions in *Mueller v. Allen*, 463 U.S. 388 (1983), and *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986). *See* 234 F.3d at 958-961. The Court of Appeals refused to consider the impact of the Community Schools program on the Program's school-participation and enrollment statistics, reasoning that evidence "concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant," and "would expand our jurisdiction far beyond the case at hand." *Id.* at 958. It also concluded that the refusal of adjoining public schools to participate should be blamed on "the program's design," because the $2,250 maximum tuition grant creates "a financial disincentive for public schools outside the district to take on students via the school voucher program." *Id.* at 959. Judge Ryan dissented. 234 F.3d at 963.

Amici's view of the Scholarship Program's "effects" is very different from the narrow, formalistic evaluation on which the Sixth Circuit's judgment rests. Our perspective is informed by our experience raising millions of dollars from thousands of donors to provide tens of thousands of private scholarships to low-income families. We submit that the decision below reflects a tragic misunderstanding of the intent, design, function, and effect of programs – public or private – that offer low-income parents the financial wherewithal to opt out of local public schools and to choose among a broad range of alternative schools. A brief description of our experience

will set the stage for our legal arguments and, we believe, assist the Court in characterizing the Scholarship Program for Establishment Clause purposes.

Our donors are people from all walks of life and of diverse religious beliefs. A large percentage of them are successful businesspersons who have seen firsthand the deficiencies of public education in job applicants and employees. These men and women donate generously because they think greater educational opportunity for low-income children is a moral imperative, and because they think enabling low-income parents to afford private schools will both improve their children's education and give public schools better incentives to function effectively. They do not give in order to advance or endorse religion or religious education. Quite the contrary. Our donors know that their dollars may be given to parents of an entirely different religious persuasion than their own, and that those dollars may end up in the coffers of a religious (or secular) school with whose professed beliefs they profoundly disagree. That risk is inherent in the idea of parental school choice as we conceive it: our private-scholarship programs are designed to give parents freedom to choose among whatever local private schools their scholarships enable them to afford.

It would come as a great surprise to amici and our donors, therefore, to learn that in reality our private-scholarship programs have the "primary effect" of advancing and endorsing religion, merely because, in the numerous urban areas in which we operate, (1) the *current* majority of private schools are religious schools, and (2) the vast majority of low-income parents who receive scholarships *elect* to enroll their children in religious schools. These are givens, facts of educational life for which we are not responsible, and which we have no choice but to accept in order to expand school choice for low-income families here and now. Were we to restrict our scholarships to use at private secular schools, some of the low-income families who now seek our help would

shun it, and many of those who still sought our help would have a scholarship but no place to spend it.

Unlike Ohio's General Assembly, of course, amici are not bound by the strictures of the Establishment Clause. The fact remains, however, that the basic character of Ohio's Scholarship Program is functionally equivalent to the private programs we operate. In the world of education reform, the intent and effect of the Scholarship Program and its philanthropic counterparts are to advance and endorse enhanced educational opportunity for low-income children, not to advance or endorse religion. As we shall explain, this Court's Establishment Clause jurisprudence leads to the same conclusion in the world of constitutional law.

SUMMARY OF ARGUMENT

The Scholarship Program satisfies the "primary effect" test as this Court explained it in *Agostini v. Felton*, 531 U.S. 203 (1997). The Program neither "results in governmental indoctrination" nor "defines its recipients by reference to religion," and Respondents do not contend that it creates "an excessive entanglement." *Id.* at 234.

Both the no-indoctrination and neutral-definition criteria are satisfied by "a true private-choice program," as Justice O'Connor used that phrase in her concurring opinion in *Mitchell v. Helms*, 530 U.S. 793, 842 (2000). By providing aid directly to its beneficiaries, a true private-choice program gives them control over whether the aid will be used for religious or secular education. *Id.* at 842. Consequently, the fact that some aid ultimately reaches religious schools and is used for religious purposes is attributable not to the government program, but to beneficiaries' private decisions. *Id.* For the same reason, reasonable observers will attribute any endorsement of religion to individuals, not the government. Thus, provided that it is also strictly neutral in defining its eligible recipients, and creates no financial incentive to choose

religious schools over secular ones, a true private-choice program complies with the *Agostini* criteria.

The Scholarship Program is a "true private-choice program." *First*, it makes scholarships available to Cleveland families regardless of their religious affilation, and the scholarship amounts do not vary depending on whether the school is religious or secular. *Second*, the Program gives parents full control over whether to apply for a scholarship, and at which participating school – religious or non-religious – they will use it. *Third*, no matter which school-choice comparison parents make between the Program and their various secular options, their financial incentives are *never* to choose religious education. *Fourth*, the Program, together with other provisions of Ohio law, was also designed to (and does) give parents a wide range of *secular* alternatives to Cleveland public schools, including Community Schools, participating secular private schools, and – if only they would elect to participate – suburban public schools.

The Sixth Circuit erroneously concluded that the Program is not a true private-choice program, principally because it evaluated the Program in a vacuum, rather than as part of Ohio's overall scheme for school choice in Cleveland. The Court of Appeals focused on the facts that, in 1999, 82% of the participating schools were religious, and 96% of students receiving scholarships were enrolled in a religious school. It attributed these outcomes entirely to the Program's design, and either ignored or dismissed as "irrelevant" the other factors that, in combination, more than suffice to produce these results. 234 F.3d at 958. *First*, the percentage of scholarship students enrolled in secular private schools dropped sharply due to the expansion of the Community Schools program, whose comparatively generous aid levels induced some participating schools to leave the Scholarship Program and become Community Schools. *Second*, the refusal of suburban public schools to participate – despite Ohio's offer of more than $4,000 in state aid per student *plus* the $2,250 scholarship amount – has to date

eliminated an important non-religious option the General Assembly contemplated when it created the Program. *Third*, the ongoing litigation over the Program has discouraged new secular private schools from emerging, because of the continuing threat that their low-income students' tuition grants will be terminated on Establishment Clause grounds. *Fourth*, in light of the fact that roughly 85% of private-school students nationwide attend religious schools, it is entirely unsurprising that the vast majority of students in the Program are likewise enrolled – *at the election of their parents* – in religious schools. The pattern of outcomes under the Program, in short, reveals no grounds whatsoever for doubting either the neutrality of the Program's design, or the genuinely independent character of the aid-directing decisions of participating parents.

The Court of Appeals also relied heavily on the "*Nyquist* rules" it extracted from this Court's decision in *Nyquist*. 234 F.3d at 958. But the first of these rules – that a program impermissibly advances religion if most of its individual beneficiaries attend religious schools – is nowhere to be found in *Nyquist*, and has since been decisively rejected by this Court. *See, e.g., Agostini*, 521 U.S. at 229. The second rule – that even an aid program that provides aid directly to individual beneficiaries will be deemed to advance religion if the aid can be put to religious use – is implicit in *Nyquist*. But *Witters* and *Agostini* leave no doubt that this rule does not apply to a program that is truly neutral and whose aid is directed by truly private choices. *Witters*, 474 U.S. at 489; *Agostini*, 521 U.S. at 225.

Finally, the Court of Appeals relied on a crabbed interpretation of *Nyquist*'s well-known footnote 38, which it treated as authorizing an "exception" for tuition-grant programs only if beneficiaries can direct the aid to the widest *possible* spectrum of public and private schools. This Court's subsequent decisions, however, require only that "a fairly wide spectrum of organizations is eligible to apply for and receive funding," *Bowen v. Kendrick*, 487

U.S. 589, 608 (1988), and that the program "make[s] aid available generally without regard to the religious or nonreligious character of the recipient school." *Mitchell*, 530 U.S. at 847 (O'Connor, J., concurring). The Scholarship Program plainly complies with these requirements.

ARGUMENT

I. A "true private-choice program" that neutrally provides aid to beneficiaries, who then make independent decisions directing that aid to religious or secular schools, does not have the "effect" of advancing or endorsing religion.

Because there is no contention that the Scholarship Program lacks a secular purpose, the constitutional spotlight in this case falls solely on the "primary effect" prong of the Establishment Clause test first advanced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and subsequently reconfigured in *Agostini v. Felton*, 521 U.S. 203 (1997). In *Agostini*, the Court identified three "primary criteria" for determining whether a governmental aid program impermissibly advances or endorses religion: "(1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion." *Id.* at 234. Respondents do not contend that the Program creates an excessive entanglement, and hence we confine our discussion to the no-indoctrination and neutral-definition criteria.

Both these criteria are satisfied by what Justice O'Connor, concurring in the judgment in *Mitchell v. Helms*, 530 U.S. at 842, termed a "true private-choice program." The defining feature of a true private-choice program is that "the government provides aid directly to the student beneficiary," and consequently "that student can attend a religious school and yet retain control over

whether the secular government aid will be applied toward the religious education." *Id.* at 842. Under these circumstances, "[t]he fact that aid flows to the religious school and is used for the advancement of religion is . . . *wholly* dependent on the student's private decision." *Id.* (emphasis in original). In contrast to a "per-capita-aid" program, a true private-choice program is constitutional even if – as in *Witters* – it allows "actual diversion" of aid to religious uses in the hands of the school to which the recipient directs the aid. *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring).[4]

For three reasons, a "true private-choice program" also satisfies *Agostini*'s no-indoctrination requirement. First, if and when state aid ultimately reaches religious-school treasuries, it arrives there by virtue of "genuinely independent and private choices," *Witters*, 474 U.S at 487, rather than as an "effect" of the state's actions in operating the program. Second, a reasonable observer would not perceive a true private-choice program as government endorsement of religion. "When government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school," reasonable observers will attribute endorsement to those individuals, not the government. *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring). Finally, by definition a true private-choice

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[4] In *Mitchell*, the four Justices in the plurality argued that a neutral and non-discriminatory per-capita-aid program is also constitutional, even if it permits "actual diversion" of aid to religious use, provided that the aid itself is not religious in content. *Mitchell*, 530 U.S. at 820-825 (plurality opinion). Because the position taken by Justice O'Connor (and Justice Breyer, who joined her opinion concurring in the judgment) constitutes "the narrowest grounds" for the result in *Mitchell*, we treat her opinion as controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977).

program does not involve the heightened Establishment Clause concerns that arise "where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 842 (1995).

Of course, a true-private choice program must also be strictly neutral, as required by *Agostini*'s second criterion. It must define its eligible recipients without reference to – or preference for – religion, to avoid skewing the distribution of aid in ways that "assist[ ] the educational function of religious schools." *Agostini*, 521 U.S. at 225. And it must ensure that the level of aid individuals receive does not increase if they choose religious over secular education, thereby guaranteeing that there is no financial incentive for recipients to funnel state aid to religious schools. *Id.* at 230-231. When these requirements are satisfied, there is every assurance that recipients' individual choices are indeed "genuinely independent."

In sum (provided the secular-intent and no-entanglement rules are also satisfied, as they are here) an educational aid program does not violate the Establishment Clause if it is a "true private-choice program," that is, if it (1) supplies individual recipients with aid they may freely choose to spend on religious or non-religious schooling, and (2) does so pursuant to neutral eligibility and aid provisions. The question in this case, therefore, boils down to whether the Scholarship Program – a facially neutral aid program in which tuition scholarships are given to individual parents to use at whatever participating school the parents choose – is in fact a true private-choice program.

II. The Scholarship Program qualifies as a "true private-choice program."

The Scholarship Program qualifies as a "true private-choice program": (1) its eligibility and aid criteria are

neutral; (2) it gives participating parents full control over whether to direct their children's scholarships to a religious or secular school; (3) it creates no financial incentive for parents to choose religious over secular schooling; and (4) in tandem with other provisions of Ohio law, it makes available to low-income Cleveland parents a wide range of alternative choices – public and private, religious and non-religious – to the default option of sending their children to a CCSD public school.

First, the program's criteria are neutral. Families who meet the Program's residency requirements are eligible regardless of their religious affiliation (if any). Scholarship recipients may use their tuition aid at any participating school, religious or secular. The scholarship amount is based on the family's income and the statutory maximum (or the school's tuition, if lower), and does not vary depending on whether the school is religious or secular. *See* R.C. 3313.978(A).

Second, the program gives parents full control over whether or not to send their children to a participating school, and if so whether to choose a religious or secular school. No family is required to participate in the Scholarship Program. If parents are unhappy with the range of choices represented by participating schools, they are free to withdraw from the Program and enroll their child in a Cleveland public school. *See* R.C. 3313.977(C). The Program also authorizes parents to enroll their child in a participating suburban public school – although, regrettably, no suburban public schools have yet seen fit to participate. R.C. 3313.978(A)(1). In addition, pursuant to Ohio's Community Schools program, Cleveland parents also have the option to pursue admission at public charter schools that operate independently of the CCSD. R.C. 3314.06.

Third, the program does not create an incentive for parents to choose a religious school rather than a secular

public or private school. There are four relevant comparisons, and in none of them is such an incentive present. First, the scholarship merely reduces – but does not eliminate – the *disincentive* parents confront when they consider rejecting a free education at a Cleveland public school in favor of enrollment in a tuition-charging religious school. Even parents who receive the maximum scholarship must still contribute 10% of the religious school's tuition in cash or in services. *See* R.C. 3313.976(A)(8). Second, for parents choosing between a participating religious school and a participating secular school, the same maximum scholarship amounts are available under either option. Third, parents can avoid the Program's residual tuition costs by choosing a Community School rather than a religious school participating in the Program. Fourth, if suburban public schools participate in the future, parents can also escape the Program's residual tuition costs by electing this public-school option. In no circumstance, therefore, does the Program create a financial incentive for parents to choose religious education for their children.

Fourth, the Scholarship Program, in tandem with other provisions of Ohio law, makes available to Cleveland parents a wide range of alternatives to the *status quo* of sending their children to Cleveland's struggling public schools. Over time, the *mix* of alternatives has shifted, especially in response to the subsequent enactment of the Community Schools program. But the Scholarship Program has *never* functioned to give parents an either-or choice between Cleveland public schools and participating religious schools. Today, parents have the additional options of choosing a participating secular school, or choosing a Community School that, while nominally public, operates independently of CCSD. R.C. 3314.01(B). In the future, if this Court upholds the Scholarship Program, more secular private schools may emerge, and some

adjoining public schools may at long last step forward to participate.[5] This robust set of options amply suffices to show that under the Scholarship Program, "tuition grants" are " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.' " *Agostini*, 521 U.S. at 225 (quoting *Witters*, 474 U.S. at 487).

III. The Sixth Circuit erroneously concluded that the Program is *not* a "true private-choice program" because it failed to consider how the Program actually functions as part of Ohio's overall scheme for school choice in Cleveland.

The Court of Appeals concluded that the Scholarship Program is *not* a true private-choice program, but rather a non-neutral plan that channels aid to religious schools by discouraging private secular schools from participating, and by giving participating parents little choice but to select a religious school. *See* 234 F.3d at 959-961. The Court of Appeals also identified several reasons why the Program is supposedly unconstitutional under this Court's decision in *Nyquist*. As we explain in section IV below, the rules the Sixth Circuit derived from *Nyquist* are inconsistent with this Court's later decisions. In large part, however, the Court of Appeals' grounds for denying the Program "true private-choice" status were *not* based on *Nyquist* or this Court's other decisions interpreting and applying the "effects" test. Rather, they derive from

[5] In Milwaukee, the number of secular schools participating in its scholarship program has increased from seven in 1990 to 30 in 1999, and 3,025 out of 8,066 students enrolled in the program attend one of these nonreligious schools. Declaration of Dr. Howard Fuller, ¶¶ 18 and 21, J.A. at 235-36.

the Court of Appeals' idiosyncratic insistence on evaluating the Program in isolation, rather than in its full legal and operational context. In this section, we show that a proper application of the "effects" test leads to a very different – and entirely benign – characterization of the Program's design and effects.

1. The low rate of participation in the Program by secular schools, and the low percentage of participating children enrolled in secular schools, are attributable to factors unrelated to the Program's design.

The Sixth Circuit attached great weight to the facts that, in 1999, 82% of the schools participating in the Program were religiously-affiliated, and that 96% of the children participating in the Program were enrolled in one of these schools. Petitioners argued that these statistics were misleading, because factors other than the Program's design explained the relatively small – and declining – market-share of secular schools within the Program. The Court of Appeals, refusing to consider this evidence, insisted that these results are attributable to the Program's design. *See* 234 F.3d at 961.

This narrow and selective focus misunderstands the "effects" prong of Establishment Clause analysis. In order to determine which consequences of a law can properly be deemed "effects" of that law, it is necessary to consider whether other causes are primarily responsible for those consequences. For example, imagine that fraud or mismanagement had caused some of the larger secular private schools that initially participated in the Program to go out of business. It would be absurd to argue that the relevant consequence – a shrinking role for secular private schools within the Program – should be viewed as an "effect" of the Program rather than of misfeasance by the operators of these schools. Yet the Court of Appeals

refused to consider whether causes other than the design of the Program are in fact responsible for the Program's high ratio of religious to nonreligious schools, and its high ratio of enrollment in religious schools to enrollment in secular ones. *See* 234 F.3d at 958.

The operation of the Scholarship Program takes on a very different complexion once these blinders are removed. The decline in the secular-school segment of the Program is attributable to factors quite apart from the Scholarship Program. First and foremost, the legislature's subsequent creation of the Community Schools program – in which independent charter schools receive roughly twice as much aid per student as their counterparts in the Scholarship Program – predictably led the two largest participating secular schools (the Hope Schools) to reconstitute themselves as Community Schools. *See* Greene Study, J.A. at 209a, 218a; Affidavit of Caroline M. Hoxby, ¶¶5c-5d, J.A. 60a. Because the Hope Schools had educated nearly 15% of all Program students, their removal from the Program had "a profound effect" on its religious composition. Greene Study, J.A. at 209a.

The unwillingness of adjoining public school districts to participate in the Program has also reduced the percentage of students in the Program who are enrolled in non-religious schools. That unwillingness, however, cannot possibly be traced to any supposed inadequacy of the scholarship amounts. Were a suburban public school to participate in the Program, it would receive *both* the full scholarship amount *and* Ohio's base per capita aid of approximately $4,500 for Cuyahoga County, R.C. 3317.012(B), for a total of over $6,500 per student. This level of state aid may fall slightly below the *average* per capita cost of education in some of the adjoining districts. But the *marginal* cost of another student is likely to be far lower than the average cost. Remarkably, however, the Sixth Circuit – ignoring the additional $4,000-plus per

student suburban public schools would receive were they to participate – concluded that "[a]t a maximum of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program." 234 F.3d at 959. Whatever reasons actually underlie the unanimous refusal of adjoining public schools to participate in the Program, "a financial disincentive" is not among them. The Scholarship Program offers these schools a generous level of funding to participate, and hence their failure to participate should be treated as an independent decision, not as an "effect" of the Program itself. It would be a sad irony if the refusal of suburban public schools to help educate low-income Cleveland children were held to establish a constitutional barrier for private schools that *do* choose to help.[6]

2. When the Program is viewed in tandem with the Community Schools initiative, the proportion of school-choice students enrolled in secular schools increases dramatically.

In addition to helping explain the decline in secular-school participation in the Program, the Community Schools program is also relevant because it too is a state-subsidized school-choice program in which Cleveland families are eligible to participate. When the two programs are considered together, a very different picture of

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[6] Participation by secular schools has also been reduced by a third factor not attributable to the Program: the uncertainty created by the litigation that has dogged the Program from its inception. The $2,250 scholarship amount might well induce the creation of new secular private schools, if those schools could be confident that tuition aid would be available to their students in the future. Few educational entrepreneurs, however, would dare start a school to educate low-income children whose tuition grants could be terminated at any time by an adverse constitutional ruling.

parental decisions emerges than the one painted by the Sixth Circuit. In the 1999 school year, 3,637 students in the Scholarship Program attended religious schools, 128 students in the Scholarship Program attended secular private schools, and 2,087 students attended secular Community Schools. Greene Study, J.A. at 222a. Overall, then, more than 37% of Cleveland students who used direct or indirect state educational aid to opt out of CCSD public schools chose non-religious schools.

The Court of Appeals dismissed these facts as "irrelevant" because the Scholarship Program and the Community Schools program are separate programs, adopted at different times, and codified in different chapters of the Ohio Code. 234 F.3d at 958. But it identified nothing in this Court's Establishment Clause cases (including *Nyquist*) that requires this bizarre result. On the Sixth Circuit's reasoning, the full facts about school-choice student enrollment in non-CCSD schools *would* be relevant – and the Program might well be constitutional even in the Sixth Circuit's eyes – if Ohio's General Assembly simply re-enacted the two Programs together and codified them in the same chapter of the Code. The constitutionality of the Scholarship Program should not turn on these empty formalities. Rather, the Program's constitutionality should be evaluated in light of its design and operation as part of, and in interaction with, other elements of Ohio education law, including the Community Schools program.

3. The Scholarship Program's tuition ceiling and eligibility requirements for participating schools do not skew the range of school choices available to Cleveland parents.

The Sixth Circuit condemned the Scholarship Program as "not neutral" in two respects. First, it concluded that the Program skews the mix of participating schools

because "[s]tudents may not choose to attend community or magnet schools using a voucher, they may not apply a voucher to tuition at a private school outside the Cleveland School District, and they may not receive a voucher for a private school within the Cleveland School District which has not registered as part of the program." 234 F.3d at 959-960. Second, it asserted that "the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." 234 F.3d at 959.

Neither objection is persuasive. As for eligibility requirements, the non-inclusion of Community and magnet schools is a red herring: students do not *need* a voucher to choose a Community School, because those schools receive per capita funding from Ohio in lieu of the smaller voucher payments. Moreover, while it is true that the Program is limited to registered private schools located within Cleveland, the Court of Appeals identified no evidence – indeed, it did not even assert – that this geographical restriction has *any* effect on the ratio of secular private schools to religious ones within the Program. A tuition-grant program whose geographical restrictions were "gerrymandered" to exclude areas with high concentrations of private secular schools would lack the neutrality required of a true private-choice program. But the selection of the entire city of Cleveland as the territory within which private schools may participate can hardly be presumed to constitute gerrymandering.

As for "tuition restrictions," the Court of Appeals identified no barriers or impediments created by the Scholarship Program to entry of private secular schools. Religious schools may on average pay their teachers less, but nothing prevents secular private schools from recruiting teachers who are willing to work for less because they

are committed to the secular mission of giving low-income children a high-quality education. And while some religious congregations may subsidize their religious schools, amici can attest that it is eminently possible to raise large sums of money *on a non-sectarian basis* to provide low-income children with better educational opportunities. Nothing in the Scholarship Program prevents private secular schools from fund-raising to cover costs in excess of the Program's $2,500 tuition ceiling. In short, the Court of Appeals failed to identify anything in Ohio law – rather than in the private altruism of religious communities and teachers at religious schools – that would tend to discourage secular private schools from competing with them for Scholarship Program students.

Beyond that, the Court of Appeals provided no reason to think that the Program's scholarship amounts are set at a level designed to discourage all but religious schools from participating. From the inception of the Scholarship Program, there have always been a significant number of participating secular schools. Indeed, the fact that 22% of participating students attended private secular schools in 1998 actually cuts in favor of the Program when one recalls that only about 15% of private school students in the United States attend non-religious schools. Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *School Choice and Social Controversy: Politics, Policy, and Law* 25 (Sugarman and Kemerer eds. 1999). The vast majority of parents who are able to afford private-school tuition elect to send their children to religious schools. There is no reason to suspect that parents who cannot afford private-school tuition differ in this respect from those who can. One would therefore expect that *in an entirely neutral tuition-grant program*, the overwhelming majority of participating low-income parents would choose a religious school rather than a private secular one. Parental preferences alone

could well explain *all* of the statistical disproportion between Program enrollment in religious and private secular schools on which the Court of Appeals fastened.

The Court of Appeals, however, appears to have believed that only government-directed advancement of religion, and not genuinely independent and private choices, could possibly account for the fact that 96% of the children participating in the Program in 1999 attended religious schools. Even putting aside the other causes that helped yield this statistic (such as the impact of well-funded Community Schools), the inference is baseless. Everyday experience confirms that many parents, rich and poor alike, choose to send their children to religious schools because their faith is precious to them and they want to pass it on to their children. In addition, however, many parents who participate in the Scholarship Program choose religious schools primarily for reasons other than religion, such as academic quality, greater safety, and location. *See* Affidavit of Paul E. Peterson, J.A. 119a (describing reasons why Cleveland parents say they apply for scholarships). Indeed, many parents choose religious schools *despite*, not because of, the particular religious faith those schools espouse. For example, at some of the participating Roman Catholic schools an overwhelming majority of the students belong to other faiths.[7] Affidavit of Carolyn Jurkowitz, ¶4, Sixth Cir. J.A. at 02743. In pragmatically choosing a high-quality education for their children at a school that professes a faith

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[7] This phenomenon is not peculiar to the Scholarship Program. Many non-Catholic recipients of amici's private scholarships send their children to Catholic schools, even though our scholarships typically cover only about half of tuition costs.

different from their own, these parents are making "genuinely independent" decisions they believe to be in their children's *secular* best interests.

The Court of Appeals was thus quite wrong to hold that this case involves "government limitation of the available choices to overwhelmingly sectarian private schools," and that therefore "[t]he idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate" here. 234 F.3d at 960. The Scholarship Program contains no such "government limitation," and the rationale for treating genuinely independent private choices as "a determining factor" applies with full force.

IV. The *"Nyquist* rules" the Sixth Circuit distilled from *Nyquist* are inconsistent with this Court's subsequent decisions, but the Court need not overrule *Nyquist* to sustain the constitutionality of the Scholarship Program.

The Sixth Circuit erroneously concluded that this Court's decision in *Nyquist* requires invalidation of the Scholarship Program. If indeed *Nyquist*'s evaluation of New York's tuition grant program requires the conclusion that Ohio's Scholarship Program is unconstitutional, then we submit that *Nyquist* conflicts with this Court's subsequent decisions affirming that true private-choice programs do not violate the Establishment Clause. As we have shown, the Program qualifies for "true private-choice" status because it meets the rigorous standards set out in the plurality and concurring opinions in *Mitchell*: its eligibility requirements and benefit levels are strictly neutral with regard to religion; it permits recipients to make independent choices about where to direct the aid they receive; it does not create incentives to prefer religious over secular schools; and it is not designed to induce participation by religious schools or discourage

participation by secular ones. *See* 530 U.S. at 809-814 (plurality opinion); *id.* at 841-843 (opinion concurring in the judgment). Because these demanding requirements are satisfied, so is the "effects" test: the ultimate disposition of the aid is properly attributable to the private choices of aid recipients, not to state action, and reasonable observers would not perceive the Program as endorsing religious education. Consequently, as a true private-choice program, the Scholarship Program is constitutional even though most of its aid recipients spend their financial aid at religious schools, and even though these schools may put that aid to religious use.

It is far from clear, however, that there is a true conflict between these principles and *Nyquist*. Certainly the *judgment* in *Nyquist* can readily be reconciled with them. Although the Court found that the New York aid programs had legitimate secular purposes, there was ample evidence from which to infer that some aspects of the program were not truly neutral, and that even the neutral tuition grants were also motivated by an impermissible purpose – to "channel[ ] state aid to sectarian schools." 413 U.S. at 785. Indeed, *Nyquist*'s discussion of the effects of the tuition grants suggests the Court *did* draw that inference. *See id.* at 783 ("it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian.") At a minimum, then, *Nyquist* may have continued vitality as a reminder that even a facially neutral program that provides tuition grants to individual parents will offend the Establishment Clause if its history, structure and design give rise to a reasonable inference that the program's "function" is to advance or endorse religion.

In addition, however, we believe the Court can uphold the constitutionality of the Scholarship Program without rejecting in its entirety *Nyquist*'s analysis of New

York's tuition-grant program. The Court of Appeals identified three reasons why the Scholarship Program is unconstitutional under *Nyquist*'s tuition-grant analysis. On close examination, it can be demonstrated that the implicit legal rules the Court of Appeals found in *Nyquist* have already been *explicitly* rejected by this Court in later cases. All that is necessary to sustain the constitutionality of the Scholarship Program, then, is to recognize that the Court has already departed from *Nyquist*'s approach (or at least from the Court of Appeals' interpretation of *Nyquist*) on these specific issues. In the end, it is primarily the Sixth Circuit's "*Nyquist* rules," 234 F.3d at 959, not *Nyquist* itself, that stands in need of correction by this Court.

The first reason identified by the Court of Appeals was that, as in *Nyquist*, although the Program's tuition scholarships are paid to parents, "the great majority of schools benefited by these tuition dollars are sectarian." 234 F.3d at 958. But this factual similarity is not a rule of law; and even if it were, that rule would no longer be good law. In *Agostini*, the Court explicitly refused to "conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Agostini*, 521 U.S. at 229. *See also Mueller*, 463 U.S. at 401 (rejecting "a rule grounding the constitutionality of a facially neutral law on . . . the extent to which various classes of private citizens claimed benefits under the law").

Second, the Court of Appeals reasoned that, again as in *Nyquist*, "there are no restrictions on the religious schools as to their use of the tuition funds," and hence no guarantee that the aid will be used exclusively for secular purposes. *Id.* at 959. On this point, the Sixth Circuit's interpretation of *Nyquist* is clearly correct: *Nyquist* treated New York's tuition grants as fatally flawed because they were subject to no restrictions that would " 'guarantee

the separation between secular and religious educational functions and . . . ensure the State financial aid supports only the former.' " *Nyquist*, 413 U.S. at 783 (quoting *Lemon*, 403 U.S. at 613). That reasoning, however, is no longer good law as applied to educational aid programs in which money goes to religious institutions only by virtue of genuinely independent individual choices. As the Court held in *Witters*, the Establishment Clause prohibition on "aid to a religious institution unrestricted in its potential uses, *if properly attributable to the State*," simply does not apply when "the decision to support religious education is made by the individual, not the State." 474 U.S. at 489, 488 (emphasis added). In other words, true private-choice programs constitute the core cases in which the Court has "departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225.

Third, the Court of Appeals held that the Program does not come within what it termed "the exception to the *Nyquist* rules" recognized in footnote 38 of *Nyquist*,[8] because "state assistance is only available to those students who attend private schools – the aid is clearly dependent on whether parents choose public or private schools." 234 F.3d at 959. This mischaracterization of the Program overlooks the facts that adjoining public school districts are eligible to participate in the Scholarship Program, that low-income children in the Cleveland public

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[8] See 413 U.S. at 782, n. 38 (reserving the question "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.")

schools are eligible for tutoring grants under the Program, and that Cleveland parents may also seek to enroll their children in public Community Schools. Nor is it the case that all private schools are eligible to participate in the Program: only private schools located in Cleveland may participate, and then only if they register as part of the Program. *See* 234 F.3d at 959-960.

The Court of Appeals also interpreted the *Nyquist* "exception" more narrowly than this Court's later cases indicate is proper. Quoting language from *Nyquist*'s footnote 38, the Court held in *Witters*, and reaffirmed in *Agostini*, that the Establishment Clause does not bar "government aid that directly assists the educational function of religious schools" when " tuition grants" are " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.' " *Agostini*, at 225 (quoting *Witters*, 474 U.S. at 487). The Court of Appeals appears to have believed that this language encompasses only programs (such as the G.I. Bill) that make aid available *universally* to all schools, public and private. But the rationale underlying this language, as this Court explained in *Mueller*, is that " 'the provision of benefits to so broad a spectrum of groups is an important index of secular effect.' " 463 U.S. at 397 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)). The Scholarship Program and its companion Community Schools program "make available" several varieties of educational aid to low-income Cleveland families, and their *private* choices determine which among a "broad spectrum" of alternative schools will indirectly benefit. As in *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988), "a fairly wide spectrum of organizations is eligible to apply for and receive funding" under Ohio's programs for school choice in Cleveland. Under these circumstances, the crucial question should not be whether the Program includes more private schools than public ones,

but whether it falls within the class of "neutral government programs that make aid available generally *without regard to the religious or nonreligious character of the recipient school*," and of which the Court has accordingly "taken a more forgiving view." *Mitchell*, at 847 (O'Connor, J., concurring) (emphasis added).[9] Under that standard, focusing as it does on whether the Program in any way discriminates in favor of religious schools or against secular ones, the Program is undeniably constitutional.

CONCLUSION

According to the Court of Appeals, the low incidence of scholarship student enrollment in non-religious schools, and the low level of participation by non-religious schools in the Scholarship Program, is not the result of "truly 'private choice[s]' " because "the available choices *resulting from the program design* are predominantly religious." 234 F.3d at 961 (emphasis added). As we have shown, however, this pattern of outcomes is in fact attributable not to "the program design" but to the more generous funding received by Community Schools, to the unwillingness of adjoining public schools to participate, to uncertainty over the outcome of this litigation – and above all to the independent choices parents make as they pursue the educational best interests of their children.

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[9] Nor should it be necessary that a neutral aid program benefit public schools, provided it benefits a wide range of private ones – and provided that the reason for the exclusion of public schools is that they are already benefiting from comparable or greater state subsidies. For example, the Washington program of educational aid to the blind upheld in *Witters* surely would not become unconstitutional if Washington were to create a system of free public colleges.

In considering the relevance of these parental choices, it is well to bear in mind this Court's recent decision in *Troxel v. Granville*, which reaffirmed the "fundamental right of parents to make decisions" concerning the upbringing and education of their children, as well as "the traditional presumption that a fit parent will act in the best interest of his or her child." 530 U.S. 57, 66, 69 (2000) (plurality opinion). Consistent with that presumption, amici suggest that – provided they are financially empowered to do so – fit parents will presumably make autonomous educational choices based on their private values and their intimate knowledge of their children. Nothing in the design or operation of Ohio's facially neutral Scholarship Program, which seeks to give low-income Cleveland parents the financial ability to make these independent private choices, indicates that it functions to skew parental decisions, to channel financial aid to religious schools, or to send a message of governmental endorsement of religion. We therefore ask the Court to reverse the judgment below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 2001

Susan Tave Zelman,
Superintendent of Public Instruction of Ohio, et al.,
Petitioners

v.

Doris Simmons-Harris, et al.,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

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10 pp

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

ABBREVIATED SUMMARY OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. History and Context 2

Ohio's Pilot Project Scholarship Program is part of the nationwide "school choice" movement, extending new educational opportunities to Cleveland families who previously have had little choice.

II. Applying the Establishment Clause in Light of the History and Context of the Ohio Law 7

The Ohio legislature has not endorsed religion. It has endorsed equal educational opportunity for disadvantaged Cleveland children.

TABLE OF AUTHORITIES

Committee for Public Education & Religious Liberty 7
v. Nyquist, 413 U.S. 756 (1973)
Lemon v. Kurtzman, 403 U.S. 602 (1971)..... 7

INTEREST OF *AMICI CURIAE*

John E. Coons is the Robert L. Bridges Professor of Law Emeritus and Stephen D. Sugarman is the Agnes Roddy Robb Professor of Law at the University of California at Berkeley (Boalt Hall). As elaborated below, for more than thirty years *amici* have collaborated to advance the understanding of the legal and policy aspects of "school choice" through research and publication and through the design of alternative legislative models.

This brief is filed with the permission of counsel for both petitioners and respondents and is in support of petitioners.

ABBREVIATED SUMMARY OF THE CASE

Ohio's Pilot Project Scholarship Program is part of a diverse nationwide "school choice" movement. Along with other school choice reforms in Cleveland and elsewhere in Ohio, the Program extends new educational opportunities within both the public and private sectors to Cleveland families who previously have had little choice but to enroll their children in their assigned local public school.

SUMMARY OF THE ARGUMENT

The Ohio legislature has not endorsed religion. It has endorsed equal educational opportunity for disadvantaged Cleveland children.

Many state legislatures are responding in an experimental spirit to the problems of American elementary and secondary education. One strategy is "school choice" facilitated through public charter schools, new inter-district transfer policies, public magnet schools, and increased ac-

cess to private schools through scholarships and vouchers. Relying upon the advice of educators and social scientists, some states have included the choice of religious private schools as a part of these multi-faceted experiments. Research has shown that religious schools are especially successful at educating low-income children. All this legislative experimentation represents federalism at its best.

In America, the family's choice of its child's school traditionally has been exercised either by securing residence in the attendance zone of the public school preferred by the family or by paying tuition to a private school. As a result, the school that any particular child attends often is determined by the wealth of his or her parents. Seeing this as unfair and unwise, reforming legislators in several states have begun to provide greater choice in both public and private sectors to those families who lack it. It was to this end that Ohio created the program of expanded choice now under review.

The Ohio program was specifically tailored to empower low-income and working class parents by furnishing them some measure of the financial autonomy that has served middle class and well-to-do families. The scholarships under attack are redeemable in those schools public and private — religious or non-religious — that decide to participate in the plan. The plan is indifferent to the family's preference among qualified schools; it neither endorses nor discredits a choice because it is, or is not, religious. Hence the Ohio program does not offend the First Amendment under any fair reading of the relevant precedents of this Court.

ARGUMENT

I. History and Context

Amici first proposed "school choice" in 1970, as a legislative remedy for families whose children were stuck in the schools of "low wealth" and "low spending" public

school districts.[1] During the 1970s we noticed the importance of "school choice" in the writings of Thomas Paine, Adam Smith and John Stuart Mill, and included this historical perspective in a book presenting the case for empowering families through "school choice.[2] Over the years, we have promoted "school choice" as a supplemental remedy in school desegregation cases, for example, in Los Angeles in 1977[3] and in Kansas City in 1989.[4]

Throughout these more than three decades, our main theme has been that — even given preferential levels of public expenditure — children of working class and poor families do not enjoy the same educational opportunities as those who are financially better off. For the latter, school choice has long been available and widely exercised. Financially able families either move their residence to a community whose public schools they find appropriate for their children or pay to send their children to private schools. As a practical matter, working class and low-income families have neither of these choices. Instead, their children are typically assigned to the local public school.

At one time it was widely believed that any American child could obtain a good education at any American public school. Given that perception, unequal access to the cherished liberty to choose was not so widely seen as unfair and oppressive. But with the publication of *A Nation At Risk* in 1983, things changed dramatically. That report, from a blue ribbon panel appointed by President Reagan, sounded the alarm that America's public schools are failing to educate too large a share of our nation's youth. In the intervening years, it has become abundantly clear that these shortcom-

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[1] John E. Coons, William H. Clune III, and Stephen D. Sugarman, *Private Wealth and Public Education* 256-68 (Harvard University Press, 1970).

[2] John E. Coons and Stephen D. Sugarman, *Education by Choice: The Case for Family Control* (University of California Press, 1978).

[3] Our *amicus* brief is reprinted in *Parents, Teachers & Children: Prospects for Choice in American Education* 301 (Institute for Contemporary Studies, 1977).

[4] Stephen D. Sugarman, "Using Private Schools to Promote Public Values" 1991 *University of Chicago Legal Forum* 171.

ings are especially acute in large urban public school districts and certain rural districts. Schools in both types of districts often are charged with the duty of educating a disproportionate number of children from low-income families.

In response to *A Nation at Risk*, several nationwide movements have developed, all seeking to improve the education of America's children. These movements include (a) the "standards" movement that generally seeks to hold schools and pupils accountable through "high stakes" testing, (b) the "whole school reform" movement, that seeks to transform the way that schools deliver education to children, and (c) the "school choice" movement.

The "school choice" movement aims simultaneously to give many more families opportunities to decide where their children receive instruction, and — by the challenge of a controlled market — to bring about a general improvement of education. Put broadly, the goals are, first, that many more children will actually obtain what their families consider to be good education; and, second, that in response to the concern that some newly empowered families will prefer alternate schools, public schools of low quality will start to reform themselves, sometimes by copying innovative ideas developed in the private sector.

The Cleveland plan is broader than the "voucher" mechanism at issue here. Indeed, Ohio reforms illustrate various significant parts of the school choice movement, serving to emphasize the diversity of the experiments now under way in American states. These include:[5]

(a) charter schools (which are autonomous public schools, attended by choice) — more than 2000 of which have been created in more than 30 states in the past few years,

(b) inter-district school transfer programs — which have been adopted in at least 18 states,

[5] Jeffrey R. Henig and Stephen D. Sugarman "The Nature and Extent of School Choice" in *School Choice and Social Controversy: Politics, Policy, and Law* (S. D. Sugarman and F. R. Kemerer, eds., Brookings Institution Press, 2000).

(c) an increased number of "magnet, alternative, and specialty" public schools that draw pupils by parental choice,

(d) more than 100 privately-funded private school voucher programs currently in place in cities around the country,

(e) "controlled choice" plans — adopted in a variety of public school districts — where every family selects a school and no child is simply assigned by residence, and

(f) as part of this wider "school choice" movement, the publicly funded Cleveland program before this Court, which, like the Milwaukee program on which it was based, expands the options of parents who are mostly poor and mostly minority by including private schools.[6]

As legislatively designed, the plan gives Cleveland families a choice among (i) their assigned local public school, with the child's education enhanced through a subsidy for special tutoring, (ii) participating Cleveland private schools, and (iii) suburban public schools. So far the suburbs have declined to participate, frustrating the opportunity for racial integration through choice that Ohio sought to provide to eligible inner city children who are primarily African-American. Nonetheless, a substantial expansion of choice has been effected, and individual suburban districts may yet decide to welcome Cleveland children as private schools have.

We know from research findings reported from several communities that participating low income parents endorse expanded choice. Families who opt for different schools

[6] For further discussions of these sorts of programs, as well as other choice plans aimed at the neediest of our children, see John E. Coons and Stephen D. Sugarman, *Scholarships for Children* (Berkeley Institute of Governmental Studies Press, 1992) and John E. Coons and Stephen D. Sugarman, *Making School Choice Work for All Families: A Template for Legislative and Policy Reform* (Pacific Research Institute, 1999).

generally report that the new schools care more about their children, that those schools seem safer, and that their children attend more regularly. Scholarly research has detected significant academic gains in some places, but it is too early in the experiment to tell whether children sent to schools of choice pursuant to this sort of program will enjoy sustained learning gains across the years. Early concerns raised by some people that this sort of program would skim off the "best" students appear to be unwarranted. What is clear is that inclusion of private school choice assures more families the type of teaching program and educational values they want for their children – an extension of the equal liberty principle so fundamental among our nation's values.

It has been objected that a high proportion of the parents in the Cleveland and Milwaukee programs are choosing religious schools. This is hardly surprising since most private schools in the U.S. were formed as religious schools, and it will take time for new private schools to be launched. Moreover, under the rules now governing the Cleveland schools, typically it is financially advantageous for private non-religious schools to form a new public charter school rather than a new private school funded by the Pilot Project Scholarship Program. This is an important point. These new public charter schools should be understood to be among the range of options being offered to Cleveland families by the diverse package of Ohio legislation that the "school choice" movement has generated.

We assume that for some Cleveland families who have selected a denominational school, the religious aspect is important, just as it has been for many of the families who have made that choice in the past. Many other Cleveland families, however, are clearly choosing religious schools today for the conventional secular educational benefits they provide. This is evident, for example, in the decision of many African-American Protestant families to send their children to schools run by Catholic parishes and orders. Still other scholarship-eligible Cleveland families are choosing to stay in the local public schools, perhaps persuaded by the promised extra tutoring. Obviously their choices are also

germane in assessing the "purpose and effect" of this experiment.

II. Applying the Establishment Clause in Light of the History and Context of the Contemporary School Choice Movement

As a matter of constitutional law, the basic point is this: Viewed as public policy, programs like the Cleveland plan are not centrally, or even importantly, about religion. Rather, they are about giving more educational opportunities to "have-nots." This is the conclusion to be drawn whether one applies the "neutrality" test, the "endorsement" test, or the "purpose and effect" test (as it has evolved in recent decisions of this Court).

We will put it more bluntly. In the late 1960s and early 1970s, state "aid to private school" statutes could be fairly characterized in the following way: The Catholic schools, which then (but not today) educated the lion's share of private school children, were understood to be in danger of closing in many communities. If Catholic schools were to close, the cost of providing schooling for their pupils would fall upon the public schools. So, it was hoped that, with a modest amount of financial support, they would remain open. But those programs, struck down by the Court in cases like *Lemon*[7] and *Nyquist*[8], never concerned themselves with the possibility that many more disadvantaged families would be enabled thereby to exercise choice; nor were they aimed at stimulating improvements in the public schools. We put aside the question whether those plans would be held unconstitutional today by this Court.

What we want to re-emphasize is that the history and context of programs like the Cleveland plan are altogether different. These plans are about giving choice to many more families. They are about improving our urban public schools, and they are about generating innovative educa-

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[7] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[8] *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

tional reforms through a diverse market. As described above, they are embedded in a much wider nest of related reforms that are structured to promote family choice in education in many ways. Together these plans constitute a crucial policy experiment in the reform of education; only in the most incidental way have they any connection with religion.

We recognize that not everyone believes that "school choice" is the best way — or even a good way — to improve education. We appreciate that the various parts of the "school choice" movement have so-far received differing receptions among the states. What must be hoped from the Cleveland case is that decisions about school choice will continue to be made through normal political processes, and not be pre-empted by a decision of this Court. Other parts of the "school choice" movement could in theory move ahead without plans like Cleveland's. But as observers on the ground, we are well aware of political realities, and if publicly funded "private choice" plans like Cleveland's are precluded, "public choice" plans like charter schools, inter-district transfers, and the like will be put at risk.

Like many others, we have realized for some time that an Establishment Clause challenge to the goal of giving expanded school choice to disadvantaged families would at some time come before this Court.[9] It is fortunate that the Cleveland program emerges from a setting in which is transparent that neither the objective of the plan, nor its substantial effect, is religious. The Ohio legislature has not endorsed religion. It has endorsed equal educational opportunity for disadvantaged Cleveland children.

Respectfully submitted,

John E. Coons *

[9] Stephen D. Sugarman, "Family Choice: The Next Step in the Quest for Equal Educational Opportunity?," 1974 *Law and Contemporary Problems* 513.

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IN THE

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SUSAN TAVE ZELMAN, SUPERINTENDENT OF OHIO, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

HANNA PERKINS SCHOOL, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

SENEL TAYLOR, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the Unites States Court of Appeals for the Sixth Circuit

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BRIEF FOR COUNCIL ON RELIGIOUS FREEDOM, NORTHWEST RELIGIOUS LIBERTY ASSOCIATION, THE SEVENTH-DAY ADVENTIST CHURCH STATE COUNCIL, AND THE INTERFAITH RELIGIOUS LIBERTY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENTS 2

ARGUMENTS 4

I. *MITCHELL v. HELMS* DOES NOT SUPPORT THIS VOUCHER PROGRAM 4

II. THE VOUCHER PROGRAM DIRECTLY AIDS RELIGIOUS ACTIVITIES AND INDOCTRINATION 11

A. Tuition Vouchers Fund The Religious Mission Of Religious Schools 12

B. The Philosophy Of Integrating Faith And Learning Crosses Denominational Boundaries And Is Profoundly Theological 19

C. The Textbooks And Curriculum In Religious Schools Further Evidence The Pervasive Religious Atmosphere Of Such Schools 21

III. THE VOUCHER PROGRAM IMPLEMENTED IN OHIO VIOLATES PRINCIPLES OF RELIGIOUS AUTOMONY AND COMPROMISES THE CHURCHES' RELIGIOUS EDUCATION MISSION 23

Page

CONCLUSION 30

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Page

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Page

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477 U.S. 619 (1986) 26

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117 F. Supp. 2d 693 (M.D. Tenn. 2000) 5

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Page

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Statutory Authorities:

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Page

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Page

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INTERESTS OF *AMICI CURIAE*[1]

The Council on Religious Freedom (CRF) is a nonprofit organization formed to promote religious liberty and church-state separation. Its board is composed of individuals who are active in religious affairs. Several board members have served on the governing boards of religious educational institutions and appreciate the need for those institutions to be free to convey their church's religious ideals.

The Northwest Religious Liberty Association (NRLA) is the advocacy agency of the North Pacific Union Conference of Seventh-day Adventists. It represents the Adventist Church and its constituent members and organizations with the purpose of protecting and advancing the principles of religious freedom in the Northwest, specifically, Alaska, Idaho, Montana, Oregon, and Washington. Within this region there are 140 Adventist elementary and secondary schools.

The Seventh-day Adventist Church State Council serves as the religious liberty educational and advocacy arm of the Adventist Church for a five state western region of the United States, including Arizona, California, Hawaii, Nevada, and Utah. Within this region there are 143 Adventist elementary and 49 secondary schools with a combined enrollment of 16,752 students currently. The Seventh-day Adventist Church

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[1]Pursuant to United States Supreme Court Rule 37.3(a), counsel of record have filed letters with the Clerk of Court consenting to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no person other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

State Council defends the religious freedom interests of the Adventist Church, its institutions, and members generally.

This case involves financial aid to sectarian elementary and secondary schools in the form of vouchers. Because the NRLA and the Church State Council are charged with interpreting and applying Adventist teachings and principles regarding religious freedom, those *amici* desire to be heard.

The Interfaith Religious Liberty Foundation is a Sacramento, California, based nonprofit educational organization that promotes religious liberty and church-state separation through the development of curriculum materials.

INTRODUCTION AND SUMMARY OF ARGUMENTS

For the very reason they exist, these *amici* and members of their organizations are as passionately committed to religious education as any of the *amici* supporting petitioners. Many of their board members have served in administrative capacities having direct involvement in church-operated elementary and secondary schools, colleges and universities.

These *amici* oppose voucher programs for use at sectarian schools for at least two major religiously-based reasons. First, they share the concern expressed by Thomas Jefferson who so eloquently insisted that: "It is sinful and tyrannical for any man to be forced to support a religion to which he does not believe." Papers of Thomas Jefferson Vol. II 546 (Julian Boyd ed. 1950). In fact, these *amici* believe that contributions to one's own religion must be voluntary and not coerced by the state. As Justice Souter recalled in *Mitchell v. Helms*, 530 U.S. 793, 120 S. Ct. 2530, 2574 (2000) (Souter, J., dissenting), "Madison's and Jefferson's now familiar words establish[ed] clearly that liberty of personal convictions

requires freedom from coercion in support of religion, and this means that the government can compel no aid to fund it."

These *amici* contend Ohio's voucher program conflicts with the controlling opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), by directly aiding sectarian schools' religious activities and indoctrination. Therefore, it unconstitutionally advances religion.

Second, these *amici* believe that such voucher programs will result in compromising the church and its religious education mission by providing a reason and need for government to intrude into the affairs of religious organizations. Ohio's program, therefore, also burdens religion. In *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971), the Court noted:

> The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance.

The Ohio voucher program is no exception. ORC Ann. § 3313.976(A) provides, in part:

> The state superintendent shall register any school [for scholarship payments] that meets the follow requirements:
>
> (4) The school does not discriminate on the basis of . . . religion. . . .

Such a mandate applies both to admissions and employment policies precluding religious schools from making employment decisions based on religious beliefs and practices. The schools operated by *amici* could not exist without the freedom to require that faculty, administration, and all employees be

fully committed to the religious mission of the school.

Justice White, concurring in *Lemon*, stated that legislation providing assistance to any sectarian school which restricted entry on religious or racial grounds would, to that extent, be unconstitutional. 403 U.S. at 671 n.2. *See also Norwood v. Harrison*, 413 U.S. 455, 464 n.7 (1973). This same reasoning, applied to employment policies, would pose an insurmountable problem for *amici*'s religious schools. Not only are *amici* opposed to the Ohio program because of its intrusive effect clearly set forth in the existing law but because subsequent legislation may further intrude into the area of church autonomy.

ARGUMENTS

I. *MITCHELL v. HELMS* DOES NOT SUPPORT THIS VOUCHER PROGRAM.

Amici believe, from a religious standpoint, that it is improper for the state to compel taxpayers to support religious activities or religious viewpoints with which they do not agree or even ones with which they do. They also assert that current law prohibits taxpayer support of religious indoctrination, which is the end result of the Ohio voucher program.

The dissent below and petitioners contend that this Court's *Mitchell v. Helms*, 530 U.S. 793, 120 S. Ct. 2530 (2000), decision and recent decisions of this Court on which *Mitchell* is based require the validation of this voucher program. But actually, the controlling opinion in *Mitchell* requires that the program be found to violate the Establishment Clause.

As the court of appeals correctly held, "[w]hen a

fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.' *Marks v. United States*, 430 U.S. 188, 193 (1977)." Therefore, Justice O'Connor's opinion concurring in the judgment controls.[2]

In *Mitchell* Justice O'Connor continued to apply the test she articulated in her earlier majority opinion in *Agostini v. Felton*, 521 U.S. 203 (1997). Justice O'Connor stated in *Mitchell* that she "would decide today's case by applying the criteria set forth in *Agostini*." *Mitchell*, 120 S. Ct. at 2560. Under her test there would have to be sufficient statutory and administrative safeguards against diversion to the school's religious mission and to prevent items with religious content from being furnished to religious schools. *Id.* at 2568-72.

Petitioners argue that the Ohio Pilot Project Scholarship Program is constitutional because it is a neutral program which is based upon parental choice and does not directly aid sectarian schools. Each of these arguments, under careful scrutiny, is incorrect.

The program does not meet the neutrality requirement of *Mitchell*. As Justice O'Connor noted in *Mitchell*, the recent holdings of this Court as to "neutrality" require "evenhandedness in distribution." Such neutrality, Justice O'Connor states, "is relevant in judging whether a benefit

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[2]It may be argued that because "neither Justice O'Connor nor Justice Breyer joined in any portions of the plurality opinion written by Justice Thomas . . ., the only binding precedent of *Mitchell* is the holding." *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, 706-07 (M.D. Tenn. 2000).

scheme so characterized should be seen as aiding a sectarian school's religious mission, but this neutrality is not alone sufficient to qualify the aid as constitutional." *Id.* at 2557-58.

The Sixth Circuit correctly observed that only schools which register and have been designated as program participants to enroll scholarship students under the pilot program could be selected by the parent. Private schools located within the boundaries of the school district, which meet applicable standards, may participate. However, there is no provision for public schools to participate within the school district where the student resides. It is true that public schools in districts adjacent to the district in which the voucher program is implemented under the Ohio statute are permitted to also register for the program, but none of the public schools adjacent to Cleveland has ever done so. Thus, as a practical matter, only private schools are available for students to select. There is, therefore, no real "evenhandedness." Students wishing to use their voucher at a public school are out of luck.

But, even if this Court found there was "evenhandedness in distribution" of such "scholarships," that alone does not validate the program. As Justice O'Connor noted in *Mitchell*, in deciding whether the program is a "genuinely independent" and "true private-choice program," as considered in *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), the student beneficiary must *retain control* over whether the secular government aid will be applied toward the religious education. *Id.* at 2559.

But under the Ohio law, the state's check is sent to the private school and must be endorsed over to the recipient school by the parent. Thus, the so-called "private-choice" is

mere subterfuge. In reality, it is payment directly to the nonpublic school. If, in fact, a public school were a participating school, the law requires the check to be sent directly to the school in the name of the school, but the effect of the payment is the same as when sent to the nonpublic school.

It is unlikely that a "reasonable observer," aware that the state sends the check directly to the sectarian school and that the law mandates the parent endorse the check held by the school over to the recipient school, would see such an arrangement as being any different from that where the state pays the funds in check form with the school named as the payee. How, one may ask, are the Establishment Clause dangers any different in Ohio's program from one where the government sends funds directly to the general fund of a sectarian institution?

If all that is necessary is the required endorsement on a check sent to a religious institution, what, as Justice O'Connor suggests in *Mitchell*, *id.* at 2560, prevents direct money grants to churches (with church members endorsing the check) for the church's unfettered use? Justice O'Connor's says such a program "foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives." *Id.* In fact, here it does not merely foreshadow such use, *that is exactly this case!*

The state's substantial payments of cash to a church's educational mission, particularly when not in any way limited by statutory or regulatory proscription against sectarian use of the funds, certainly advances religion. This is unmistakably so when the funding is not, as in *Mitchell* and *Agostini*, merely supplemental in character. It is rather a subterfuge

which cannot excuse the Court from its duty of "sifting through the details and determining whether the program offends the Establishment Clause." *Id.* What must be determined in each case is "whether the aid has the 'effect' of advancing or inhibiting religion."

As Justice O'Connor noted in *Mitchell*, in *Zobrest* "no government funds reached the school's coffers, aid did not relieve the school of expenses it otherwise would have assumed, and aid was not distributed to the school but to the child." *Id.* at 2557. But, under the voucher program here, just the reverse is true. State funds *do* reach the school's treasury; the aid *does* relieve the school of expenses it otherwise would have to assume; and aid *is not* sent to the child or his parent but to the school.

It is true that the *Mitchell* plurality found no problem with actual diversion of tax-derived funds for religious indoctrination. But Justice O'Connor's concurring opinion, joined by Justice Breyer and the three justices dissenting, makes clear that the majority of this Court in *Mitchell* find such use impermissible. As Justice O'Connor stated in her concurring opinion:

> Although "[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations," our decisions "provide no precedent for the use of public funds to finance religious activities."

Id. at 2558. This statement is reflective of Justice O'Connor's concurrence in *Bowen v. Kendrick*, 487 U.S. 589, 601 (1988), where she pronounced that "*any* use of public funds to promote religious doctrine violates the Establishment Clause." [Citation omitted.]

As Justice O'Connor pointed out, in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the aid there in the form of textbooks loaned to students was permissible, "in part, on the fact that the aid had not been used to advance the religious mission of the recipient school." *Id.*

The O'Connor concurrence in *Mitchell* looked at the practical consequences of the program, that is whether the program was or was not "less like a direct subsidy, which is impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution." *Id.* at 2558. Here the program, from a practical viewpoint, smacks of a direct governmental subsidy -- not an individual's payment of personal funds the parent was otherwise entitled to spend.

Here, in the case of a low-income student, the aid provides 90% of that student's tuition to attend and fully participate in all classes and the school life. Thus, it represents much more than the type of supplemental aid as that in *Mitchell's* Chapter 2 program which "concerns only teaching tools that must [under the statute and regulations of Chapter 2] remain supplementary . . . ." Rather, here, the payment is more akin to the Community Education Program in *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985), where "the government financed the entirety of . . . classes [in which] . . . religious indoctrination [may] take place. . . ." *Mitchell*, 120 S. Ct. at 2568.

Although Justice O'Connor concluded in *Mitchell* that a religious school teacher should be depended upon to abide by secular restrictions placed on governmental assistance, here there are no such restrictions. Unlike *Mitchell* and *Agostini*, there are no safeguards whatsoever that the funds will not be

used for religious activities and indoctrination. *Id.* at 2569-70.

But under Cleveland's program, not only are there absolutely no such safeguards, because nearly all of the tuition is paid by the state, but it is inevitable that the state will pay for both the secular and sectarian aspects of the child's education. It is true that in *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980), this Court did permit direct cash reimbursement to sectarian schools. But in *Regan* the Court carefully pointed out that the program there did not present "any appreciable risk of being used to transmit or teach religious views." *Id.* at 662. The Court stated that "the outcome would likely be different were there no effective means for insuring that the cash reimbursement would cover only secular services." *Id.* at 659.

It is true, as cases cited by petitioners demonstrate, that aid may be provided to certain aspects of a sectarian school's program. This is in recognition that sectarian schools perform secular functions. For this reason, some forms of aid as in *Zobrest, Agostini* and *Mitchell* have been deemed such as may be channeled to the secular without providing aid to the sectarian. "But the channel is a narrow one." *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 775 (1973).

The *Nyquist* Court thus recognized the narrowness of the channel of permissible aid and required a determination that the financial assistance provided by government would aid only secular functions of the sectarian school. Then, and only then, was the aid to religion considered indirect and incidental. Widening the channel to permit aid to the sectarian aspects of religious schools would destroy a core purpose of the Establishment Clause designed to protect religious freedom and thus a protection for religion itself.

Agreeing with Justice Souter with respect to the Court's continued "recognition of the special dangers associated with direct money grants to religious institutions," Justice O'Connor said:

> In fact, the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition.

Mitchell, 120 S. Ct. at 2566. O'Connor pointed out that the First Amendment was directed at least against "sponsorship, financial support, and active involvement of the sovereign in religious activities." *Id.*

II. THE VOUCHER PROGRAM DIRECTLY AIDS RELIGIOUS ACTIVITIES AND INDOCTRINATION.

As this Court indicated in *Abington Township School Dist. v. Schempp*, 374 U.S. 203, 218 (1963):

> Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather, it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity has been given the two-fold protection, neither can it perform or aid in performing the religious function. The dual prohibition makes that function private.

But the Ohio voucher scheme, as we will demonstrate, unquestionably aids sectarian schools in performing their religious function.

We have demonstrated that, within the Cleveland School District, vouchers are not even usable at public schools. They are only accepted by registered private schools, most of which are religious. Statistically, if such programs were validated by this Court and extended to other parts of the nation, the participating schools would overwhelmingly be religious in nature.

According to statistics developed by the National Center for Education Statistics, nationwide 84.3% of all private school students attend religious schools.[3] The statistical breakdown identifies "Nonsectarian" schools representing the remainder, or 15.7% of students, which necessarily includes non-religious schools such as Montessori Schools, but by its terms must also fit some religious schools, such as Muslim and Jehovah's Witness, that do not fit any other category. Thus, the total number of students in religious schools is definitely higher than 85%.

Although the total number of students attending private schools is about 11.4% of all American students, the number of private schools is far higher, 23% of all U.S. schools.[4] If this Court approves tuition vouchers, funding will flow primarily to religious schools.

A. Tuition Vouchers Fund The Religious Mission Of Religious Schools.

The constitutional theory for approving tuition vouchers for students to attend religious schools is based on a myth, a false theoretical construct -- that the public can by tuition vouchers avoid funding the religious mission of sectarian schools. This may sound plausible as a theoretical proposition, but it has no basis in fact. Religious schools themselves do not perceive a distinction between the secular and sectarian. Instead, they regard schools as a church ministry, integral to the church and to its religious and evangelistic mission. This is true across denominational lines. The distinction between secular education and religious mission is purely theoretical and artificial; it has no basis in reality.

First, consider what various denominations and textbook publishers say about their own schools. The Seventh-day Adventist Church operates some 1,100 elementary and secondary schools in the United States with a combined enrollment of about 90,000 students. An official church policy is entitled: "The Seventh-day Adventist School As An Integral Part Of The Seventh-day Adventist Church."[5] This policy recites various scriptural and religious explanations for why the school is the church. These policies reflect the belief that education and spiritual redemption are the same work. Thus, the Seventh-day Adventist school system has "as its basic evangelistic task the education and redemption of the children and youth of the Church."[6] The educational task is also defined by reference to Matthew 28:18-20, a passage known as The Great Commission where Jesus instructs his disciples to "teach all nations" the spiritual truths and practices of the Bible and to baptize the converts.

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[3]*See* Council for Private Education web site referencing statistics provided by the National Center for Education Statistics. App. at 1a-3a.

[4]Council for Private Education. App. at 1a-2a.

[5]North American Division Working Policy, K-12 Education Policies F-05-20, 1998-99. App. at 4a-10a.

[6]*Id.* App. at 8a.

An authoritative Seventh-day Adventist source, a book titled simply *Education*, declares:

> In a knowledge of God all true knowledge and real development have their source. *Whatever line of investigation we pursue*, with a sincere purpose to arrive at truth, we are brought in touch with the unseen, mighty Intelligence that is working in and through all. *The mind of man is brought into communion with the mind of God, the finite with the Infinite. . . . In this communion is found the highest education.* [Emphasis added.]

Ellen G. White, *Education* 14 (Pacific Press Publishing Ass'n 1903). White's writings are regarded by Seventh-day Adventists as uniquely inspired and authoritative although not placed on the same level as the Bible.

The subject may be arithmetic, handwriting, or some other ostensibly "secular" subject, but if it is pursued in a pervasively Christian context, with truth as the sincere pursuit, such "secular" subjects will connect the student's mind with the mind of God. There is nothing secular about connecting with the mind of God.

The following is cited in official church policies from the same source:

> To restore in man the image of his Maker, to bring him back to the perfection in which he was created, to promote the development of body, mind and soul, that the divine purpose in his creation might be realized -- this was to be the work of redemption. This is the object of education, the great object of life.

Id. at 16, 17. *See* App. at 7a-8a.

Here, the work of education and redemption are regarded as identical. Indeed, physical and mental development, which may be regarded as "secular," are considered an integral part of redemption, and thus spiritual. In the Adventist world view, it is simply impossible to separate the secular from the sacred in education.

Seventh-day Adventists are not alone in this philosophy. One of the largest textbook publishers, Bob Jones University Press, *see* App. at 17a-22a, explains the Christian school this way:

> The work of the Christian school is an extension of the Christian educational ministries of the Christian home and the church. Its purpose, therefore, is the development of the student in the image of God. This purpose determines both the content and the means of instruction.

App. at 17a.

The largest private school system in the world and in the United States is operated by the Roman Catholic Church. Pope Pius XI, in his encyclical on the Christian Education of Youth, wrote:

> For it is necessary, if we may use the words of Leo XIII, not only at certain hours to teach Catholic religion to children but that all other subjects must also be made fragrant with the odor of piety. If this be not done, if this holy habit should not pervade and permeate the souls of both teachers and pupils, little benefit will accrue from any teaching but generally very great harm.

Edd Doerr and Albert J. Menendez, *Church Schools & Public Money* (Prometheus Books 1991). *See also* the Declaration on

Christian Education issued by Vatican II, App. 34a.

In the religious school, the teacher is expected not merely to embrace the faith intellectually but to live it and to convey a life of faith by example, not just precept. The teacher must convey the faith as much by who she is as by the intellectual content conveyed. This is true in religious schools of all denominations. Rev. John McKenzie, then chair of the theology department at the University of Notre Dame, described the Catholic school this way:

> The Roman Catholic schools have always placed religious education as the primary purpose of the schools with no attempt to mask this under some other purpose. . . . Children also learn the way of worship; they are taught respect and reverence for prelates, clergy, and religious. *They are daily reminded of their identity as Catholics. They grow up in an atmosphere of Roman Catholic traditions and attitudes which are communicated not so much by instruction as by prolonged close association under the direction of professional religious persons.*

Id. (emphasis added).

Formal instruction in religion isn't regarded as the primary means of transmitting the faith. Instead, the faith is transmitted by the example and influence of the teachers. A study of Seventh-day Adventist schools documents that "teachers in Adventist schools believe that teaching is God's choice for their lives and they view their work as ministry." *Valuegenisis Report IV, A Study of the Influence of Family, Church and School on the Faith, Values, and Commitment of Adventist Youth* 70 (North American Division Board of Higher Education and Board of Education K-12 1993). Indeed, this perspective is firm church policy in that only committed

church members are eligible to teach in church schools.

The concept of creating a religious "atmosphere" appears throughout the literature on integrating faith and learning. This atmosphere is a metaphor that encompasses a variety of experiences, including: (1) the pervasiveness of a religious world view applied consistently across curriculum content; (2) the importance of the influence of teachers as living witnesses to, and examples of, the faith; and (3) the importance of the community and the culture in reinforcing and transmitting the faith.

This latter point is poignantly reflected in the excerpts above. Yet, it is a consideration easy to overlook in our individualistic culture. The culture of the church and the church school is far less individualistic than American society at large. There is a tremendous sense of identity and belonging to the religious community that plays a vital role in the transmission of religious faith and values. Tuition vouchers inevitably finance not just individuals but support those individuals as integral parts of a faith community.

The Southern Baptist philosophy sees education as "uniting home, church and school in Jesus Christ" through "kingdom Education" so that the generations to come will know the truth of God's word and not forget His works, nor be taken captive by the vain philosophies of their day. This makes no distinction between the school and the church. They are part of the same mission and purpose: advancing the kingdom of God and God's truth. *See* App. 28a.

The National Christian School Association forcefully rejects any notion that member schools provide a secular education. Instead, it declares:

> Christian education is much more than just a Bible class added to the state's curriculum or daily devotional services added to an otherwise secular environment. Christian education is about the intersection of faith with every part of the curriculum and each activity that the school sponsors.

See App. at 27a.

The Lutherans operate one of the largest Protestant school systems in America. *See* App. at 31a. One Lutheran educator has articulated the Lutheran philosophy:

> What's Lutheran in Education?. . . That the Bible be dominant not only as basic subject matter, but also as a dynamic frame of reference and an orienting force which *Christianizes every other subject in a curriculum.*

Church & State, Oct. 1970, at 23 (emphasis added).

Another Lutheran educator said:

> In the Christian view, there can be no artificial divorce between sacred and secular learning. . . . Christian doctrine will, therefore, permeate the entire program.

Id.

The Lutheran Church-Missouri Synod's publishing arm is Concordia Publishing House. Concordia "has a deliberate, distinctive goal to provide you with quality sources that equip you for successful teaching and active ministry." According to this Lutheran philosophy, teaching and ministry are inseparable. Accordingly, Concordia promises: "All our materials are Bible-based and Christ-centered so that your

efforts to include Christ in all aspects of education are successful." *See* App. at 32a.

This is consistent with the philosophy expressed by the Lutheran Church-Missouri Synod District and Congregational Services which describes its education function as "School Ministry." The mission of this ministry is evangelistic "so that . . . children may be equipped as disciples of Jesus Christ." *See* App. at 32a.

Christian Schools International is an organization of 475 Reformed Christian Schools with a combined enrollment of over 100,000 students. Its motto is "Advancing Christian education and supporting schools in their task of teaching students to know God and His world and to glorify Him through obedient service." They publish textbooks that "incorporate a clear Biblical perspective on the subject area." *See* App. at 33a.

Across denominational boundaries, and including some groups that approve of tuition vouchers, the educational philosophy and practice is that religious schools provide religious, not secular, education. Funding religious schools through vouchers would make the public a sponsor of, and partner in, religious education.

B. The Philosophy Of Integrating Faith And Learning Crosses Denominational Boundaries And Is Profoundly Theological.

There is a profound theology behind religious education. It is a theology of integrating faith and learning that has been the subject of countless scholarly articles. Several points are worth noting briefly because of their relevance to this discussion. First, integration is not new but was discussed at

least as early as the early church father, Tertullian. Ken Badley, *The Faith/Learning Integration Movement*, Journal of Research on Christian Education 13, 14 (Spring, 1994). Second, integration of faith and learning is practiced by a wide spectrum of denominations including evangelical, Roman Catholic, fundamentalist Protestant, and Reformed Protestants. *Id.* at 16.

The scholarly discussion of the integration of faith and learning is evidence that what is contained in the above quoted official church policy statements is actually put into practice in the curriculum and in the classroom. It is useful then to review a few brief observations about "integration."

According to Badley, integration means more than mere "interaction" between faith and learning. It is more than an engagement or dialogue between the two. Instead, faith and learning are seen as a "coherent whole from the ground up." *Id.* at 17. In short, the task of integrating faith and learning is "to view -- and to engage in -- all of life and learning from the vantage point of Christian faith." *Id.* at 31.

William Hasker defines integration "as a scholarly project whose goal is to ascertain and to develop integral relationships which exist between Christian faith and human knowledge." William Hasker, *Faith-Learning Integration: An Overview*, Christian Scholar's Review 23 (March 1992). The existence of a "single reality, all of which is created by God, and under His dominion" is a central theological premise of integration. *Id.* Hasker strongly implies that the divisions between faith and science, as between secular education and religion, is an artificial division, created, or at least as fostered, by those with a secular world view. *Id.*

C. The Textbooks And Curriculum In Religious Schools Further Evidence The Pervasive Religious Atmosphere Of Such Schools.

A closer look at religious textbooks and curriculum provides further evidence of just how pervasive religion really is in religious schools:

> The Christian school curriculum includes astronomy, physics, chemistry, biology, mathematics, and related subjects because they provide a knowledge of God's nature and His work in this world. In the curriculum of the Christian school, the voice of creation joins with that of the written revelation in praise of the glory and goodness of God.

The Christian Philosophy of Education (Bob Jones University Press 2001). App. at 20a.

One of the largest Christian textbook publishers, A Beka Book, expresses its approach to science this way:

> While secular science textbooks present modern science as the opposite of faith, the A Beka Book science texts teach that modern science is the product of Western man's return to the Scriptures after the Protestant Reformation, leading to his desire to understand and subdue the earth, which we say is the orderly, law-abiding creation of the God of the Bible.

App. at 25a. Its science curriculum, therefore,

> presents the universe as the direct creation of God and refutes the man-made idea of evolution. Further, the books present God as the Great Designer and Lawgiver,

without Whom the evident design and laws of nature would be inexplicable.

Id. See also App. 23a-26a.

Seventh-day Adventist educators, for example, have developed textbooks throughout the curriculum in science, reading, social studies, handwriting, and religion in an effort to fully integrate faith and learning. George R. Knight, *Seventh-day Adventist Education* in *Religious Schooling in America* 103 (James C. Carper & Thomas C. Hunt eds., 1984). *See* App. at 11a-14a. The science curriculum for Grades 5 and 6 is entitled: "Discover God's World, Series A," and "Discover God's Creation, Series B." For grades 7 and 8, the titles are "Explore God's World, Series A" and "Explore God's Creation, Series B." App. at 14a.

The integration of faith and learning applies equally to other areas of curriculum. For example, Seventh-day Adventist handwriting curricula have children writing Bible passages. Book titles include: *God Made My World, Words of Jesus*, and *Words of Love*. Seventh-day Adventist Curriculum Catalogue, App. at 11a. The reading series emphasizes reading selected to inculcate faith and build character, including *In the Beginning, God Made It so,* and *Love Your Neighbor*. Indeed, reading curriculum content must "[b]e in harmony with and promote Biblical doctrine and Seventh-day Adventist goals of service, spiritual values and attitudes." App. at 12a. This is typical of religious school curriculum everywhere.

Finally, the integration of faith and learning is not just an abstract goal, but a basic reality in religious schools across the denominational and theological spectrum. As such, the religious mission of the school and church is implemented

throughout the school day, in all aspects of curriculum and instruction, through the example of the teachers and through the atmosphere of a religious culture and climate created in the school. Tuition vouchers, if approved, will inevitably finance and advance religion directly.

III. THE VOUCHER PROGRAM IMPLEMENTED IN OHIO VIOLATES PRINCIPLES OF RELIGIOUS AUTONOMY AND COMPROMISES THE CHURCHES' RELIGIOUS EDUCATION MISSION.

As noted above, for a sectarian school to participate in Ohio's Pilot Project Scholarship Program, under § 3313.976(A), the school must be registered by the state superintendent and must not, under subsection (4), "discriminate on the basis of . . . religion. . . ." Under § 3313.976(B), "[t]he state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any provision of division (A) of this section." Thus, the state is to make a determination as to the termination of a sectarian school if the superintendent has information that a religious school discriminates on the basis of religion.

Religious organizations have long claimed the right to discriminate in the hiring and maintaining of their preaching and teaching ministries. This is sometimes referred to as the constitutional "ministerial exception" but has not been limited to members of the clergy. *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 461 (D.C. Cir. 1996). Such organizations also have long believed they must be permitted to discriminate on a religious basis as to membership and enrollment within their institutions. In a case involving the hiring of a minister, the Seventh-day Adventist Church successfully argued this issue before the Fourth Circuit Court

of Appeals in *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985). That court stated:

> As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious organization or participation in religious ritual and worship, he or she should be considered "clergy." Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Columbia L. Rev. 1514, 1545 (1979).

Id. at 1169. *See also McClure v. Salvation Army*, 465 F.2d 553 (5th Cir. 1970); *EEOC v. Southwestern Baptist Theological Seminary*, 485 F. Supp. 255 (N.D. Tex. 1980), *aff'd in part and rev'd in part*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *Maguire v. Marquette University*, 627 F. Supp. 1499 (E.D. Wis. 1986), *modified*, 814 F.2d 1213 (7th Cir. 1987); *Miller v. Catholic Diocese of Great Falls*, 728 P.2d 794 (Mont. 1986). But the constitutional exemption from anti-discrimination laws afforded to churches under the Free Exercise Clause has its *quid pro quo*. As churches are shielded from government involvement in their sectarian ministries, the Establishment Clause sets churches apart from other private organizations and prevents religious organizations from being recipients of direct funding by tax-derived funds. *See Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977).

Establishment Clause violations may arise both when government *benefits* religious organizations as well as when government potentially *burdens* religion. *See St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436, 1441 n.3 (9th Cir. 1983). We have demonstrated that the Ohio law benefits religion. We now demonstrate how it burdens religion.

The anti-discrimination requirements of Ohio's voucher law are troubling because they may well strip away the constitutional shield prohibiting the state from meddling in and destroying the "religious autonomy" guarantees. In *NLRB v. St. Louis Christian Home*, 663 F.2d 60, 64 (1981), the court found that even though the Christian Church perceived its religious mission included caring for unfortunate children, it was not entitled to church autonomy protection from governmental intrusion since it hired employees without regard to religion. But the Ohio statute here specifically requires such non-discriminatory hiring.

Similar analyses contributed to defeating claims to church autonomy protection when employees were chosen without regard to religious affiliation. *See Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302, 307 (3d Cir. 1982); *NLRB v. Salvation Army of Mass. Dorchester Day Care*, 763 F.2d 1, 6-7 (1st Cir. 1985); *Volunteers of America-Minnesota-Bar None Ranch v. NLRB*, 752 F.2d 345, 348 (8th Cir. 1985); and *Volunteers of America, Los Angeles v. NLRB*, 777 F.2d 1386, 1389 (9th Cir. 1985). The federal courts compared each of these cases with *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where "[t]he religious character of the enterprise . . . existed at all three levels: the church, the church-operated institution, and the institution's employees." *St. Louis Christian Home*, 663 F.2d at 64.

Church control over the religious affiliation of the teaching staff and the imposition of religious tests to determine hiring, promotion, and termination is critical to the operation of sectarian schools operated by religious organizations. As Professor Douglas Laycock stated:

> Church labor relations rather plainly fall within the right of church autonomy. Deciding who will conduct the

> work of the church and how that work will be conducted is an essential part of the exercise of religion. In the language of the Supreme Court's autonomy cases, labor relations are matters of "church administration"; undoubtedly, they affect "the operation of churches."

Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 31 Colum. L. Rev. 1373, 1378 (Nov. 1981). He further contended, *id.* at 1399-40, that

> anti-discrimination laws initially prevent the church from deciding whether to discriminate among its employees and applicants. Many churches may wish to discriminate on the basis of religion. Equally important, churches that do not want to discriminate at all are deprived of the chance to define discrimination. Some may oppose unequal treatment of individuals because of race, sex, or national origin, but want to be free to act on any facially neutral basis even if its has a disparate impact on racial, sexual, or ethnic groups.

This "discrimination" concern is no mere theoretical problem. It became a major issue in Ohio in a case that reached this Court in *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986).

The Ohio voucher law presents another of "the myriad, subtle ways in which Establishment Clause values can be eroded." *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

Amici here urge that Ohio's voucher statute fosters impermissible governmental entanglement with religion in both substantive and procedural dimensions. Paraphrasing the Ninth Circuit in *Bollard v. California Province of Soc'y of*

Jesus, 196 F.3d 940, 948-49 (1999), on the substantive level the law directly implicates "the church's freedom to choose its . . . [teachers]," and its religious educational mission is severely compromised by the anti-discrimination proviso. "A religious organization's decision to employ or to terminate employment of a minister is at the heart of its religious mission." *Id.*

Any church-operated elementary or secondary school seeking registration to receive voucher students would be required to decide whether or not it would waive its right to select, discipline, and terminate its teachers for religious reasons free from governmental interference. Such a right is recognized in Title VII which exempts religious educational institutions from its religious discrimination proscriptions. *See* 42 U.S.C. § 2000e-1(a) and § 2000e-2(e)(2).

It has been said that "[a] church is always free to burden its activities voluntarily through contracts. . . ." *Minkus v. Baltimore Annual Conference*, 894 F.2d 1354, 1359 (1990). But for the state to manipulate such a choice that "would significantly . . . rearrange the relationship between church and state" raises very serious First Amendment concerns. *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000). The anti-discrimination mandate of the Ohio law clearly results in state interference with church administration of its schools and interferes with the selection of personnel deemed to be within the constitutionally protected category of the "ministerial exception." It thus is violative of Free Exercise principles. *See EEOC v. Catholic Univ. of America*, 83 F.3d at 462.

Procedurally, "the prospect of future investigation and litigation [by the state superintendent] would inevitably affect to some degree the criteria by which future vacancies . . . will

be filled" in participating sectarian schools. *Id.* at 467. This would likely cause religious schools registered to participate in the voucher program to act in the future "'with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessment of who would best serve the needs' of the . . . [school]." *Id.* The dangers of procedural entanglement become acute when there is also substantive entanglement, as here. *Bollard*, 196 F.3d at 949.

Amici understand it is critical to petitioners' "neutrality" argument that voucher programs they defend proscribe all forms of discrimination, including religious discrimination in both student enrollment and teacher employment at private voucher schools, as it must at public schools. But this underscores why such a program violates the "spirit of freedom for religious organizations [and] independence from secular control or manipulation" reflected in this Court's jurisprudence. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

Under the plain reading of the anti-discrimination proviso of the Ohio statute, Adventist schools would be excluded from participation because they, like many other religious schools, require teachers to be co-religionists, consistent with the philosophy of integrating faith and learning.[7]

Section 3313.976(A)(6) of the law provides that the superintendent is to terminate a school's registration to receive voucher students if it is found that the school teaches "hatred." Such a requirement implicates the religious curriculum

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[7]North American Division Working Policy, K-12 Education Policies F 0530 Nondiscrimination Exception-Employment, App. at 10a.

directly. Many faith traditions teach some form of exclusivity -- that their religion is the only truth or is the best expression of truth and that some other religions are wrong.[8] Frances R. A. Patterson has documented the widespread anti-Catholic bias in some conservative Christian schools. This research examined textbooks widely used in Christian schools.[9]

In an earlier survey, Edd Doerr and Albert J. Menendez found evidence of bias in textbooks from Christian publishers against a wide range of religious groups that some may consider "hatred." A few examples must be cited, albeit reluctantly: repeatedly referencing to Catholic teachings as "blasphemous" and "pagan;" The Episcopalian religion criticized as "dead in ritualism and rationalism;" and evidence of the ancient charges of deicide against the Jewish people."[10]

What constitutes teaching hate, of course, is very subjective and lends itself to biased judgments. Scholars have documented offensive teachings about a wide range of social, political, and historical issues in Christian textbooks which would open a fierce debate as to whether they constitute hate. Such topics include the condemnation of abortion and homosexuality, teaching about the civil rights movement,

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[8]Christian schools will cite the Gospel of John 14:16 where Jesus said: "I am the way, the truth and the life. No man cometh to the Father but by me."

[9]Patterson, Frances R. A., *Teaching Intolerance: Anti-Catholic Bias in Voucher-Supported Schools*, 64 The Educational Forum 139-49 (Winter 2000).

[10]Edd Doerr and Albert J. Menendez, *Should Tax Dollars Subsidize Bigotry?* 74 Phi Delta Kappan 165 (Oct. 1992).

attacks on the U.S. Supreme Court and judicial review.[11]

At best, the Ohio provision may exclude religious schools that teach views of exclusivity. At worst, the excluding of religious schools perceived as teaching hate permits, and perhaps requires, exploration by the state into the content of religious studies at registered sectarian schools.

This does not mean taxpayer support of teaching hate may ever be permitted -- certainly not! But the practical result is to bring the entire activity of religious schools under governmental scrutiny. This poses an enormous threat to the autonomy of church-operated schools, especially with regard to such sensitive and divisive issues at the core of the religious mission.

CONCLUSION

For the reasons stated above, the judgment of the Sixth Circuit Court of Appeals should be affirmed.

Dated: December 13, 2001

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[11]Frances R. A. Patterson, *Building a Conservative Base: Teaching History and Civics in Voucher-Supported Schools*, 82 Phi Delta Kappan 150 (Oct. 2000); Frances R. A. Patterson, *Supreme Court: Enemy of Freedom* 29 J. L. & Educ. 405 (Oct. 2000).

APPENDIX

APPENDIX ITEMS:

Council For American Private Education Website
www.capenet.org/facts.html

Private School Enrollment Continues to Climb

September 2001 - Six million students -- 11.4 percent of the nation's K-12 population -- attended private elementary and secondary schools in 1999, according to officials at the National Center for Education Statistics (NCES).

Since 1989, the private school enrollment figure has risen 15.8 percent, about the same as the 15.6 percent public school growth rate for the same 10-year period.

The figures were released last month in connection with NCES's annual projection of education statistics, a document that provides actual enrollment counts through 1999 and projections through 2011. Total national K-12 enrollment is expected to increase slightly from 53.1 million to 53.4 million between now and 2005, the projected peak year, but the degree and timing of enrollment shifts will vary at the elementary and secondary levels. Public and private K-8 enrollment is set to drop about 1 percent between 2001 and 2011, while 9-12 enrollment is expected to grow by nearly 7 percent through 2006, when it will then begin a gradual decline.

The NCES 10-year enrollment forecast presumes a static 11 percent share of the nation's students will attend private schools throughout the projection period.

On the teacher front, NCES is predicting that 3.65 million elementary and secondary school teachers will be employed nationally in 2011, an increase over 2001 levels of 87,000 teachers in public schools and 11,000 in private schools.

Also last month, NCES published the results of the biennial private school survey (PSS) conducted by the U.S. Census Bureau in the 1999-00 school year. The survey identified 27,223 private elementary and secondary schools, about 23 percent of all schools in the country, and nearly 5.2 million students. (Though derived from the same Census Bureau survey, the PSS enrollment figure for 1999 is about 800,000 less than the figure published in the NCES projection document principally because the latter includes some pre-K students in its enrollment counts for both public schools and private schools.)

The PSS report showed some significant demographic shifts within the world of private education. Since 1989, conservative Christian schools have seen an astounding increase of 46 percent in enrollment. The 245,000 additional students in those schools accounted for 75 percent of the total rise in private school enrollment during the past decade. Other types of private schools that posted noteworthy percentage increases in enrollment during the same timeframe included Episcopal schools (37 percent) and nonsectarian schools (26 percent).

Source of data: National Center for Education Statistics

Where do private school students go to school?

	89-90	99-00
Catholic	54.5%	48.6%
Nonsectarian	13.2%	15.7%
Conservative Christian	10.9%	15.0%
Baptist	5.8%	6.1%
Lutheran	4.4%	4.3%
Jewish	3.2%	3.3%
Episcopal	1.7%	2.2%
Seventh-day Adventist	1.6%	1.2%
Calvinist	0.9%	0.8%
Friends	0.3%	0.3%

SEVENTH-DAY ADVENTSIT CHURCH
K-12 EDUCATION POLICIES

F 05 Philosophy of Education

F 05 01 Philosophy---The Seventh-day Adventist Church recognizes God as the ultimate source of existence and truth. In the beginning, God created in His image a perfect humanity, a perfection later marred by sin. Through Christ and His Spirit, God determined to restore humanity from its lost state. Through the Bible, He has revealed His will to the world, a revelation that supercedes human reason. Through His Church on earth, He seeks the lost for His kingdom.
The basic tenets of the Seventh-day Adventist Church, as well as the inspired writings of Ellen G. White, are directed toward God's restorative plan for fallen humanity. The Church conducts its own system of education to engender belief in these tenets, within the context of one's personal relationship with Jesus Christ, and to foster a desire to share that relationship with others.

Made in God's image, every human being, although fallen, is endowed with attributes akin to those of the Creator. Therefore, Seventh-day Adventist education seeks to nurture thinkers rather than mere reflectors of other's thoughts; loving service rather than selfish ambition; maximum development of one's potential; and an appreciation for all that is beautiful, true, and good.

An education of this kind imparts far more than academic knowledge. It is a balanced development of the whole person. Its time dimensions span eternity. In Seventh-day Adventist education, homes, schools, and churches cooperate together with the divine agencies in preparing

learners for citizenship here on earth and in the New Earth to come. *

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*This statement is an abridgement of the complete philosophy statement found in the General Conference *Working Policy*.

F 05 05 Mission Statement---The Seventh-day Adventist Church in North America operates a system of elementary and secondary education that began in 1872. The unique philosophy of Christian education of the Church is based on the Scriptures and the writings of Ellen G. White. All children and youth have been entrusted by the Church to the education system for spiritual nurture and educational excellence.

The primary aim of Seventh-day Adventist education is to provide opportunity for students to accept Christ as their Savior, to allow the Holy Spirit to transform their lives, and to fulfill the commission of preaching the gospel to all the world.

The education program is predicated on the belief that each student is unique and of inestimable value, and on the importance of the development of the whole person. Students are educated to accept service as a way of life, to be sensitive to the needs of the people in the home and society, and to become active members of the Church.

F 05 10 Goals for Curriculum in Seventh-day Adventist Schools ---The following goal statements have been established to support the unique philosophy of Seventh-day Adventist education.

Acceptance of God and His Word---Each student will surrender his or her whole life to God through conversion; use the Bible as a basis for a relationship with Jesus Christ and an authoritative guide in all areas of life.

Commitment to the Church---Each student will desire

to know, live out, and share the basic tenets of the Seventh-day Adventist Church.

Family and Interpersonal Relationships---Each student will develop a sense of self-worth, along with skills in interpersonal relationships needed for meeting the responsibilities of family membership, and respond with sensitivity to the needs of others.

Responsible Citizenship---Each student will develop an understanding of multi-cultural diversity and historical heritage, and a working knowledge of governmental processes, while affirming a belief in the dignity and worth of others and a responsibility for one's local, national, and global environments.

Healthy Balanced Living---Each student will accept personal responsibility of achieving and maintaining optimum physical, mental, and spiritual health.

Intellectual Development--- Each student will adopt a systematic, logical approach to decision-making and problem-solving based on a body of scientific, mathematical, and historical knowledge, within the context of a biblical perspective.

Communication Skills---Each student will acquire optimum competency in verbal and nonverbal communication, in the use of information technology, and in effective communication of one's faith.

Life Skills---Each student will function responsibly in the everyday world, using Christian principles of stewardship, economy, and personal management.

Aesthetic Appreciation---Each student will develop an appreciation of the beautiful, both in God's creation and in human expression, while nurturing individual ability in the fine arts.

Career and Service---Each student will develop a strong work ethic and an appreciation of the dignity of service, along with an awareness of career options and

opportunities, as they relate to one's personal involvement in the mission of the Church.

F 05 15 Objectives of Seventh-day Adventist Education---The Seventh-day Adventist Church desires to provide for all its youth an education within the framework of the science of salvation. The fundamentals and common branches of knowledge are to be studied so that proficiency is achieved and a high quality of teaching is maintained.

The Seventh-day Adventist elementary school will assist each child to develop 1. a love and appreciation for the privileges, rights, and responsibilities guaranteed each individual and social group, and 2. a wholesome respect and attitude for each unit of society---home, church, school, and government. The elementary school will offer an organized program to ensure adequate development leading toward total spiritual, physical, mental, and emotional health and a basic core of skills and knowledge for everyday living.

The Seventh-day Adventist secondary school, predicated on the results obtained through the elementary school with character building as an undergirding structure, will endeavor to operate realistically for each student in the upgrading and maintenance of health, in the command of fundaments learning processes, in the teaching of worthy home membership, vocational skills, civic education, worthy use of leisure, and ethical maturity. The secondary school implementing the church philosophy will seek for objectives of spiritual dedication, self-realization, social adjustment, civic responsibility, and economic efficiency.

F 05 20 The Seventh-day Adventist School As An Integral Part of the Seventh-day Adventist Church---Seventh-day Adventist schools are an integral part of the Seventh-day Adventist Church in the following ways:

1. "To restore in man the image of his Maker, to bring him back to the perfection in which he was created, to promote the development of body, mind, and soul, that the

divine purpose in his creation might be realized—this was to be the work of redemption. This is the object of education, the great object of life."—(*Education*, pp. 15, 16)

2. The commission given in Matthew 28:18-20 states that the basic task of the Church is an educational task.

3. The Seventh-day Adventist school system has as its basic evangelistic task the education and redemption of the children and youth of the Church. Its object is to promote the development of character and to direct the youth to a "knowledge of God, the Creator, and of Christ, the Redeemer, as they are revealed in the sacred word." (*Education*, p. 17) In pursuing this task the school system has a greater continuing influence than any other aspect of the church program.

4. The school is concerned about the whole person—body, mind, and soul—and seeks to ensure that youth receive a balanced physical, mental, moral, social, and practical education.

5. The school system emphasizes the principle of service to God and man. It prepares youth for a life of service whether as employees of the Church or as active, contributing lay members.

a. The students generally come from Seventh-day Adventist homes and/or are baptized members of the Seventh-day Adventist Church.

b. In addition, the school may also serve as a mission outreach to the community. When a school desires to recognize this potential ministry to the community, non-Seventh-day Adventist youth may be enrolled in larger numbers. This type of program carries additional responsibility as detailed in F 45 10.

c. In some instances a church may operate a "mission" school which is an evangelistic outreach program to families in the community. A mission school is not limited in the number of non-Seventh-day Adventist students that may

be enrolled.

6. The members of the school boards and conference board of education are members of the Seventh-day Adventist Church.

a. The school board is composed of members of the Seventh-day Adventist who represent a cross section of the school constituency and who are supportive of Seventh-day Adventist education.

b. The conference and union conference boards of education are composed of representatives of various church institutions and/or conferences, lay members of the Church, and church officials.

7. Educational employees must be active members of the Seventh-day Adventist Church in regular standing, and committed to the program of the Church. Employment qualifications, licenses and credentials, salary and wages, benefits, and retirement are all established and regulated by the policies which cover all other denominational workers.

8. The uniquely designed curriculum in Seventh-day Adventist schools is developed by church educators who ensure that the educational objectives of the Church are achieved.

a. It is based on a distinctive Seventh-day Adventist philosophy with a strong commitment to academic excellence.

b. It utilizes the best in current curricular research.

c. It reflects an awareness of the principles of human growth and development and the worth and dignity of each student.

d. It emphasizes a process which encourages, guides, and sustains the learner as he seeks to relate to the Creator and to his fellow human beings.

9. The title to school buildings and property is held by the conference association which is the legal

corporation that holds title to all church and school properties.

F 05 25 Nondiscriminating Policy---Admission of Students---The Seventh-day Adventist Church in all of its church schools, admits students of any race to all rights, privileges, programs, and activities generally accorded or made available to students at its schools, and makes no discrimination on the basis of race, color, ethnic background, country of origin or sex in administration of education policies, applications for admission, scholarship or loan programs, and extracurricular programs.

F 05 30 Nondiscrimination Exception---Employment---For Seventh-day Adventists the free exercise of religion includes the right to operate educational institutions that are distinctively Seventh-day Adventist. The creation and maintenance of such institutions require that they be staffed only by those individuals who are in complete harmony with the beliefs and practices of the Church. Hence, in the employment of personnel for its educational institutions one of the occupational qualifications for any position is that the individual must be a Seventh-day Adventist, committed to the program of the Church.

School boards shall, officially and in practice, abide by the following policies relating to employment:

1. Equal employment opportunities shall be afforded to all on the basis of qualifications, without regard to race, color, gender, national origin, ancestry, physical handicap, age, height, weight, marital status (single, married, or widowed), or prior military service.

2. Inasmuch as the personal life and the professional identity of an individual are inseparable, all employees are expected to conform to the standards of conduct that are in harmony with Seventh-day Adventist principles.

HANDWRITING
BASIC

A REASON FOR WRITING

This penmanship program, developed by Eva Hoshino and Carol Ann Retzer, uses a thematic cycle of Scriptural texts for handwriting instruction. The program includes thirty-six weekly lessons with directed daily practice activities culminating with the verse of the week. Ideas are also presented for using the completed verses in on-going witnessing activities. It is recommended that the decorated verses be used with the family three times a month and be shared outside the family at least once a month.

The research-based curriculum systematically develops letter formation, size and proportion, spacing, slant, alignment, and line quality. The program track sequence—manuscript, transition, cursive—it to be carefully followed. Cursive pages are to be removed from second grade worktexts. An alternation plan of instruction may occur within the cursive track if needed. An instructional video, teacher's guidebooks, student alphabet desk cards, alphabet wall sheets, and extra border sheet packs are also available.

Grade K	God Made My World - introduction to manuscript
Grade 1	Words of Promise - manuscript
Grade 2	Words of Jesus – manuscript
Grade 3	Words to Live by - transition
Grade 4	Words of Love - cursive
Grade 5	Words of Praise - cursive
Grade 6	Words of Wisdom - cursive

SEVENTH-DAY ADVENTIST CURRICULUM CATALOG

ABOUT THE LIFE SERIES

The Seventh-day Adventist elementary reading curriculum is designed to provide instruction for students that will enable them to develop optimum reading skills and competencies and that will create in the student an interest in reading as a source of learning. In addition, the reading curriculum is designed to reinforce the principles of the Seventh-day Adventists faith and to create in the student a taste for that literature that builds character and encourages a sense of mission and service.

In selecting and developing materials for the LIFE SERIES, editors were guided by criteria established by the Reading Steering Committee, which included the following goals and purposes:

1. Provide the learner with optimum reading skills.
2. Foster in the learner an interest in reading as a source of learning, relaxation, and worship.
3. Reinforce in the learner the principles and standards of the Seventh-day Adventist Church.
4. Develop discerning and discriminating readers who are able to identify quality literature that is in harmony with Christian principles.

Content selections were based on criteria established by the Reading Steering Committee with goals as outlined below.

Content selection will:

1. Be in harmony with and promote Biblical doctrine and Seventh-day Adventist goals of service, spiritual values, and attitudes

2. Be appropriate to the experience and background of the children for whom it is intended
3. Include knowledge and information that will fit children for usefulness in a real world and for practical duties in life (MYP 279)
4. Include material that will stimulate thinking and have a healthful, strengthening, and sanctifying effect on the mind (MYP 287)
5. Include material that will encourage a taste for quality literature and promote discrimination in the selection of leisure reading matter
6. Include realistic characters
7. Include proper reading matter that will be enjoyable and will afford amusement and recreation without demoralizing the mind (AH 411)
8. Include colorful, realistic illustrations that are appropriate for children and accurately depict events described in the content material
9. Avoid intermingling concepts of good and evil, thus confusing the mind (CT 458-9)
10. Avoid addictive, sentimental, sensational, or escapist material that will unfit the mind for serious study (CT 139)
11. Avoid use of expressions that would tend to date the material or could have meanings other than those that are intended

In addition to endeavoring to meet these criteria, the editors have attempted to provide a reading program that will meet the needs of children in the various settings found in Seventh-day Adventist education. For example, much emphasis has been placed on the development of self-instructing materials that should be of assistance to the multigrade teacher whose instructional time with any given grade may be limited.

SEVENTH-DAY ADVENTIST CURRICULUM
CATALOG

SCIENCE-HEALTH
BASIC

Grade 5	Discover God's World, Series A
Grade 6	Discover God's Creation, Series B
Grade 7	Explore God's World, Series A
Grade 8	Explore God's Creation, Series B

Bob Jones University Press Website: excerpts from "The Christian Philosophy of Education."
Www.bjup.com/resources/articles/white_papers/philosophy_of_ed.html

Purpose

The purpose of Christian education is the directing of the process of human development toward God's objective for man: godliness of character and action. It bends its efforts to the end "that the man of God may be perfect, throughly furnished unto all good works" (II Tim. 3:17).

This goal of godliness presupposes the experience of regeneration. As education in general begins with physical birth, Christian education proper begins with spiritual rebirth, when the life of God is communicated to the soul. To say that Christian education proper begins with the new birth is not, however, to say that it is pointless before regeneration. The student can be provided with necessary awarenesses of God and responses to His Word so that when the Holy Spirit brings conviction of sin he will readily and with full understanding accept Christ as his Saviour. Timothy from childhood knew "the holy Scriptures, which are able to make thee wise unto salvation through faith which is in Christ Jesus" (II Tim. 3:15). To make children and even unregenerated adults "wise unto salvation" is no less a legitimate function of Christian education today.

Growth in godliness proceeds step by step from regeneration toward full maturity "in the knowledge of our Lord Jesus Christ" (II Pet. 1:5-8). This growth, like regeneration, is made possible by divine grace (Titus 2:11-13). It results from the emulation of Christ, who, as "the express image" of "the Majesty on high" (Heb. 1:3), is the visible manifestation of the divine nature that God has ordained for man's imitation. As regenerated man continues to occupy his mind with the

truth of God revealed in Christ, he is "changed into the same image from glory to glory, even as by the Spirit of the Lord" (II Cor. 3:18). His full conformity to the image of God in Christ--his Christ-likeness--is the goal of Christian education (Rom. 8:29). This goal is pursued with the recognition that its complete realization awaits the full view of Christ in the life to come, when "we shall be like him; for we shall see him as he is" (I John 3:2).

Responsibility

In the Scriptures God has commanded two institutions to educate: the home and the church. As an extension of either or both of these institutions, the Christian school has a Biblical mandate to educate.

The home

The Bible makes clear that education is to begin in the home (Gen. 18:19; Deut. 6:7; Prov. 22:6; Eph. 6:4; II Tim. 1:5; 3:15). It makes parents responsible for their children and charges them with an educational task.

The church

The New Testament indicates that the responsibilities of the church include edification as well as evangelism (Matt. 28:19-20; Acts 2:42; II Tim. 2:2). The Scriptural representation of the church as a body--an organism that grows and matures--implies a teaching function for this institution. Also, the recognition of the gift of teaching by the New Testament (Rom. 12:4-7; I Cor. 12:28) assumes the necessity of teaching in the local churches.

The Christian school

Christians have a Biblical mandate to educate in their homes and in their churches. In order to reinforce the educational ministries of these institutions or to protect their ministries from secular interference, Christian parents or church members, acting either individually or in concert, may elect to form a Christian school. In doing so, they are acting from religious conviction. To deny them their choice of means in carrying out the Biblical mandate of Christian education is to deny them the exercise of their religious convictions.

It follows that the education of children is the prerogative not of the state but of the parents or church members. Furthermore, it is evident that allowing the state to dictate the standards and procedures of Christian education jeopardizes the ability of parents and of church members to carry out their responsibility to God for the education of their children. The subjection of the Christian school to the control of the state or of any other secular agency is, in effect, the subjection of the Christian homes and churches to secular domination. It is rightly regarded as vicious, for secular control (even that which may appear benign) is incompatible with the aims of a spiritual ministry.

The work of the Christian school is an extension of the Christian educational ministries of the Christian home and the church. Its purpose, therefore, is the development of the student in the image of God. This purpose determines both the content and the means of instruction.

Content

King David exhorted his son, "And thou, Solomon my son, know thou the God of thy father, and serve him with a perfect heart and with a willing mind" (I Chron. 28:9). How perfectly David must have understood that the education of the child of God must include both the knowledge of God and the preparation for exercising that knowledge in service. Accordingly, in Christian education students are taught to *know* God and to *imitate* Him in His character and in His works.

The knowledge of God

The whole body of Christian educational theory rests upon the recognition that all truth is of God. He is the God of truth (Ps. 31:5); His Son is the Lord of truth (John 14:6); His Spirit is the Spirit of truth (John 14:16-17). All truth, whether discerned or undiscerned by man, comes forth from a single source and, therefore, is one harmonious whole. Consequently, God's written self-revelation is the starting point of all rational inquiry and the guide to all interpretation of reality. No concept can be true that conflicts with the statements of the [chScriptures.[ch Conversely, no untruth is a legitimate support of divine revelation or has any place in the ministry of spiritual truth. A reverence for the God of truth compels a conscientious regard for accuracy in all areas of factual investigation and reporting.

Since it is the purpose of Christian education to develop redeemed man in the image of God, Christian educators must point students to the original of this image, God Himself. Students come to know God by studying His revelation of Himself in His Word and in His works. Of these, the more fully revealing of God is His Word; and, therefore, the Bible is the center of the Christian school curriculum. The Bible is not only the most important subject matter but also the source

of the principles determining the other subject matters and the way in which they are taught. The presentation of Biblical truth is thus not confined to a single segment of the curriculum--the study of the Bible--but diffused throughout the teaching of all subjects. The teacher's knowledge of the Scriptures controls his selection and interpretation of materials and determines his whole perspective on his subject matter. The Scriptures possess this privileged status in the curriculum, for they are the primary means of conveying the knowledge of God.

This knowledge of God implies more than just knowledge *about* God. Certainly an acquaintance with the facts about God in the written revelation is important. But the knowledge of God that is unique to Christian education is a *personal* knowledge that begins with repentance of sin and faith in Jesus Christ as Saviour and develops through obedience to and communion with God. To know God is to be born into the family of God and to live in fellowship with Him (I John 5:20; Phil. 3:10). It follows that without a student body composed mainly of students possessing this personal knowledge of God, no school can legitimately be regarded as a Christian educational institution.

Though the Word of God is the main source of the knowledge of God, both factual and personal, and therefore deserves precedence, the works of God are also an important part of the Christian school curriculum. The creation reveals the Creator, and that which reveals God is a proper study for man. Indeed, the Scriptures themselves invite man to consider God's earthly handiwork and hold him responsible for recognizing in it the work of God (Job 38-39; Rom. 1:18-20).

Especially is God revealed in His rational creation, man, who having been created in the image of God is the highest of God's works on earth. It is for this reason that the Christian school gives emphasis to the "humanities": the study of man's

language, his literature, his artistic achievements, the record of his history, the logic of his mathematical reasoning, and other forms of his personal and cultural expression. But the natural sciences are not disregarded. The glories of the vast universe and the myriad wonders of man's earthly habitation testify that their Creator is a God of order, of beauty, and of power (Ps. 19:1; Rom. 1:20). The perfect suitability of man's physical environment to his needs and the fact that God committed the earth to man to subdue and enjoy (Gen. 1-2) witness to the goodness of God in His love for and delight in His human creation. Though the study of nature has often displaced the study of nature's God, even to the point of man's worshiping the creation rather than the Creator (Rom. 1:25), nevertheless God Himself pronounced the material universe "good" and established its laws and processes as means of accomplishing His will for man (Gen. 1:31). The Christian school curriculum includes astronomy, physics, chemistry, biology, mathematics, and related subjects because they provide a knowledge of God's nature and His work in this world. In the curriculum of the Christian school, the voice of creation joins with that of the written revelation in praise of the glory and goodness of God.

The instruments

The means of achieving godliness--the purpose of Christian education--is the imitation of God. The imitation of God by the student depends upon and conforms to the imitation of God by the teacher. The teacher in the Christian school stands in much the same relation to his students that Paul stood in with regard to his Corinthian converts when he wrote, "Be ye followers of me" (I Cor. 4:16). The Spirit-filled Christian teacher stands in the place of God, representing God to the student. What the student knows of God is often what he sees in his teacher. "Ye became followers of us, and of the Lord," Paul reminded the Thessalonians (I Thess. 1:6). It is for this

reason that the Christian school must pay careful attention to the character and conduct of its teachers. No school that is careless concerning the Christ-likeness of its teachers can hope to fulfill the purpose of Christian education.

Of course, a Christian school should be concerned about the professional as well as the spiritual preparation of its teachers. Knowledge of the student and mastery of the subject to be taught as well as of the methodology of its presentation are necessary for effective teaching. Jesus Christ knew His students (John 2:25) and His subject matter and was competent in every conceivable legitimate technique of imaginative, resourceful teaching. He, therefore, taught with a commanding assurance and vigor that amazed the multitudes (Matt. 7:29). No amount of carefully prepared educational materials, however important they may be as tools, can compensate for the lack of a carefully prepared teacher: one who has followed the spiritual and professional example of his Master.

The position of the teacher is one of authority and service, and the two are intertwined. In Scriptural leadership, he who leads must also serve (Matt. 20:25-28). In fact, he rules in order to serve. Christ, our Lord and Master, not only served mankind supremely in His death but also continues to serve His people. He can serve most fully those who accept His rule. Similarly the Christian teacher exercises authority over the student in order to serve the student in his quest for Christ-likeness. The teacher's ability to serve the student depends to a great extent upon the student's acceptance of his rule.

Likewise the Christian school administrator exercises authority over both the teacher and the student in order to serve the teacher in his service of the student. The chief responsibility of the administrator is to provide the most favorable environment possible for the communication of

Christ to the student. The teacher can function as a "teacher come from God" only as the administration serves his needs and, through him, the needs of the student. Conversely the administration can serve the teacher and the student in the process of Christian education only as they submit to its rule. As a godly administration undergirds the ministry of a godly teacher to a responsive student, the goal of godliness in the student's character and action is increasingly realized.

A Beka Book Web Site, Curriculum Distinctives. www.abeka.com/distinctives.html.

BIBLE

The clear teaching of the Bible is the foundation for all other learning.

Since the Bible is the most important subject of Christian education, we believe it should be taught specifically and systematically to all each day. The *A Beka Book* Bible Program presents the Bible in the narrative style in which it is written. The stories of the Old and New Testaments in the lower grades lead up to a presentation of the more abstract statements in the New Testament epistles and the wisdom books for older students. The lessons flow from the Word of God, through the heart of the teacher, to the heart of the student. The curriculum has been planned so that students going through the *A Beka Book* Bible Program will be thoroughly acquainted with the basic portions of the Scriptures.

HISTORY

Students need a realistic view of history, government, geography, and economics based upon the foundational truths of the Scriptures.

Ever since H. G. Wells published his *Outline of History* in 1920, the theme of world history texts has been man's supposed progress from savagery toward socialism, from tribal religious toward one-world government. American history is usually presented as a series of conflicts-rich vs. poor, black vs. white, North vs. South, labor vs. management, male vs. female, etc.

Our *A Beka Book* texts reject the Marxist/Hegelian conflict theory of history in favor of a truthful portrayal of peoples, lands, religions, ideals, heroes, triumphs, and setbacks. The

result has been positive, uplifting history texts that give students an historical perspective and instill within them an intelligent pride for their own country and a desire to help it back to its traditional values.

We present government as ordained by God for the maintenance of law and order, not as a cure-all for the problems of humanity. We present free-enterprise economics without apology and point out the dangers of Communism, socialism, and liberalism to the well-being of people across the globe. In short, *A Beka Book* offers you a Christian and conservative approach to the study of what man has done with the time God has given

MATHEMATICS

No subject matter better reflects the glory of God than mathematics. To study mathematics is to study God's thoughts after Him, for He is the great Engineer and Architect of the universe.

Unlike the "modern math" theorists, who believe that mathematics is a creation of man and thus arbitrary and relative, we believe that the laws of mathematics are a creation of God and thus absolute. All of the laws of mathematics are God's laws. Our knowledge of God's absolute mathematical laws may be incomplete or at times in error, but that merely shows human frailty, not relativity in mathematics. Man's task is to search out and make use of the laws of the universe, both scientific and mathematical.

A Beka Book provides attractive, legible, workable traditional mathematics texts that are not burdened with modern theories such as set theory. These books have been field-tested, revised, and used successfully for many years in Christian schools. They are classics with up-to-date appeal. Besides training students in the basic skills that they will need all their lives, the *A Beka Book* traditional mathematics books teach

students to believe in the absolutes of the universe, to work diligently to get right answers, and to see the facts of mathematics as part of the truth and order that God has built into the real universe.

SCIENCE/HEALTH

Science is the study of God's order, provision, and reasonableness as revealed in His physical creation.

While secular science textbooks present modern science as the opposite of faith, the *A Beka Book* science texts teach that modern science is the product of Western man's return to the Scriptures after the Protestant Reformation, leading to his desire to understand and subdue the earth, which he saw as the orderly, law-abiding creation of the God of the Bible.

The *A Beka Book* Science and Health Program presents the universe as the direct creation of God and refutes the man-made idea of evolution. Further, the books present God as the Great Designer and Lawgiver, without Whom the evident design and laws of nature would be inexplicable. They give a solid foundation in all areas of science -- a foundation firmly anchored to Scriptural truth. Teachability is assured through accurate, interesting writing, carefully planned demonstrations that can be performed with a minimum of equipment, chapter terms and questions, full-color illustrations, consideration of the interests and comprehension skills of students at each grade level.

ENGLISH

Because God has given us the great commission of communicating His truth to mankind, we must give our students the finest tools available to carry out this goal in a reasonable, well-articulated manner.

God gave us our powers of thought and language and chose to

reveal His will and His ways to us in a written form, the Bible; thus we need to pay particular attention to the teaching of grammar, spelling, vocabulary, composition, and literature as we seek to educate students from a Christian perspective.

Since Darwin, linguists have sought in vain for a credible explanation for the origin of language. Having accepted evolutionary philosophy, they can only think that language must be simply a response to a stimulus, an emotional outcry, an imitation of animals.

If such foolishness were true, then any talk of language being governed by rules or any claims that some expressions are better than others would be inappropriate, and relativism would rule. This explains many English programs today. But as Christians, we still believe that the Bible provides the only credible explanation for the universe, of man, and of language. Therefore, it is easy to see in language a structure which reflects the logic, reasonableness, and orderliness of the One who created man and his language.

National Christian School Association, web page: Statement of Purpose

www.nationalchristian.org/purpose/index.html

In Joshua chapter four as the children of Israel are about to cross into the promised land, they face the one last obstacle- the Jordan River. After God allows the people to walk across miraculously on dry ground, God commands the nation to build an altar. Twelve stones were taken from the bottom of the Jordan River for the altar. In verse six, the reason for the memorial is given when God says "In the future when your children ask you 'What do these stones mean?' tell them that the flow of the Jordan was cut off before the Ark of the Covenant of the Lord."

Notice that the natural curiosity of a child is assumed. God does not say "If your children ask," he says "When your children ask." The function of a Christian school is like that of the altar beside the Jordan River. Institutions of Christian education exist to be ready with a Biblical answer when our children ask about the world around them.

Christian education is much more than just a Bible class added to the state's curriculum or daily devotional services added to an otherwise secular environment. Christian education is about the intersection of faith with every part of the curriculum and each activity that the school sponsors. Christian schools are uniquely able to handle the questions about the nature of God, his creation and what he expects of us-questions that can arise naturally out of any class.

An increasing number of parents are seeking the difference found in Christian education. Enrollment in NCSA schools has increased 27 percent in the past decade. In addition, several new schools are beginning each year.

Southern Baptist Association of Christian Schools website; www.sbacs.org

SBACS Vision To advance a system of Christian schools of excellence, uniting home, church and school in Jesus Christ through Kingdom Education* so that the generations to come will know the Truth of God's Word and not forget His works, nor be taken captive by the vain philosophies of their day. Psalm 78:1-7; Colossians 2:8

The cause of education in the kingdom of Christ is co-ordinate with the causes of missions and general benevolence and should receive along with these the liberal support of the churches. An adequate system of Christian schools is necessary in a complete spiritual program for Christ's people (Baptist Faith and Message...1963

*Kingdom Education defined: A life-long, Bible-based, Christ-centered process of leading a child to Christ, building a child up in Christ, and equipping a child to serve Christ. Glen Schultz, Kingdom Education, LifeWay, 1998

SBACS Mission The Southern Baptist Association of Christian Schools will impact the education of school-aged children toward a biblical worldview by providing information, training, fellowship and avenues for influence for pastors and educational leaders of Southern Baptist schools and churches. Revised February 8, 1998 SBACS Executive Committee, Orlando, Florida

Southern Baptist Convention The Southern Baptist Convention, which meets annually, records three statements related to Christian schools in their minutes. The first reference is in article XX of the 1925 Baptist Faith and Message. The second reference is in article XII of the 1963 Baptist Faith and Message. The third reference is the adoption

of a Christian school resolution at the convention in Atlanta in 1999.

The 1963 Baptist Faith and Message statement on education identifies the need for an adequate system of Christian school to provide a complete spiritual program for Christ's people. The authors, paragraph 2, list three levels of the school system: Christian schools, college and seminary. Interestingly, both statements identify the need to provide a complete spiritual program for "Christ's people" not just Southern Baptists.

1963 Baptist Faith and Message, XII. EDUCATION The cause of education in the kingdom of Christ is co-ordinate with the causes of missions and general benevolence and should receive along with these the liberal support of the churches. An adequate system of Christian schools is necessary in a complete spiritual program for Christ's people.

In Christian education there should be a proper balance between academic freedom and academic responsibility. Freedom in any orderly relationship of human life is always limited and never absolute. The freedom of a teacher in a Christian school, college, or seminary is limited by the pre-eminenance of Jesus Christ, by the distinct purpose for which the school exists.

Deuteronomy 4:1, 5,9,14; 6:1-10; 31:12-13; Nehemiah 5:2; 7:24ff; 18:19-20; Luke 2:40; 1 Corinthians 1:18-31; Ephesians. 4:11-16; Philippians 4:8; Colossians 2:3,8-9; 1 Timothy 1:3-7; 2 Timothy 2:15; 3:14-17; Hebrews 5:12-6:3; James 1:5; 3:17.

1925 Baptist Faith and Message, XX. EDUCATION Christianity is the religion of enlightenment and intelligence. In Jesus Christ are hidden all the treasures of wisdom and knowledge. All sound learning is therefore a part of our Christian heritage. The new birth opens all human faculties

and creates a thirst for knowledge. An adequate system of schools is necessary to a complete spiritual program for Christ's people. The cause of education the Kingdom of Christ is coordinate with the causes of missions and general benevolence, and should receive along with these the liberal support of the churches.

Deuteronomy 4:1,5, 9,13–14; Deuteronomy 6:1,7:1–10; Psalm 19:7–8; Proverbs. 8:1–7; Proverbs 4:1–10; Matt. 28:20; Colossians 2:3; Nehemiah 8:1–4

The Lutheran Church--Missouri Synod
Schools: www.lcms.org

Since 1640 Lutheran schools have existed in our country. Early Lutheran settlers upheld the high value of education which continues to be upheld by The Lutheran Church -- Missouri Synod (LCMS). According to the LCMS by-laws, "the most effective education agencies available to the church for equipping children and youth for ministry are the full-time Lutheran elementary and secondary schools. "Initially our schools were begun to teach the church family's students how to read so they could study the Bible and the catechism. Gradually, the curriculum was expanded to include the other subjects which became standard in the "new" public schools, so Lutheran school students could become productive Christian citizens and church leaders. It is assumed that the Christian faith is shared, as opportunities arise, throughout the school day in all subjects by Lutheran Christian teachers. From our oldest Lutheran school, St. Mathew in Manhattan, which has been continuously operating since 1752, the LCMS has expanded to 2023 Lutheran schools. There are Lutheran schools in every state. Currently, there are 62 LCMS high schools, 991 elementary schools and 1,170 early childhood centers serving a total of 280, 714 students. Of this total. 199,209 students are in elementary schools, 16,047 in secondary schools and 65,458 in early childhood centers. A total of 17,819 educators serve in these schools, 70% of which are specifically prepared and certified by the LCMS to serve in our Lutheran schools. Most early childhood educators are employed part time. These church-certified educators are considered to be Ministers of Religion, Commissioned by the LCMS. Most also hold state teaching certificates. Approximately 42% of the students in Lutheran schools are members of the operating congregations. The rest, 58%, come from the general public, seeking the quality Christian education we provide.

Lutheran Church Missouri Synod
Concordia Publishing House
School – Linking Faith to Life
www.cph.org/school/schoolindex.html

Christian schools make a difference in the lives of students and their families. As The Christian Education Specialist, CPH has a deliberate, distinctive goal: to provide you with quality resources that equip you for successful teaching and active ministry.

Our development and editorial staff includes experienced educators; people who understand your needs because they've worked in the classroom too.

Because we share your vision, you can be assured that all our materials are Bible-based and Christ-centered, so that your efforts to include Christ in all aspects of education are successful.

Listed for sale by Concordia:

Integrating the Faith
A Teachers Guide for Curriculum
The Indispensible Gujide for Effective Christian Education

Incorporates Christian principles into all curriculum

Six complete volumes

The ad copy states:

"Support the Word of God and Presence of Christ in Every Educational Setting"

Christian Schools International Publications Catalog
www.gospelcom.net/csi/catalog

Christian Schools International publishes textbooks and teacher guides for a variety of subject areas, including Bible, scoience, health, literature, writing, spelling, physical education, and more. CSI also distributes videso, CD-ROMS, and other resources to reinforce teaching and learning.

The materials that CSI publishes for students and teachers incorporate a clear biblical perspective on the subject area. In addition, the materials are attractive, up-to-date, and academically sound, promoting effective teaching and learning.

Declaration On Christian Education
Gravissimum Educationis
Proclaimed By
Pope Paul VI
On October 28, 1965

Christian Education

Since all Christians have become by rebirth of water and the Holy Spirit a new creature(8) so that they should be called and should be children of God, they have a right to a Christian education. A Christian education does not merely strive for the maturing of a human person as just now described, but has as its principal purpose this goal: that the baptized, while they are gradually introduced the knowledge of the mystery of salvation, become ever more aware of the gift of Faith they have received, and that they learn in addition how to worship God the Father in spirit and truth (cf. John 4:23) especially in liturgical action, and be conformed in their personal lives according to the new man created in justice and holiness of truth (Eph. 4:22-24); also that they develop into perfect manhood, to the mature measure of the fullness of Christ (cf. Eph. 4:13) and strive for the growth of the Mystical Body; moreover, that aware of their calling, they learn not only how to bear witness to the hope that is in them (cf. Peter 3:15) but also how to help in the Christian formation of the world that takes place when natural powers viewed in the full consideration of man redeemed by Christ contribute to the good of the whole society.(9) Wherefore this sacred synod recalls to pastors of souls their most serious obligation to see to it that all the faithful, but especially the youth who are the hope of the Church, enjoy this Christian education.(10)

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Nos. 00-1751, 00-1777, 00-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, *et al.*,

Petitioners,

-and-

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

-and-

SENEL HERMAN TAYLOR, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ANTI-DEFAMATION LEAGUE, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities ii

INTEREST OF *AMICUS* 2

INTRODUCTION 3

STATEMENT OF FACTS 5

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. THE OHIO PROGRAM IS IRREMEDIABLY IN CONFLICT WITH THE COURT'S PRECEDENTS UNIFORMLY FORBIDDING THE PROVISION OF GOVERNMENT FUNDING TO RELIGIOUS SCHOOLS FOR RELIGIOUS PURPOSES. 10

II. THE OHIO PROGRAM IS STRUCTURED SO THAT THE DISPOSITION OF GOVERNMENT FUNDS TO RELIGIOUS SCHOOLS IS NOT THE RESULT OF GENUINE PARENTAL CHOICE. 16

CONCLUSION 21

TABLE OF AUTHORITIES

FEDERAL CASES

Agostini v. Felton,
521 U.S. 203 (1997) 2, 4, 12, 17, 18

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 2, 11, 17

Engel v. Vitale, 370 U.S. 421 (1962) 2, 3, 4

Everson v. Bd. of Educ., 330 U.S. 1 (1947) 10

Lee v. Weisman, 505 U.S. 577 (1992) 2, 3

Lemon v. Kurtzman, 403 U.S. 602 (1971) 2

McCollum v. Bd. of Educ., 333 U.S. 203 (1948). 2, 3

Mitchell v. Helms, 530 U.S. 793 (2000) 2, 8, 12, 13, 20

Mueller v. Allen, 463 U.S. 388 (1983) 16

Reed v. Rhodes, 934 F. Supp. 1533 (N.D. Ohio 1996) 20

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 2, 12-14

Santa Fe Indep. School Dist. v. Doe, 530 U.S. 290 (2000) 2

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) 6, 7, 11, 19

Widmar v. Vincent, 454 U.S. 263 (1981) 17

Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986) 2, 11, 16-17

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) 2, 16

STATE STATUTES

Ohio Rev. Code § 3313.975(C)(1) 5

Ohio Rev. Code § 3313.976(A)(1) 5

Ohio Rev. Code § 3313.976(A)(3) 5

Ohio Rev. Code § 3313.976(C) 5

Ohio Rev. Code § 3313.976(8) 6

Ohio Rev. Code § 3313.977(A)(1) 6

Ohio Rev. Code § 3313.979 7

Ohio Rev. Code § 2744.01(C)(2)(c) 18

Ohio Rev. Code § 2744.01(F) 18

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ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ANTI-DEFAMATION LEAGUE, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS*[1]

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of Church and State embodied in the Establishment Clause of the First Amendment. Separation, ADL believes, preserves religious freedom and protects our democracy.[2]

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *amicus* has obtained and lodges herewith the written consents of the parties to the submission of this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, made a monetary contribution to its preparation or submission.

[2] In furtherance of this belief, ADL has participated in the major church-state cases of the last half-century. *See* ADL briefs *amicus curiae* filed in *Mitchell v. Helms*, 530 U.S. 793 (2000); *Santa Fe Indep. School Dist. v.* Doe, 530 U.S. 290 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector and Visitors of the University of Virginia*, 5[illegible] U.S. 819 (1995); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Engel v. Vitale*, 370 U.S. 421 (1962); and *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "A union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

INTRODUCTION

Time and again, this Court has reaffirmed the view that a clear separation between Church and State is a *sine qua non* of the flourishing of religion in our country. The Establishment Clause "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Bd. of Educ.*, 333 U.S. 203, 212 (1948). The Court has properly recognized that religion is not aided by government funding, but rather hurt by it. "The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring), quoting *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985).

Consistent with these underlying precepts, the Court has never permitted government subsidization of religious activities through direct monetary

payments to religious institutions. That core principle of Establishment Clause jurisprudence marks the bright line between permissible and impermissible government assistance programs. It is supported by a compelling rationale.

When government seeks to fund religion, it damages its own strength, undermines its credibility as a neutral voice for all its peoples, and promotes conflict. "Anguish, hardship and bitter strife" result "when zealous religious groups struggle with one another to obtain the Government's stamp of approval." *Engel,* 370 U.S. at 429. As Justice Souter noted in his dissent in *Agostini v. Felton*:

> Th[e] flat ban on subsidization . . . expresses the hard lesson learned over and over again in the American past and in the experiences of the countries from which we have come, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion.

Agostini v. Felton, 521 U.S. 203, 243 (1997) (Souter, J., dissenting).

The Ohio voucher program at issue in this case is squarely at odds with that "flat ban." The predominant effect of the Ohio program is to provide to religious schools direct and unrestricted government monetary payments that may be, and are, used for religious education, and that may be used for other religious purposes extending from purchases of religious icons and prayer books to payment of the

salaries of clergy employed by the schools. The program provides such monies not as the result of genuine, independent parental choice, but through a structure that provides financial incentives almost exclusively to religious schools to participate in a school voucher program, and deprives students who wish to attend secular public schools of any benefit from that program. Because, for all practical purposes, parents who do not wish to give their children a religious education may not participate in it, the program conveys a clear message that government endorses religious education to the detriment of, and in preference to, secular education. In so doing, the program erodes the principles of separation that are fundamental to the Establishment Clause.

STATEMENT OF FACTS

Through the Ohio Pilot Scholarship Program (the "Ohio Program" or "Program"), the State of Ohio provides tuition monies, commonly called "vouchers," for children located within the public school district of Cleveland to attend schools that participate in the Program. *See* Ohio Rev. Code §§ 3313.975(C)(1), 3313.976(A)(1) and (3), and 3313.976(C). Under the Program, vouchers are not available to enable children to attend public schools in the Cleveland public school district. Public schools in adjacent districts are permitted—but not required—to accept vouchers, but not a single eligible public school has done so since the Program was enacted in 1995. Thus, Cleveland parents wishing to take advantage of the benefits of the Ohio Program are faced with a scheme heavily weighted in favor of non-public schools.

Of the non-public schools that participate in the Program, the vast majority (82%) are religious schools. As a result, since the date of its enactment, between 88% and 96% of the participants in the Ohio Program have enrolled in and attended religious schools, and government funds distributed under the Program have gone to such schools. As the court of appeals concluded, the structure of the Ohio Program provides strong financial incentives for non-public religious schools—and *not* secular schools—to participate in the program. *Simmons-Harris v. Zelman*, 234 F.3d 945, 959-60 (6th Cir. 2000). The Program provides vouchers of up to slightly below $2500 per pupil annually—roughly equal to tuition at private religious schools—and prohibits participating schools from charging any more than nominal additional tuition to low-income families participating in the Program. Ohio Rev. Code § 3313.976(8). Participating schools also must give a preference in admissions in the lower grades to low-income children eligible for vouchers. *Id.* § 3313.977(A)(1). As the court of appeals noted:

> Practically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs. *See* Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999) (finding that voucher funding levels typically "approximate[] the tuition level set by parochial schools [which] reflects subsidies from other sources").

Simmons-Harris, 234 F.3d at 959.

The State of Ohio delivers the voucher monies by check directly to schools participating in the Program. Although the checks are made payable to the parents of students at the school participating in the Program, the parents must present themselves at the school and must then endorse the check over to the school. Ohio Rev. Code § 3313.979. Thus, all monies disbursed under the Ohio Program flow directly from the State into the coffers of the participating schools. Parents never obtain title to or custody of the funds and, once the funds are disbursed, parents have no say in how they are used.

As is entirely appropriate to *their* missions, the religious schools participating in the Ohio Program teach religion and incorporate religious practices as an integral and pervasive part of their educational programs. Summarizing the evidentiary record before it, the court of appeals noted:

> The sectarian schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects.

Simmons-Harris, 234 F.3d at 949. The secular and the religious are inseparably entwined in the participating schools. The overwhelming majority of students in the Program receive religious instruction while in school. Students participating in the Program spend a material part of their school day learning religious beliefs and engaging in worship and other forms of religious activity, funded by direct and unrestricted

government cash payments made pursuant to the Program.

State funds provided under the Ohio Program need not be used only for "secular, neutral, and nonideological services, materials and equipment," *Mitchell* v. *Helms*, 530 U.S. 793, 861 (2000) (O'Connor, J., concurring), but may also be employed by the recipient institutions "to advance the religious missions of the recipient schools," *id.* at 840. Schools receiving state funds under the Program may use them to purchase religious books or articles of worship such as religious icons and prayer books, or in any other way they wish that may promote religion or religious beliefs. In short, the Ohio Program provides government monies directly to religious schools to fund religious education and religious activities.

SUMMARY OF ARGUMENT

1. The Ohio Program unconstitutionally uses public funds to finance religious education and other religious activities. State monies supporting between 88-96% of the students participating in the Program flow directly to religious schools, with no restrictions as to the use of the money. Those funds are used to further religion, to finance religious practices, and to support schools whose central mission is to instill religious beliefs in the students who attend them. The direct, unrestricted use of public money to finance such religious activities violates the Establishment Clause.

2. The Ohio Program provides a significant financial incentive to religious schools—and not to public schools or to secular private schools—to participate in the Program. Because the Ohio Program

inherently biases the "choices" made by parents who wish to take advantage of the Program in favor of religious schools, it does not provide to parents whose children participate in the Program the opportunity to exercise a genuinely independent and private parental choice.

3. The direct governmental support of religious activity involved in this case also cannot be justified in fact on the ground that government funds that flow into the coffers of religious schools supported by the Program do so solely as the result of genuinely independent and private parental choice. Parents wishing to take advantage of vouchers cannot use them to send their children to public schools because none of the public schools theoretically eligible to participate in the Program in fact do so, and there is no reason to believe they that they will do so in the future. (Indeed, the lack of public school participation in the Program is as much an act of the State as the decision to enact the Program, and reinforces its unconstitutionality.) Parents thus have no meaningful opportunity to use the vouchers to send their children to non-public secular schools, and no real "choice."

4. For all of these reasons, the Ohio Program employs government monies to advance religion, and violates the First Amendment.

* * *

ARGUMENT

I. THE OHIO PROGRAM IS IRREMEDIABLY IN CONFLICT WITH THE COURT'S PRECEDENTS UNIFORMLY FORBIDDING THE PROVISION OF GOVERNMENT FUNDING TO RELIGIOUS SCHOOLS FOR RELIGIOUS PURPOSES.

For more than a half century, this Court has consistently refused to permit public funds to flow directly to religious institutions to be used for religious purposes. As Justice Black wrote for the Court in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), under the Establishment Clause "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 16.

Everson upheld against Establishment Clause challenge a state program that authorized reimbursement to parents for the cost of the public transport of children to and from school. The Court reasoned that, while reimbursement of costs in transporting children to school undoubtedly helped some children attend religious schools, *id.* at 17, school transportation costs were among those "general government services" that are "separate and so indisputably marked off from the religious function" as not to implicate Establishment Clause issues. *Id.* at 18. The Court emphasized that:

> The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

Id.

The Court has consistently reaffirmed that direct governmental financial support of religious activities in religious schools is forbidden. In *Committee For Public Education* v. *Nyquist*, 413 U.S. 756 (1973), a case the court of appeals viewed as controlling here (*Simmons-Harris*, 234 F.3d at 953), the Court held that a New York statute providing various forms of financial assistance to nonpublic (mostly religious) schools, including tuition assistance to parents, violated the Establishment Clause. Of dispositive significance to the *Nyquist* Court was that none of the assistance provided pursuant to the statute was restricted in use. The state made "no endeavor to guarantee the separation between secular and religious education functions and to ensure that the State financial aid supports only the former." *Nyquist*, at 783. Thus, the Court found, "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that *direct aid in whatever form is invalid.*" *Id.* at 780 (emphasis added).

The Court has scrupulously maintained the line drawn in *Everson* and *Nyquist*. Consistent with the principle that government monetary payments may not be used to fund religious activities, the Court has upheld government assistance to religious schools only where the assistance is indirect or cannot be used to further the recipients' religious mission. In *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986), the Court noted that "[i]t is . . . well-settled . . .

that the State may not grant aid to a religious school . . . where the effect of the aid is that of a direct subsidy to the religious school." *Id.* at 487. Similarly, *Agostini* v. *Felton*, 521 U.S. 203 (1997), which approved use of federal funds to send public school teachers to religious schools to provide remedial instruction, did so only because the teachers were instructed that they "could not . . . become involved in any way with religious activities of the private schools" and "[n]o . . . federal funds ever reach[ed] the coffers of religious schools." *Id.* at 211, 228.

The same approach underlies the Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). There, the University of Virginia authorized student activities fund payments for the costs of student publications, yet withheld such payments with respect to one student group because of the religious content of its publications. *Id.* at 823-26. Invalidating that ban because state discrimination against speech on the basis of content violates the Speech Clause of the First Amendment (*id.* at 837), the Court also sustained the funding under the Establishment Clause. The Court held that the "governmental program here is neutral toward religion . . . [which] distinguishes the student fees [here] from a tax levied for the direct support of a church . . . ." *Id.* at 840. Consistent with this holding, the Court identified the "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Id.* at 842 (citations omitted).

In *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court's most recent decision in this arena, the Court upheld a school aid program in which the federal government distributed funds to state and local

governmental agencies, which in turn purchased and lent educational materials and equipment to public and private schools. As Justice Thomas noted, speaking for the plurality, the aid program incorporated important elements protecting against government endorsement and entanglement, by requiring that the services, materials, and equipment lent to the schools be "secular, neutral, and nonideological." *Id.* at 831.[3]

Justice O'Connor's concurring opinion made clear that the Establishment Clause does not permit government to make direct money payments to religious institutions where those payments may be used without restriction to advance religious purposes. Reaffirming the Court's admonition in *Rosenberger* that "special dangers" exist where "'government makes direct money payments to sectarian institutions,'" *Mitchell*, 530 U.S. at 843 (quoting *Rosenberger*, 515 U.S. at 842), Justice O'Connor emphasized that:

> the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition. *See,*

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[3] The question of "divertibility" addressed by the various opinions in *Mitchell* (*i.e.*, whether the government may constitutionally provide aid in the form of secular goods or services that are capable of being diverted for religious use) is not at issue in this case. Here, funds are provided to the coffers of religious schools free of restriction against use for the teaching and inculcation of religion. For that reason the concern expressed by the *Mitchell* plurality—that a "no-divertibility" rule would be unworkable—is not raised here.

> *e.g., Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970) ("[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity").

Id. at 856.

Justice O'Connor focused on the key line of demarcation in Establishment Clause jurisprudence. "[A]lthough 'our cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'" *Id.* at 840 (quoting *Rosenberger*, 515 U.S. at 840 (O'Connor, J., concurring)). Thus, Justice O'Connor noted, where a program does not provide an effective means of guaranteeing that government money is used exclusively for secular purposes, and a plaintiff can show "that the aid in question actually is, or has been, used for religious purposes," the plaintiff has demonstrated a "First Amendment violation." *Id.* at 857.

Applying the principles that emerge from these cases to the Ohio Program can yield only one result: the Ohio Program crosses the settled line of demarcation under the Establishment Clause. The Ohio Program channels government aid in the form of monetary payments directly to religious schools in a manner that furthers religious activity. Secular purposes served by the aid cannot cure the constitutional infirmity because those purposes are inextricably entwined with the dominant religious purposes of the institutions receiving the aid.

There can be no doubt that the funds under the Ohio Program are received directly from the state; that the check is initially drawn to a parent is hollow formalism, serving only to compound the constitutional defect. Indeed, the only constitutional significance this fact has is that the ritual that the Ohio Program requires of a participating parent—visiting the religious school where the government check has been delivered, and there being required to sign the check over to the school—underscores the message of government endorsement of religion.

In contrast to the programs approved in *Agostini* and *Mitchell*, where the aid to religious schools was girded with restrictions against the use of the aid for religious purposes, the monies disbursed here may freely be used for any purpose, including religious purposes. Because the religious and secular functions of the schools participating in the Ohio Program are inextricably intertwined, the aid necessarily furthers the schools' religious missions. As a result, students who attend these schools and whose tuition is paid by the government necessarily are involved in religious instruction and in worship supported by tax dollars. This result is impermissible under any of this Court's readings of the Establishment Clause.

In sum, in asking the Court to uphold the Ohio Program, petitioners would have the Court cross a line never before crossed, and reach an outcome wholly inconsistent with the Court's clear precedents. Because the Ohio Program puts government money directly into the coffers of religious schools, which then may and do use the funds for religious activities, the Ohio Program violates the Establishment Clause.

II. THE OHIO PROGRAM IS STRUCTURED SO THAT THE DISPOSITION OF GOVERNMENT FUNDS TO RELIGIOUS SCHOOLS IS NOT THE RESULT OF GENUINE PARENTAL CHOICE.

This case does not require the Court to consider whether true parental choice may justify government monetary assistance to religious schools free of restrictions against religious use. Here, choice in favor of religious over secular schools is driven by the nature of the government program. In this case, the "choice" afforded participants is a consequence of an unconstitutional structuring of the Ohio Program that strongly favors religious schools—the Program permits only very limited non-religious choice for the overwhelming majority of pupils, and as a result merely serves to channel aid primarily to religious schools.

This Court's precedents clearly teach that "choice" has meaning in this context only if there is a real ability to employ government aid for secular as well as religious uses. For example, in *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, (1986), the state was permitted to provide tuition assistance to a student attending a religious school because, unlike here, the student was able to choose among hundreds of secular as well as religious programs. *Id.* at 488. In *Mueller v. Allen*, 463 U.S. 388 (1983), the tax deduction at issue was available for all school expenses, private or public, religious or secular. And, in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), funds were available for use in any high school, not just religious ones. *See also*

Widmar v. *Vincent*, 454 U.S. 263, 274 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.").

"Choice" also cannot save a school aid program if the choice is influenced by features of the program that provide a financial incentive favoring religious uses for the aid. Thus, in *Committee For Public Education* v. *Nyquist*, 413 U.S. 756 (1973), the Court rejected the argument that, because the grants were paid to the parents, and the parents were not compelled to spend the grants on tuition, the grant provision was constitutional. The Court reasoned, "[i]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into sectarian institutions." *Id.* at 786.

Likewise, as Justice O'Connor's opinion for the majority in *Agostini v. Felton*, 521 U.S. 203 (1997), recognized,

> [a] number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. *Cf. Witters*, 474 U.S. at 488 (upholding neutrally available program because it did not "creat[e] [a] financial incentive for students to

undertake sectarian education"); *Zobrest*, at 10 (upholding neutrally available aid because it "creates no financial incentive for parents to choose a sectarian school").

Agostini, 521 U.S. at 231.

The Ohio Program offers no true choice within the meaning of these principles. Students who wish to avail themselves of government tuition aid may choose only schools that participate in the Program. Because *all* of the schools participating in the Program are non-public, and the overwhelming majority of them are religious, the "choice" available to parents and their children overwhelmingly favors religious over secular education.

The structure of the Ohio Program itself provides incentives for private religious schools—and not for public or non-public secular schools—to participate in the Program. The Program provides no benefit to parents whose children remain in the Cleveland public schools. While the Program ostensibly permits public schools in adjacent districts to participate in the Program, none of those districts in fact participates.

It is axiomatic that the decisions of these public school districts not to participate in the Program are also decisions of the State. *See* Ohio Revised Code § 2744.01(C)(2)(c) (stipulating that school districts provide "governmental function"); Ohio Revised Code § 2744.01(F) (school district is a political subdivision of the State). Here, because they further deprive children and parents of a true choice between religious and secular education, such acts merely serve to reinforce

the unconstitutional structure of the Program. It would be anomalous to suggest that a state can rely on the putative action of a political subdivision (the surrounding public school districts) in support of the constitutionality of a voucher program such as the Ohio Program, and then fail to command that subdivision to take that action.

With respect to non-public schools, the Program inherently provides an incentive to participate only to schools that are able or willing to charge their students tuition of approximately $2500 (the value of the voucher plus permitted additional tuition) or less. As the court of appeals recognized, by and large only religious schools are able to charge fees close to that amount. *Simmons-Harris*, 234 F.3d at 959. Thus, the Ohio Program by its nature creates a financial incentive for religious schools, but not public or non-public secular schools, to participate in it.

Finally, the condition of the Cleveland public school system—which petitioners point to as justification for the Program (Brief of State Petitioners at 2-3)—only exacerbates the absence of real choice faced by parents whose children are eligible for it. Those parents who wish to use vouchers to escape that system cannot send their children to public schools in other districts (which do not accept vouchers), and must therefore choose among non-public schools participating in the Program, the overwhelming majority of which are religious schools.

Although the Ohio Program was adopted in response to a federal court order that placed the Cleveland school district under state supervision due to pervasive mismanagement by its school board and a history of racial segregation, *Simmons-Harris*, 234 F.3d

at 948; *Reed* v. *Rhodes*, 934 F. Supp. 1533, 1536-37 (N.D. Ohio 1996), this is no answer. For in seeking to remedy one constitutional violation, the state has merely substituted another. A "choice" to use vouchers to enroll children in religious schools—where the State provides few or no feasible alternatives—is no choice at all, and cannot justify the advancement of religion that is the effect of the Program.

In sum, the Ohio Program's channeling of funds to religious schools is far from being "wholly dependent on the student's private decision," *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring). It is, rather, a result of the nature and structure of the Program itself. Because the Ohio Program creates a strong financial incentive for parents to choose a religious school, notions of parental "choice" cannot immunize it from constitutional infirmity.

* * *

The avoidance of government entanglement in the affairs of religious institutions and of government endorsement of religion are core values of American democracy. They not only preserve religion, they allow it to flourish; they help to sustain our secular, democratic form of government. Consistent with those values, the Court has approved government aid that indirectly benefits religious institutions, but it has never approved direct government monetary payments to religious schools that advance religious activities, as the payments in question here do. To approve such payments would do violence to these core values and transgress the line long observed by the Court. The Ohio Program violates the Establishment Clause of the First Amendment, and should be invalidated.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL.,

Petitioners,

v.

DORIS SIMMONS-HARRIS, ET AL.,

Respondents.

And Related Cases

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR CALIFORNIA ALLIANCE FOR PUBLIC SCHOOLS AS AMICUS CURIAE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE CALIFORNIA ALLIANCE FOR PUBLIC SCHOOLS 1

SUMMARY OF ARGUMENT 4

I. UNRESTRICTED AID TO RELIGIOUS SCHOOLS INEVITABLY RESULTS IN GOVERNMENTAL INDOCTRINATION 5

A. Private Choice Is Only One Element in Determining Whether a Program Advances Religion 5

B. School Voucher Programs Are Different From Other Forms of Government Aid 10

II. VOUCHER PROGRAMS INEVITABLY STEER SCHOOL CHILDREN INTO RELIGIOUS INSTITUTIONS 14

A. Religious Schools Dominate the Private School Market 14

1. Religious schools dominate voucher programs nationwide 15

2. Religious schools dominate the private school market in the United States 18

B. Research Demonstrates That Voucher Parents Have Little or No Choice Between Religious and Secular Schools 20

1. There are very few seats available in private secular schools 21

TABLE OF CONTENTS – Continued

Page

2. Voucher programs steer voucher participants toward religious schools because of cost 23

C. The Ratio of Religious to Secular Private Schools Is Not Likely to Change in Response to a Voucher Program 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

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Agostini v. Felton, 521 U.S. 203 (1997) 5, 6, 11

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Page

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Page

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Page

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INTEREST OF THE CALIFORNIA ALLIANCE FOR PUBLIC SCHOOLS[1]

The California Alliance for Public Schools ("CAPS") is a coalition of individuals and community groups that came together after the defeat of Proposition 38, a school voucher initiative that appeared on the November, 2000 California ballot. More than 70% of the California electorate voted against the measure, an even larger number than the 69.5% that voted against an earlier voucher initiative that appeared on the November, 1993 ballot.

Following the defeat of Proposition 38, CAPS began its efforts to promote and protect California's public schools. With its web site, www.ourpublicschools.org, and its Internet newsletter, CAPS provides news and research to the California educational community and to all those who have an interest in protecting and improving California's public schools. CAPS also conducted a statewide poll of voters in April, 2001 to reconfirm California's strong rejection of vouchers. The poll, conducted by the Mellman Group, found that a solid 59% would reject a $4,000 voucher to help pay for the costs of private school for every student in California.

CAPS' member organizations represent hundreds of thousands of voters, parents, teachers, school board members, administrators and other school employees, firefighters, unions and civil servants, all of whom have a vital interest in California's schools. Each of the following

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[1] The parties have consented to the filing of this brief, and letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

organizations, which are listed in alphabetical order, is a member of CAPS:

American Association of University Women
Americans United for the Separation of Church & State
Anti-Defamation League
Association of California School Administrators
Association of California Urban School Districts
Bay Area Urban League
California Association of School Business Officials
California County Superintendents Educational Services Association
California Federation of Teachers
California Latino School Board Member Association
California Legislative Council for Older Americans
California National Organization for Women
California Professional Firefighters
California School Boards Association
California School Employees Association
California School Nurses Organization
California Speech-Language-Hearing Association
California State Employees Association
California State Firefighters Association
California State Parent Teacher Association
California State Pipe Trades Council
California Teachers Association
Children's Advocacy Institute
Chinese Progressive Association
Coalition for Adequate School Housing
Congress of California Seniors
Delta Kappa Gamma
Frente Indigena Oaxaqueno Binacional
League of Women Voters of California
National Council of Jewish Women – California

National Council of Jewish Women – Los Angeles
Parents of Watts Working With Youths and Adults
People for the American Way
Service Employees International Union, California State Conference

CAPS and its members believe that vouchers are harmful not only to the public schools but to the general polity as well. As Justice Brennan observed in *School Dist. of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963):

> It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort – an atmosphere in which children may assimilate a heritage common to all American groups and religions.
>
> *Id.* at 241-42 (Brennan, J., concurring).

A voucher system that diverts government funds to pay for religious instruction not only weakens our schools' ability to perform their "uniquely public function;" it strikes at the heart of the separation of church and state that the Establishment Clause was designed to protect. As the accompanying brief demonstrates, more than 78% of the nation's private elementary and secondary schools are religious. Because they have parish or denominational support, religious schools can offer a private education more cheaply than their secular counterparts. In light of these facts, school voucher plans inevitably steer voucher recipients toward religious schools, in violation of the Establishment Clause and to

the clear detriment of the public schools that CAPS was formed to defend.

SUMMARY OF ARGUMENT

Just as Henry Ford's customers could have any color car they wanted provided it was black, school voucher recipients in Cleveland can theoretically send their children to any private school they want, but the school will almost always be religious. Because private schools in Cleveland are overwhelmingly religious, voucher participants have no real choice. Their only viable alternative is a religious school.

The Cleveland voucher program is not unique in its religious effect. Religious schools dominate the nation's private schools, and they almost always cost less than secular private schools. Even if voucher systems were to become widespread, the private school market is unlikely to change. Because education is labor intensive and requires extensive facilities, religious schools with denominational or parish support will always have an advantage over secular schools that must hire teachers at market rates and provide their own facilities and equipment.

In 1993 and again in 2000, the voters of California confronted these realities when they rejected statewide initiatives that would have made vouchers available to all of the State's 6 million schoolchildren. In California, as in other states, the private school population has stayed at approximately 10% of the public school population for many years. Of that 10%, the vast majority of students are in religious schools. More importantly for vouchers, the relatively few available seats in private schools are far

more likely to be found in religious schools than in secular institutions.

Californians understood that if the voucher initiatives passed, their tax dollars would be used to fund religious schools. They also understood that the initiatives prohibited even the most rudimentary fiscal or educational accountability. Whether or not they recognized the constitutional compulsion behind the prohibition, they knew that these measures would funnel vast amounts of public money to pay for religious instruction over which the State could exercise no control. They defeated each measure by votes of more than two to one.

The 1993 initiative prompted policymakers to ask what a voucher could buy and what types of schools would be most likely to participate in a voucher program. This brief will discuss the fruits of that and other research, which demonstrates that nationwide, school voucher programs will inevitably steer schoolchildren into religious institutions. The result is government support and endorsement of religious instruction, in violation of the First Amendment.

I. UNRESTRICTED AID TO RELIGIOUS SCHOOLS INEVITABLY RESULTS IN GOVERNMENTAL INDOCTRINATION

A. Private Choice Is Only One Element in Determining Whether a Program Advances Religion

The Establishment Clause prohibits a state from enacting laws that have the primary purpose or effect of advancing religion. In *Agostini v. Felton*, 521 U.S. 203, 234 (1997), this Court identified three criteria for determining whether a statute has the effect of advancing religion:

whether the statute results in governmental indoctrination, defines its recipients by reference to religion, or creates an excessive entanglement between church and state. Because no party has claimed that the Ohio program defines its recipients by reference to religion or creates an excessive entanglement, this case turns on the issue of governmental indoctrination.

This Court has said that "the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000). One factor critical to, but not dispositive of, the endorsement issue is whether the aid flows directly to the religious institution or whether it goes instead to a private individual who then makes the choice of where to put the aid to use. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10, 12 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986).

This Court's decisions describe a continuum with direct governmental subsidies at one end and a government employee's donation of part of his paycheck to a religious institution at the other. *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 226; *Witters*, 474 U.S. at 486-87. In each case, the ultimate source of the funds is the government, but the character of the transaction changes dramatically because of two intervening variables. The first variable is the identity of the decisionmaker: Does the government decide to send aid to the religious institution or does the aid flow because of the "genuinely independent and private choices" of individuals? *Id.* at 488.

The second variable is who owns the funds. In the case of the government employee's donation, the funds have ceased to belong to the government. They are the employee's funds, because he has earned them. The decision to donate part of his funds to a religious institution is entirely his; it cannot be attributed to the government because both the funds and the choice to donate them belong to the individual.

The more limitations there are on the use of the funds, however, the more clearly the funds belong to, and come from, the government. Where the funds are issued as part of a government program, to be used to pay for services that the government would otherwise supply directly and only for those services, they retain far more of their character as government funds. Because it is the government that decides how the money can be used and for what, ownership of the funds more truly resides with the government than with the individual. When funds like these flow to religious institutions, they are much more likely to be viewed as a government endorsement of religion.

Government voucher programs may fall in many places along this continuum, depending on what they are for and how they are run. Food stamps are a good example of a government voucher program that poses no threat of government endorsement of much of anything. Food stamps are unlikely to be used at religious institutions, and even if they are used to buy bread for a private communion service, no one is likely to attribute that choice to the government. Conversely, if they are spent at a bakery run by a religious group or a kosher deli, the commercial transaction for which they are used is not likely to be infused with religious meaning for either

side. Most importantly, there is a true consumer's marketplace in which the food stamps can be used, and although there are restrictions on the type of goods that can be purchased with the stamps, those restrictions do not loom so large that they amount to a government endorsement of any one brand or type of food.

School vouchers are quite another thing. Unlike food stamps, school vouchers are used to buy not goods, but services. These services not only involve speech, but speech directed at the youngest and most impressionable members of our society who are there to be taught and molded by the very speech for which the government is paying.[2] Moreover, the teaching function performed by the speakers is one normally performed by the government and which the government recognizes is so essential to the maintenance of a free society that a child's exposure to it, whether in a public school or private, is compulsory in every state.

This Court has long recognized the importance of education to a free society. Its most famous discussion of the subject appeared in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), where the Court wrote:

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[2] *See* Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243-260, at 258 (1996). Dean Sullivan argues that "government long has been involved in the inculcation of values in schools" and "[p]arochial school teachers, if funded by the state, inevitably mingle the state's value inculcation . . . with a religious value system and set of beliefs." *Ibid.* She concludes that "[t]he inevitable mingling of these two messages impermissibly implicates the state in the religious message." *Ibid.*

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

For at least the last century, this function has been performed primarily by the nation's public schools, a responsibility which this Court has described as ranking "at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Thus, while the Free Exercise Clause requires that parents be allowed to send their children to religious schools,[3] the state's interest in, and its identification with, the issue of education is undisputable.

That the state's educational interests also include inculcation of civic values is equally indisputable:

> The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions. . . . These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic

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[3] *Id.* at 213-14; *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925).

> political system have been confirmed by the observations of social scientists. [Citations].
>
> *Ambach v. Norwick*, 441 U.S. 68, 77-78 (1979) (citations omitted).

Likewise, this Court has long recognized the importance of teachers in molding the minds of their students:

> [A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. [Footnote.] This influence is crucial to the continued good health of a democracy.
>
> *Id.* at 78-79 (footnote omitted).

Thus, the identification of the state with the educational function and its interest in the values that are communicated through the schools makes it far more likely that government payments for religious instruction will appear to any rational observer to be government endorsement of religion.

B. School Voucher Programs Are Different From Other Forms of Government Aid

Because the stakes are so high and schools are so different from food stamps, the constitutionality of school vouchers must turn on more than whether a child's parents choose to enroll her in a religious private school rather than a secular public one. Other factors must be considered, and that is precisely what this Court has done in its recent school aid cases. With respect to the deaf child's interpreter in *Zobrest v. Catalina Foothills*

School District, for example, the Court noted that "no funds traceable to the government ever find their way into sectarian schools' coffers," because the school district paid the interpreter directly. 509 U.S. 1, 10 & n.11 (1993). It was also important that the religious school "is not relieved of an expense that it otherwise would have assumed in educating its students." *Id.* at 12. Most importantly, the Court noted that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor." *Id.* at 13. The interpreter is a conduit for the teaching, not the teacher herself. *Agostini v. Felton*, 521 U.S. 203, 204 (1997) ("Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place. . . . ") (emphasis in original).

Similarly, in *Agostini*, the Court emphasized that "[n]o Title I funds ever reach[ed] the coffers of religious schools"; the funds did not relieve schools of costs they would otherwise have; nor was there any reason to believe that the public employees posted at religious schools would violate rules and "embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures." 521 U.S. at 226, 228.

None of these distinctions marks the voucher program at issue here. Public funds not only reach the coffers of religious schools, they flow directly there. Ohio Rev. Code Ann. § 3313.979 (Anderson 1999 & Supp. 2000). That the checks are made out to the parent or guardian who must sign them over to the school is a distinction without a difference. The money never loses its character

as government funds, and it is sent directly to the school itself. The aid undeniably relieves the school of costs that it would otherwise have had in educating its voucher students, and it undeniably is used to pay for the inculcation of religion.

These factors necessarily affect both the importance of asking whether government aid reaches religious institutions as the result of the "genuinely independent and private choices of individuals," and how that question is framed. Petitioners and their amici argue that the choice question is the only one worth asking and that the universe of choices from which voucher parents can choose must be viewed broadly enough to include the public schools or at least Cleveland's public magnet and community schools.[4] To return to the food stamp analogy, this would be a little like saying that it would be constitutional for a city to tell welfare recipients that they could take their meals at a government commissary or use their food stamps only at soup kitchens, even though the government knew that 90% of the city's soup kitchens were religious and that they required recipients to sit through a religious service in order to get a bowl of soup. With the school voucher, however, the risk of government endorsement of religion is even worse, because the recipient is a child who will spend a large part of the day being given religious instruction at government expense.[5]

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[4] *See, e.g.*, Brief on the Merits of State Petitioners at 8-10; Brief on the Merits for the Hanna Perkins School, et al. Petitioners at 20-21, 34; Taylor, et al. Petitioners' Brief on the Merits at 40-42 and Table 1; Brief on the Merits for the United States as Amicus Curiae at 15-17.

[5] The difference between schoolchildren and adults is a critical difference between this case and the use of government funds to pay for such things as college tuition under the G.I. Bill or the blind student's theological education approved in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). College students are far less impressionable than elementary and high school students, and their decision to undertake secondary education is itself voluntary, as opposed to the compulsory education required of younger students. *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 252 (1963). Even in *Witters*, the aid was paid directly to the student, and the Court noted that the "full benefits of the program" were not "limited, in large part or in whole, to students at sectarian institutions." *Witters*, 474 U.S. at 488. The opposite is true here.

Where a government program displays these characteristics – aid that is used to purchase instruction that would otherwise have been provided by the government and that is required by the government, money that flows directly to the religious institution, that relieves the institution of costs that it would otherwise have to educate certain of its students, and that is used without restriction for the religious instruction of the young – the issue of private choice as an indicator of government endorsement must focus on the choices available to the program participants, not the public at large. If the choices available to program participants are overwhelmingly religious, to the point where those who would partake of the program know that they must also partake of religion, then the inevitable effect is government endorsement and advancement of religion.

As the discussion that follows demonstrates, this is the case with school vouchers. There simply are not enough seats at secular private schools, either in Cleveland or nationwide, to make nonsectarian education a realistic option for voucher recipients. The result is that

voucher programs create a clear "financial incentive for students to undertake sectarian education" in violation of the Establishment Clause.[6]

II. VOUCHER PROGRAMS INEVITABLY STEER SCHOOL CHILDREN INTO RELIGIOUS INSTITUTIONS

A. Religious Schools Dominate the Private School Market

It is undisputed that during the 1999-2000 school year, 96% of Cleveland's voucher recipients were enrolled in religiously affiliated schools and that such schools made up 82% of the schools that participate in the Cleveland voucher program. *Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000) (Zelman Pet. App. at 5a); Brief on the Merits of State Petitioners at 7; Brief on the Merits for the United States as Amicus Curiae at 4.

These numbers suggest, but do not demonstrate, that the secular choices available to voucher participants are in fact limited. In order to determine the true extent of those choices, however, one must look beyond merely the number of secular schools that participate in the program; one must look at their size as well. Accurate data on available spaces are difficult to obtain, but enrollment data are available and can serve as an indicator of the number of available spaces. Those data demonstrate that religious schools dominate not only existing voucher programs, but the private educational marketplace nationwide.

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[6] *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. at 487.

1. Religious schools dominate voucher programs nationwide

The ten secular schools that participated in the Cleveland voucher program in 1999-2000 admitted a total of 129 voucher enrollees. Declaration of Alice O'Brien, Exh. E (J.A. 285a-286a). Even if *all* of the secular private schools in Cleveland were to participate in the program, there would be room for fewer than 500 additional students. The National Center for Education Statistics[7] lists only 12 secular K-8 private schools in Cleveland, with a total enrollment of 889[8]. However, some of these seats are for pre-schoolers, and the total secular K-8 private school enrollment, excluding pre-kindergarten children, in Cleveland is only 510 students. *Ibid.* By contrast, in 1999-2000 the Cleveland voucher program paid for 3,632 students to attend religious schools. Zelman Pet. App. at 5a.

Cleveland's program is not an aberration. Every other voucher program, whether funded publicly or privately, displays the same characteristics. The oldest publicly funded voucher program is in Milwaukee, Wisconsin. The Wisconsin Legislature created the Milwaukee program in 1989; the program began in 1990-91

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[7] The statistics that follow come primarily from the National Center for Education Statistics ("NCES"), an agency within the United States Department of Education that is the main federal organization responsible for collecting and analyzing data on education. Other sources include state departments of education and studies conducted under the auspices of the Program on Education Policy and Governance at Harvard University.

[8] NCES' database, The Private School Locator 1999-2000, is available at http://nces.ed.gov/surveys/pss/locator/locator.asp.

by funding 341 pupils in seven secular schools.[9] After the Wisconsin Supreme Court upheld inclusion of religious schools in 1998,[10] participation in the program more than tripled, an increase that the Wisconsin Legislative Audit Bureau described as "largely because of religious schools' participation in the program." *Milwaukee Evaluation* at 13. In the 1999-2000 school year, the program included 7,996 pupils in 91 different schools. *Id.* at 11.

Just as in Cleveland, the Milwaukee program is now dominated by religious schools. Of the 86 schools that participated in the program in 1998-99, only 23 (26.7%) were secular and 63 (73.3%) were religious. *Milwaukee Evaluation* at 15. Religious schools served 69.9% of the students in the program, and secular schools served 30.1%. *Ibid.*

The same pattern is repeated in other states or cities that have established voucher programs. Florida's program is only two years old and extremely small. Students are eligible if they are enrolled in or assigned to a public school that the State has designated as failing for any two years in a four-year period. Fla. Stat. § 229.0537 (2001). Only two schools were designated as failing during the

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[9] Wis. Legislative Audit Bureau, *An Evaluation: Milwaukee Parental Choice Program*, at 11 (Feb. 2000), available at http://www.legis.state.wi.us/lab/reports/00-2full.pdf [hereinafter *Milwaukee Evaluation*].

[10] *Jackson v. Benson*, 218 Wis. 2d 835 (1998), *cert. denied*, 525 U.S. 997 (1998).

initial year of the program, and no new schools were added in 2000-2001.[11] There were 57 students in the program in 1999-2000. *Ibid.* Although the Florida Department of Education does not identify schools as religious or secular, of the five schools listed on the program's web site as approved to participate, four have names that identify them as religious schools.[12]

In addition to the Cleveland, Milwaukee, and Florida programs, private philanthropical organizations have established voucher programs in several other cities. The largest of the private philanthropic programs is the Children's Scholarship Fund, which awarded 40,000 scholarships in 1999 to children in low to moderate income families throughout the country.[13] Fully 92% of these scholarships were used at religious schools. *Id.* at 5. Evaluations of the Children's Scholarship Fund-affiliated programs in Washington D.C., and Dayton, Ohio reported similar results, with 91% of the Washington scholarships

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[11] *See* "Opportunity Scholarship Program, Parent Information" on Fla. Dep't of Educ. web site, a document available at http://www.opportunityschools.org/osas/osp/info.html.

[12] The schools are Saint John The Evangelist, Little Flower Catholic, Sacred Heart Cathedral School and Saint Michael School. The fifth, and presumably secular, school is called Montessori School. *See* "Opportunity Scholarship Program, Private School Information, Participating Private Schools" on Fla. Dep't of Educ. web site, a document available at http://www.opportunityschools.org/doeosas/owa/privatebycounty.

[13] Paul E. Peterson & David E. Campbell, Harvard Univ. Program on Educ. Policy & Governance (PEPG), *An Evaluation of the Children's Scholarship Fund*, at 1 (May 2001), available at http://www.ksg.harvard.edu/pepg/papers.htm.

going to religious schools and 92% in Dayton.[14] More than 91% of the vouchers issued in a similar privately funded program in San Antonio, Texas went to religious schools.[15] The number was 85% for a privately funded program in the San Francisco Bay Area.[16]

2. Religious schools dominate the private school market in the United States

The National Center for Education Statistics publishes a biennial survey of private schools in the 50 states and the District of Columbia, conducted by the U.S. Bureau of the Census. Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Private School Universe Survey: 1999-2000*, at 1 (Aug. 2001). In the fall of 1999, there were 27,223 private elementary and secondary schools in the United States, 78.4% of which were religious. *Id.* at 5 (Table 1).

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[14] Patrick J. Wolf, Paul E. Peterson & Martin R. West, Harvard Univ. PEPG, *Results of a School Voucher Experiment: The Case of Washington, D.C. After Two Years*, at 9 (Aug. 2001), available at http://www.ksg.harvard.edu/pepg/papers.htm; Martin R. West, Paul E. Peterson & David E. Campbell, Harvard Univ. PEPG, *School Choice in Dayton, Ohio After Two Years: An Evaluation of the Parents Advancing Choice in Education Scholarship Program*, at 3 (Aug. 2001), available at http://www.ksg.harvard.edu/pepg/papers.htm.

[15] Jay P. Greene & Daryl Hall, Mathematica Policy Research, Inc., *The CEO Horizon Scholarship Program: A Case Study of School Vouchers in the Edgewood Independent School District, San Antonio, Texas*, at 7 (May 2001), available at http://www.ksg.harvard.edu/pepg/papers.htm.

[16] Paul E. Peterson, David E. Campbell & Martin R. West, Harvard Univ. PEPG, *An Evaluation of the BASIC Fund Scholarship Program in the San Francisco Bay Area, California*, at 15 (Jan. 2001), available at http://www.ksg.harvard.edu/pepg/papers.htm.

The remaining 21.6% nonsectarian schools included regular schools (9.2%), special emphasis schools such as those that focus on science and math or the performing arts[17] (7.8%), and special education (4.6%). *Ibid.*

Enrollment figures reveal an even stronger predominance of religious education. Of the 5,162,684 students who attended private schools in the United States in 1999, more than 84% of them (4,354,621 students) attended religious schools. *Ibid.* When one subtracts the 86,274 special education students who attended nonsectarian schools, there were only 721,789 students (14%) who attended nonsectarian regular or special emphasis private schools in the United States. The numbers are particularly striking at the elementary school level, where educational foundations are laid and where students are most impressionable.[18] In grades two through six, the percentage of private school students who attend nonsectarian schools hovers around 12%; it is only 11.3% for those who are in the fourth grade. *Id.* at 14 (Table 10).

As might be expected, private schools are more numerous in urban areas than in rural, with only 22.2% of the nation's private schools located in rural areas or in small towns. *Id.* at 7 (Table 3). Even in urban areas, however, religious schools predominate. Students enrolled in private nonsectarian schools account for only 14.8% of the private school enrollment in the inner city and 15.3% of the private school enrollment in what NCES

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[17] *Id.* at 30.

[18] *See, e.g.*, Martin E. Marty, *Education, Religion, and the Common Good*, 43-44 (2000) ("In elementary schools especially, where students often have a single teacher for most subjects, children may be more gullible, more easily influenced and manipulated, more exploitable.").

calls "urban fringe/large town." The remainder of the urban private school population is in religious schools. *Id.* at 23 (Table 19).

B. Research Demonstrates That Voucher Parents Have Little or No Choice Between Religious and Secular Schools

Recent studies demonstrate that the high number of vouchers used at religious schools is driven far more by scarcity and cost than true parental choice. Of the representative sample of parents who were offered vouchers by the Children's Scholarship Fund, only 9.5% said that religion was the single most important reason why they chose their child's school. Peterson & Campbell, note 13, at 71 (Table 22). For the Washington, D.C., Dayton, San Francisco and San Antonio programs, the numbers were 3.8%, 7%, 19% and 14.9% respectively.[19] Slightly more than half (56%) of parents participating in the private New York School Choice Scholarships Foundation, which provided 1,300 scholarships in 1997 worth up to $1,400 annually for at least three years to children from low-income families, listed religious instruction as a "very important" factor in their choice of school. By contrast, 83% listed teacher quality as very important, and 77% listed academic quality.[20] Thus, the research indicates that

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[19] Wolf, et al., *supra* note 14, at 52 (Table 3); West, et al., *supra* note 14, at 51 (Table 4); Peterson, et al., *supra* note 16, at 35 (Table 2); Paul E. Peterson & David Myers, Mathematica Policy Research and Harvard Univ. PEPG, *An Evaluation of the Horizon Scholarship Program in the Edgewood Independent School District, San Antonio, Texas: The First Year,* at 41 (Table 1.5) (Sep. 1999).

[20] Paul E. Peterson, David Myers & William G. Howell, Mathematica Policy Research and Harvard Univ. PEPG, *An Evaluation of the New York City School Choice Scholarships Program: The First Year,* at 31 (Table 2) (Oct. 1998), available at http://www.ksg.harvard.edu/pepg/papers.htm.

for most voucher parents, something other than a preference for religious instruction is pushing them toward religious schools. That "something" has to do with the realities of the educational marketplace.

1. There are very few seats available in private secular schools

In 1988, Congress commissioned a study to assess whether private schools could be used to alleviate overcrowding in public schools.[21] Researchers with the U.S. Department of Education gathered data from 22 large urban areas about private school enrollment rates, tuition and fees, additional space availability, admissions policies, student characteristics and flows, policies on religious participation, willingness to participate in a transfer program, and likely decisionmakers on participation. *Ibid.*[22] Of the 774,000 students who attended private schools in the study areas, 87% were in religious schools. *Id.* at ix. They also found that 41% of the nonsectarian schools were special emphasis or alternative schools, a factor that further limits choice for those parents who want their children to attend a "regular" school. *Id.* at 32.

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[21] U.S. Dep't of Educ., *Barriers, Benefits, and Costs of Using Private Schools to Alleviate Overcrowding in Public Schools,* at vii (1998) [hereinafter *Barriers, Benefits, and Costs*].

[22] The areas surveyed were: Baltimore City, Buffalo, Chicago, Dade County, Dallas, Detroit, Duval County (FL), El Paso, Houston, Long Beach, Los Angeles, Memphis, Milwaukee, Nashville, New Orleans, New York City, Oakland, Philadelphia, Pittsburgh, Portland (OR), San Antonio and San Diego. *Ibid.*

One significant factor that schools said would limit their participation in any transfer program was the availability of space. Although the researchers found that many of the schools were operating below capacity,[23] religious schools accounted for 85% of the available capacity. Thus of the 150,000 available private school seats in the 22 cities studied, 127,500 were in religious schools. *Id.* at xii.

The Department of Education's findings are generally consistent with those in a 1993 survey by the Southwest Regional Laboratory called *What a Voucher Could Buy: A Survey of California's Private Schools.* The major difference was with respect to capacity. The Southwest Regional Laboratory found that, in 1993 at least, most California private schools were nearly full, although like the 1998 federal survey, the Southwest Regional Laboratory survey found that high-tuition schools had less capacity. One-quarter of such schools were at full capacity, and 75% of them could expand by no more than 15%.[24]

The Southwest Regional Laboratory survey sought to assess the potential impact of Proposition 174, the voucher initiative that appeared on the November, 1993 California ballot. The study found that 84% of religious

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[23] One-third were below 70% capacity, and another third were between 70% and 90% of full capacity. *Id.* at xi. The availability of space was inversely correlated with tuition; of the schools that charged $8,000 or more, 70% were operating near full capacity, whereas only 29% of the schools that charged less than $2,000 were operating close to full capacity. *Ibid.*

[24] Marcella Dianda & Ronald Corwin, Southwest Regional Laboratory, *What a Voucher Could Buy: A Survey of California's Private Schools,* at 3 (Feb. 1993).

schools would accept voucher students, compared to only 62% of nonreligious schools. *Ibid.* The study also indicated that more religious than nonreligious schools would expand in response to the voucher program. *Id.* at 9 & A-12 (Table A-22).

2. Voucher programs steer voucher participants toward religious schools because of cost

In addition to their overwhelming market share, religious schools are far more likely to be within economic reach for voucher recipients than are secular schools. As the federal and Southwest Regional Laboratory studies found, secular schools are more likely to charge higher tuition than religious schools. In the 22 cities studied by the Department of Education, the average nonsectarian school charged $5,888 in 1996-97, whereas the average Catholic school charged $2,406, and other religious schools averaged $3,586.[25] Nonsectarian schools were less likely to offer tuition discounts than were religious schools (56% and 69% respectively), although they gave discounts to somewhat higher percentages of their low-income students than did religious schools (40% of nonsectarian low-income students received discounts, as opposed to 31% of low-income students in Catholic schools and 37% in other religious schools). *Id.* at 41. Of the 40,000 recipients of the Children's Scholarship Fund, 92% of whom attend religious schools, 69% spent less than $2,000 of their own income to augment their scholarship, and 94% spent less than $4,000 of their own funds

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[25] *Barriers, Benefits, and Costs, supra* note 21, at 40.

on tuition.[26] Although only 13% of Children's Scholarship Fund recipients said that cost prevented them from sending their child to the school they preferred, the study of BASIC scholarship recipients in the San Francisco Bay Area revealed that 30% of those who declined scholarships said that they did so because they could not afford the cost of the school.[27]

The relatively modest amount of most voucher payments and the fact that every existing voucher program has some limit on family income inevitably produce an economic incentive to use the voucher at a less expensive school. This is particularly so, because nearly all private schools in the 1998 federal survey reported at least one type of additional cost, with the amount averaging $158 per student.[28] These costs include registration fees (75% of schools), uniforms and books (more than 50%), and fees for instructional and noninstructional activities (about 33%). *Id.* As demonstrated above, because the less expensive private schools are almost all religious, the economic incentives steer voucher recipients toward religious schools.

C. The Ratio of Religious to Secular Private Schools Is Not Likely to Change in Response To a Voucher Program

Critics may argue that it is unrealistic to view the educational marketplace as it currently exists, because the availability of vouchers will encourage entrepreneurs to

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[26] Peterson & Campbell, *supra* note 13, at 5, 43-44.

[27] *Id.* at 42, 72 (Table 23); Peterson, et al., *supra* note 16, at 16, 37 (Table 4).

[28] *Barriers, Benefits, and Costs*, *supra* note 21, at 40.

establish new schools or expand existing ones, many of which could be secular. Experience and the economic realities of private schooling demonstrate that this will not be the case.

The Milwaukee voucher program has been in existence for ten years; during the first seven years of the program, participation was limited to secular schools because of legal challenges.[29] Under these conditions, one would expect the number of secular schools to have grown, particularly during the first seven years of the program, when such schools theoretically had a decided advantage over religious schools in the form of government-subsidized tuition. Such growth was small, however. The program began in 1990-91 with seven private schools; the number slipped to six in 1991-92, then climbed to 11 in 1992-93. *Id.* at 4. It stayed at 12 from 1993-1995, then grew to 17 in 1995-96, 20 in 1996-97, and 23 in 1997-98. *Ibid.*

With the admission of religious schools in 1998-99, the number of schools in the program jumped to 87, and by 2000-01, the number was 103. *Ibid.* The State Department of Public Instruction projected that 107 schools would participate in the program in 2001-02.[30] For the 2001-02 school year, at least 67 of those schools, excluding

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[29] State of Wis., Legislative Fiscal Bureau: *Milwaukee Parental Choice Program* (Informational Paper #29), at 2 (Jan. 2001), available at http://www.legis.state.wi.us/lfb/informationalpapers/2001/29.pdf.

[30] *See* "Milwaukee Parental Choice Program Headcount and FTE, 2001-02 School Year" on Wis. Dep't of Pub. Instruction web site, a document available at http://www.dpi.state.wi.us/dpi/dfm/sms ("Number of Choice Students Enrolled by School in 2001-02").

preschools, are identifiable by name or by NCES as religious schools, and they account for 64.8% of the total number of students enrolled in the program. *Ibid*.

Religious schools will continue to dominate the educational marketplace because they will always have an economic advantage in the form of denominational and volunteer support that secular schools cannot match. The 1998 federal survey found that tuition accounts for 91% of the operating costs at secular private schools, but only 76% of the costs at Catholic schools and 83% of the costs at other religious schools.[31] The report explained that private schools "obtain revenue from parish or congregational subsidies and grants, endowments, and fundraising efforts" and that "[s]chools that are religiously-affiliated or that have relatively low tuitions tend to derive a higher proportion of their revenues from sources other than tuition." *Ibid*. Most religious schools receive donated or subsidized facilities and are staffed at least partially by teaching clergy whose salaries are usually well below market level.[32] In a May, 2000 study, Patrick McEwan of Columbia University reported:

> Estimates from the 1990's, based on a random sample of U.S. Catholic elementary schools, show that the average school receives 28 percent of its revenue from parish subsidies (Kealey, 1996). Besides monetary subsidies, many personnel in private schools are members of religious orders and their salaries understate their

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[31] *Barriers, Benefits, and Costs, supra* note 21, at 43.

[32] Henry M. Levin, *Educational Vouchers: Effectiveness, Choice, and Costs*, JOURNAL OF POLICY ANALYSIS AND MANAGEMENT, Vol. 17, No. 3, 373-92, at 383 (1988).

> true market value. In 1995, for example, 47 percent of Catholic elementary principals were priests or members of a religious community (Kealey, 1996). Their average salary was $20,274 per year, compared with an average salary [of] $34,520 for principals who were laypersons. Nine percent of all private school teachers and a somewhat larger percentage in Catholic schools work on a "contributed services" basis (Chambers and Bobbit, 1996). Salaries of these teachers are an average of 19 percent lower than others in private schools. [Footnote.] Finally, churches may donate use of land and buildings. Bartell's study makes careful estimates of the value of contributed services of physical facilities as well as personnel, finding that cash operating costs of Catholic schools in his sample were between 36 and 45 percent of total resource costs, the rest accounted for by contributed services. [Footnote.][33]

That subsidies such as these provide a significant advantage for religious schools is clear when one considers the costs of establishing and operating a private school. Most secular private schools do not publish data on their revenues and costs, but such data are available

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[33] Patrick J. McEwan, Columbia Univ., Nat'l Center for the Study of Privatization in Educ., *The Potential Impact of Large-Scale Voucher Programs*, at 26 (footnotes omitted) (May 2000). McEwan's report relied on Robert J. Kealey's *Balance Sheet for Catholic Elementary Schools: 1995 Income and Expenses* (1996), published by the National Catholic Educational Association. Dr. Kealey's report for 1999 income and expenses states that 85% of Catholic elementary schools received a parish subsidy during 1998-99 and that 48.3% of the schools relied on the subsidy for more than 20% of their income. R. Kealey, *Balance Sheet for Catholic Elementary Schools: 1999 Income and Expenses*, at 14 (2000).

for Edison Schools, Inc., a publicly traded, for-profit company that runs 113 public schools nationwide, with a combined enrollment of 57,000 students.[34] Edison has incurred net losses every year since it opened in 1996, and it expects losses to continue into the future. *Id.* at 30. Its loss for 2001 was $38.1 million. *Ibid.* Edison reports total revenue per student of $6,593 with a net loss per student of $668, for total expenditures per student of $7,261. *Id.* at 27. It reported pre-opening expenses for administrative and personnel costs associated with opening new schools or expanding existing sites of $8.6 million to accommodate 19,500 new students, or $441 per student. *Id.* at 29-30, 33. Edison reports the cost of constructing a new school as between $4 million and $8 million. *Id.* at 43.

Even a $5,000 voucher would fall far short of meeting expenses like these. Only the Milwaukee voucher program provides such an amount,[35] and as discussed above, it has not been sufficient to produce any significant increase in the supply of seats at secular private schools. Most vouchers, however, are less than half that amount.[36]

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[34] Edison Schools, Inc., *2001 Annual Report* (2001), available at http://media.corporate-ir.net/media___files/NSD/edsn/reports/edsn___ar___01.pdf.

[35] State of Wis., *supra* note 29, at 6.

[36] The Cleveland voucher is a maximum of $2,500 per student. Ohio Rev. Code Ann. § 3313.978(C)(1) (Anderson 1999 & Supp. 2000). The Florida voucher program appears to pay full tuition, but is dependent upon whether the student's public school has received a failing grade for two years. The lack of certainty about the availability of vouchers in a particular area would discourage entry into the Florida private school market. The November 2000 voucher initiative on the California ballot would have provided a $4,000 voucher, and the voucher initiative that was also defeated 2-1 in Michigan in the same month would have provided a $3,300 voucher. *See Voucher Initiatives Defeated in Calif., Mich.*, Education Week (November 15, 2000).

Vouchers available through private voucher programs are generally small. Children's Scholarship Fund vouchers are limited to 50% or 75% of private school tuition, depending on family income. Peterson & Campbell, *supra* note 13, at 11. BASIC Fund vouchers in the San Francisco Bay Area were a maximum of $1,500 in 1999. Peterson, et al., *supra* note 16, at 5. Washington Fund Scholarships in Washington, D.C. were a maximum of $1,700 in 1997. Wolf, et al., *supra* note 14, at 5. PACE Scholarship Program vouchers in Dayton, Ohio were a maximum of $1,200 for elementary students and $2,400 for high school students in 1998-99. West, et al., *supra* note 14, at 9.

Without the subsidies and below-market salaries that religious schools enjoy, secular schools are unlikely to enter the private school market in response to a large-scale voucher program.

CONCLUSION

When government pays for a function that is both essential to a society and overwhelmingly characterized by speech, government endorsement of that speech becomes impossible to avoid. The taxpayer whose funds are being used to pay for religious education is as aware of the connection as the parents who benefit from the use of those funds. Unlike the parents, the taxpayer's wishes are not consulted, and he cannot opt out of the program. Compulsion such as this is indistinguishable from "the general assessments in support of religion that lie at the core of the prohibition against religious funding," and equally violative of the First Amendment. *See Rosenberger*

v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 851 (1995) (O'Connor, J., concurring) (importance of possibility of opting out).

Whether the average observer approves or disapproves of government endorsement is not the issue. It is the existence of the endorsement, here coupled with religious indoctrination at state expense, that violates the Constitution. That endorsement is clear when a program deliberately directs schoolchildren into an educational market that is overwhelmingly religious.

Respectfully submitted,

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Nos. 00-1751, 00-1777, 00-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, *et al.*,

Petitioners,

-and-

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

-and-

SENEL HERMAN TAYLOR, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment permits a State to pay private school tuition, including tuition at predominantly religious schools, where such payments so intertwine the State with the teachings of the private schools that the State feels compelled to restrict and regulate aspects of the schools' teachings in connection with the provision of the funds.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	v
Interest of the Amicus Curiae	1
Statement of the Case	2
Summary of Argument	3
Argument	6
I. Ohio's Voucher Program Crosses The Line Between Permissible And Constitutionally Forbidden Aid To Religious Schools That Has Existed Since The *Everson* Decision.	6
II. Ohio's Voucher Program Results In Unlawful Government Indoctrination Of Religion.	10
A. The Establishment Clause Is Violated If Religious Indoctrination Can Be Attributed To The State.	10
B. The Viewpoint-Related Criteria For Schools To Participate In The Voucher Program Survive Scrutiny Under The Free Speech Clause Because The Schools Are Perceived To Be In Part Communicating The Government's Own Message.	11

Contents

	Page
1. The Ohio statute's viewpoint discrimination would normally violate the First Amendment's Free Speech Clause.	11
2. The Ohio Statute does not raise free speech concerns because vouchers are funding in part the government's own message.	14
C. Because The Schools That Accept Vouchers Are Properly Seen To Be Communicating In Part A Governmental Message, The Ohio Voucher Program Violates The Establishment Clause Because Of The Inference Of Government Endorsement Of The Schools' Religious Message.	15
III. The Ohio Voucher Program Also Results In Excessive Entanglement Between Government And Religious Organizations.	18
A. Avoidance Of Entanglement Is A Fundamental Aspect Of Establishment Clause Jurisprudence.	18
B. Ohio's Voucher Program Causes Excessive Entanglement Between The State and Religious Schools Because Administrative Enforcement of Ohio's Viewpoint Discrimination Provisions Inevitably Requires The State To Evaluate And Interfere With Religious Doctrines.	21

Contents

	Page
C. The Intrusion Into Doctrinal Matters Here Distinguishes This Program From The Limited Neutral State Regulatory Oversight That This Court Has Permitted.	25
IV. The Flaws In The Ohio Voucher Program Cannot Be Cured By Severing The Provision Barring Registration Of Schools That Teach Hate Or Advocate Unlawful Behavior.	27
Conclusion	30

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Agostini v. Felton, 521 U.S. 203 (1997)	*passim*
Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968)	9
Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990)	26
Bob Jones Univ. v. United States, 461 U.S. 574 (1983)	12
Brandenburg v. Ohio, 395 U.S. 444 (1969)	12
Cantwell v. Connecticut, 310 U.S. 296 (1940)	13
Cohen v. California, 403 U.S. 15 (1971)	12
Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 1, 19, 20, 21	
Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987)	10
Dickerson v. United States, 530 U.S. 428 (2000) ..	21
Edwards v. Aguillard, 482 U.S. 578 (1987)	1
Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) 12, 13, 23	

Page

Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1 (1947) 6, 7, 8, 9

Good News Club v. Milford Cent. Sch., 531 U.S. 923 (2000) 1

Hernandez v. Comm'r, 490 U.S. 680 (1989) 26

Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995) 12

Leavitt v. Jane L., 518 U.S. 137 (1996) 29

Lee v. Weisman, 505 U.S. 577 (1992) 1, 6, 7

Legal Servs. Corp. v. Velasquez, 531 U.S. 533 (2001) ..... *passim*

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... *passim*

Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999) 14

Meek v. Pittenger, 421 U.S. 349 (1975) 25

Mitchell v. Helms, 530 U.S. 793 ..... *passim*

Mueller v. Allen, 463 U.S. 388 (1983) ..... *passim*

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 24, 25

Pierson v. Ray, 386 U.S. 547 (1967) 22

Page

Prince v. Massachusetts, 321 U.S. 158 (1944) 23

Pub. Funds for Pub. Sch. v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974) 21, 24

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 12, 13

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 14

Reynolds v. United States, 98 U.S. 145 (1878) 23

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) 12, 15, 16, 21

Rust v. Sullivan, 500 U.S. 173 (1991) 15

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 16

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 29

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) 2, 3

Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 14

State v. Hochhausler, 668 N.E.2d 457 (Ohio 1996) 6, 28

Cited Authorities

	Page
State ex rel. Herbert v. Ferguson, 52 N.E.2d 980 (Ohio 1944)	28
State ex rel. Squire v. City of Cleveland, 82 N.E.2d 709 (Ohio 1948)	28
Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985)	25, 26
Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994)	12
United States v. Lee, 455 U.S. 252 (1982)	23
United States v. Seeger, 380 U.S. 163 (1965)	22
Walz v. Tax Comm'n, 397 U.S. 664 (1970)	18, 19
Witters v. Washington Dep't of Servs. for Blind, 474 U.S. 481 (1986)	9, 16, 17
Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)	1, 9
United States Constitution:	
Amend. I	*passim*

Cited Authorities

	Page
Statutes:	
20 U.S.C. § 7372(a)	17
1999 Ohio Law Files 37, Section 54	28
Ohio Rev. Code Ann. § 1.50 (West 2001)	28
Ohio Rev. Code Ann. §§ 3313.974-3313.979 (West 2001)	2
Ohio Rev. Code Ann. § 3313.975 (West 2001)	2
Ohio Rev. Code Ann. § 3313.976 (West 2001)	*passim*
Ohio Rev. Code Ann. § 3313.979 (West 2001)	3
Rules:	
Sup. Ct. Rule 37.1	6
Sup. Ct. Rule 37.3(a)	1
Sup. Ct. Rule 37.6	1
Other Authority:	
Marc Fisher, *Muslim Students Weigh Questions of Allegiance*, WASH. POST, Oct. 16, 2001	23

INTEREST OF THE AMICUS CURIAE[1]

The National Committee for Public Education and Religious Liberty ("National PEARL") is a national coalition of organizations sharing the objective of preserving religious freedom and the separation of church and state in public education.[2]

National PEARL was the lead plaintiff in *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), upon which the court below relied and which Petitioners here seek to distinguish. National PEARL has also participated as *amicus curiae* in numerous other cases before this Court addressing Establishment Clause issues, including *Good News Club v. Milford Cent. Sch.*, 531 U.S. 923 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); and *Edwards v. Aguillard*, 482 U.S. 578 (1987). As a national organization dedicated to protecting religious freedoms for all citizens, and as a party to one of the principal precedents at stake here, National PEARL believes its participation as amicus curiae makes a meaningful contribution to the issues raised in this case.

---

1. Pursuant to United States Supreme Court Rule 37.3(a), counsel of record has filed letters with the Clerk of Court consenting to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

2. National PEARL's members include the following organizations: A. Philip Randolph Institute, American Federation of Teachers, Americans for Religious Liberty, American Humanist Association, Central Conference of American Rabbis, Community Church of New York, Council of Supervisors and Administrators, Hadassah, Jewish Labor Committee, Jewish Reconstructionist Federation, Minnesota Civil Liberties Union, Monroe County PEARL, National Council of Jewish Women, National Education Association, National Center for Science Education, New York State United Teachers, Ohio PEARL, United Community Centers, United Federation of Teachers, United Synagogues of Conservative Judaism, Washington Area Secular Humanists, Woman's ORT, and Workmen's Circle.

STATEMENT OF THE CASE

In 1995, the Ohio legislature enacted the "Pilot Project Scholarship Program" (the "voucher program" or the "program"). Ohio Rev. Code Ann. ("ORC") §§ 3313.974-3313.979 (West 2001). The voucher program mandates that the Ohio Superintendent of Public Education provide scholarships and other assistance for certain Cleveland School District students in the kindergarten through eighth grades, to enable them to pay tuition necessary to attend nearby private schools or alternative public schools that meet standards set forth in the statute. *See id.* § 3313.975. The statute does not restrict the schools' use of the State's voucher payments in any way. Thus, participating religiously-affiliated private schools may use the state funds for any purpose, including the teaching and promotion of religious tenets. The program is targeted toward low-income families.

The statute established numerous rules governing the participation of schools in the program. Participating schools must be registered with the State Superintendent of Public Education. *See id.* § 3313.976(A). Among the requirements for registration, participating schools, whether public or private, must not "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." *Id.*

The overwhelming majority of schools that have registered to participate in the voucher program are sectarian. During the 1999-2000 school year, 82% (forty-six of fifty-six) of the schools participating in the program were church-affiliated. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000). 96% of the students participating in Ohio's voucher program enrolled in sectarian schools. *Id.* No public schools have participated in the program. *Id.*

Participating private schools are subject to oversight by Ohio's Superintendent of Public Education in several

respects. First, prior to and as a condition of registration, the Superintendent must determine that private and public schools satisfy the standards of participation set forth in section 3313.976(A). *See* ORC § 3313.976(A). Once schools are registered, the Superintendent "shall revoke the registration of any school, if after a hearing, the superintendent determines that the school is in violation of any of the provisions" of section 3313.976(A). *Id.* § 3313.976(B).

Under Ohio's program, a voucher can only be used to pay the private school that registers and complies with the program's requirements, including the limitations on what the school advocates or teaches. Program funds for students in private schools are mailed directly to the participating schools, where the checks, which are payable to the parents, are presented to parents for endorsement over to the school. *Simmons-Harris*, 234 F.3d at 948 (State Pet. App. at 4a). If any neighboring public schools participated in the program (and, as noted, none to date do), grants for use at those schools would be paid directly to the relevant school district. *See* ORC § 3313.979.

SUMMARY OF ARGUMENT

Ohio's voucher program violates the Establishment Clause because, unlike in any of the cases upon which Petitioners primarily rely, the State's funds are provided to religious schools for use in their general or religious curriculum without restriction. Ohio's voucher program results in direct financial aid to religious schools. It is of no analytical significance that the voucher checks — which are mailed directly to private schools — must be endorsed by parents and thus pass momentarily through the hands of a third party. Parents have no discretion or control over the use of voucher funds; this is not a case in which a "student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education." *Mitchell v. Helms*, 530 U.S. 793, 842 (2000) (O'Connor, J., concurring). Under such circumstances, the statute does not merely subsidize the "private

choices of individuals," *Agostini v. Felton*, 521 U.S. 203, 226 (1997), but rather represents an unconstitutional governmental advancement of religion.

Direct government funding of religious schools without any limitations on the use of the funds, such as that provided by the Ohio voucher program, inevitably associates the government with the institution's religious message. The Ohio program thus violates the Establishment Clause by providing an "imprimatur of state approval" to the voucher schools, *Mueller v. Allen*, 463 U.S. 388, 399 (1983), resulting in a suggestion that indoctrination "has been done at the behest of the government." *Mitchell*, 530 U.S. at 809.

The most striking manifestation of this problem is the restriction placed on the doctrines taught by schools that wish to participate in the voucher program. The Ohio voucher statute contains a straightforward form of viewpoint discrimination. Schools may be registered to receive vouchers only if they do not "teach" hatred of other races and religions and only if they do not "advocate or foster" unlawful behavior. Ohio undoubtedly placed restrictions on voucher schools because it recognized that the teachings of schools receiving funds from the voucher program would carry the imprimatur of the State.

Indeed, the voucher program's content-based restrictions on speech survive constitutional scrutiny under the Free Speech Clause only because the schools' teachings are, in fact, in part the government's own message. Private parties have a right under the Free Speech Clause to teach hate and advocate unlawful behavior. This Court has, however, recognized that the government may refuse to fund a disfavored message "where the government's own message is being delivered" and "when the government speaks . . . to promote its own policies or to advance a particular idea." *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 541 (2001).

If the message taught in schools that receive vouchers is, in part, "the government's own message," the Ohio statute fails to "separate the government from endorsement of the religious message." *Mitchell*, 830 U.S. at 843 (concurring opinion). This creates an inference, impermissible under the Establishment Clause, that the State has also endorsed the religious message of the schools.

Moreover, an inquiry into whether a statutory scheme creates an excessive entanglement between religious organizations and the State "has consistently been an aspect of [the Court's] Establishment Clause analysis." *Agostini*, 521 U.S. at 232 (O'Connor, J.). Ohio's voucher program violates the Establishment Clause in this regard as well, because it results in excessive entanglement in sensitive areas of religious doctrine by compelling the State to regulate the teachings of religious schools.

The Ohio statute requires pervasive entanglement in a highly sensitive area. The State must determine whether the educational message — including an educational message dictated by the school's religious orientation — constitutes the teaching of hate of other groups or advocacy of violations of law. The regulation contemplated by the statute would inevitably collide with religious doctrine, given, for example, the long-standing history of religious civil disobedience. Moreover, Ohio's determination whether religious schools have violated the viewpoint discrimination provisions would inevitably prove to be politically divisive.

The Court cannot solve the constitutional infirmities with the Ohio voucher program by severing section 3313.976(A)(6) of the statute. Ohio's voucher program violates the Establishment Clause because the program's general funding of the participating schools creates the perception of a government imprimatur for the message taught in religious schools. Removing only this provision, which is merely the most striking symptom of the underlying problem, would not cure

the underlying defect in the statute. Moreover, severance would be improper under Ohio law because the provisions in question are "so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out." *State v. Hochhausler*, 668 N.E.2d 457, 466-67 (Ohio 1996) (internal citations and quotation omitted). Thus, the Court must declare the statute unconstitutional in its entirety.

ARGUMENT

The Sixth Circuit properly held that Ohio's voucher program violates the Establishment Clause of the United States Constitution. The grounds set forth in the Sixth Circuit's opinion are sufficient in themselves for this Court to conclude, as did the lower court, that Ohio's program is unconstitutional. Mindful, however, of the Court's instruction that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court," Sup. Ct. Rule 37.1, this brief focuses primarily on issues that the parties have not previously addressed.

I. OHIO'S VOUCHER PROGRAM CROSSES THE LINE BETWEEN PERMISSIBLE AND CONSTITUTIONALLY FORBIDDEN AID TO RELIGIOUS SCHOOLS THAT HAS EXISTED SINCE THE *EVERSON* DECISION.

This Court has long recognized Jefferson's edict that the First Amendment was "intended to erect 'a wall of separation between church and state.' " *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States* 98 U.S. 145, 164 (1878)). As noted in *Lee v. Weisman*, 505 U.S. 577, 601 (1992) (Blackmun, J., concurring, joined by Stevens and O'Connor, JJ.), even the dissenters in *Everson* agreed that "'[t]he Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and

civil authority by comprehensively forbidding every form of public aid or support for religion.'" 505 U.S. at 601 (alteration in original) (quoting *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting, joined by Frankfurter, Jackson, and Burton, JJ.)).

The Founders intended the First Amendment's clauses on religion to shield religion from governmental interference as well as to maintain a nonsectarian government. James Madison warned that "experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." Memorial and Remonstrance Against Religious Assessments, Par. 7 (1785) (hereinafter "Remonstrance"), *reprinted in* Appendix to *Everson*, 330 U.S. at 63-72 (Rutledge, J., dissenting). Madison declared that "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." Remonstrance, Par. 1, *reprinted in* Appendix to *Everson*, 330 U.S. at 63-72.

The Court in *Lee v. Weisman* echoed this belief: "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." 505 U.S. at 589. "[T]he lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Id.* at 591-92.

> The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.

Id. at 592.

This is not a time for the principle of separation of church and state to be diluted. This nation's unique contribution to religious freedom has been its fundamental principle of separation of church and state. This principle has been redefined from time to time, but there is no question of its lasting value in the promotion of peace and prosperity domestically, and the promise it may hold for the rest of the world faced with threats from nations that, to quote James Madison in his Remonstrance, use religion as an "engine of civil policy." Remonstrance, Par. 5, *reprinted in* Appendix to *Everson*, 330 U.S. at 63-72.

There is no question that Ohio's voucher program results in direct financial aid to religious schools. Indeed, the religious schools are the actual, direct, and primary recipient of government funds under the program. Although funds are nominally payable in the first instance to the parents of voucher program students, the checks are not even mailed to the parents of participating students. Rather, checks are mailed to the private schools, where the parents must endorse the check over to the school to pay for tuition. The simple expedient of momentarily funneling the funds through the hands of third parties — who have no discretion or control over the use of the funds — cannot transform the nature of the constitutional analysis.

This is not a case in which a "student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education." *Mitchell v. Helms*, 530 U.S. 793, 842 (2000) (O'Connor, J., concurring). Religious schools may use Ohio's voucher funds to support their general curricula no matter how much the curricula may inculcate religious doctrines or other teachings. Yet, Petitioners acknowledge that:

> In programs of direct aid, if a religious school employs that aid to inculcate religious doctrine or teaching, it might be argued that the government has communicated a subtle message of endorsement.

State Petitioners Br. at 21 (citing *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring)). Because the substance of the Ohio

program is one of direct aid, the voucher program is unconstitutional for the very reason identified by Petitioners.

This aspect of the Ohio voucher program, government funds being provided to religious schools to use without restriction in their general curriculum, distinguishes this case from every case upon which Petitioners primarily rely: *Everson*, 330 U.S. 1; *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Mitchell*, 530 U.S. 793. In each one of those cases, the government benefit either had a minimal relationship to religious indoctrination (free bus fare in *Everson*, books in *Allen*, tax deductions for educational expenses in *Mueller*, and interpreters in *Witters* and *Zobrest*), or the benefit program expressly barred the use of funds for religious purposes (the remedial instruction in *Agostini* and the teaching aids in *Mitchell*). In no case has this Court upheld direct aid to schools of the type found in the Ohio program that can be used to pay for religious indoctrination. As Justice O'Connor noted in *Mitchell*, although the Court's cases "have permitted some government funding of secular functions performed by sectarian organizations," its "decisions provide no precedent for the use of public funds to finance religious activities." 530 U.S. at 840 (internal quotation and citation omitted).

Nothing in this Court's precedents or in the history of the Establishment Clause justifies crossing the line that has existed from *Everson* to the present day. The Ohio program — which provides direct funds with "no strings attached" — is, and should remain, on the wrong side of that line.

II. OHIO'S VOUCHER PROGRAM RESULTS IN UNLAWFUL GOVERNMENT INDOCTRINATION OF RELIGION.

Notwithstanding the evolution of this Court's Establishment Clause jurisprudence, a bedrock principle remains clear: The government may not appear to engage in religious indoctrination. *Mitchell*, 530 U.S. at 808 (plurality opinion); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) ("For a law to have forbidden 'effects' under *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)], it must be fair to say that the *government itself* has advanced religion through its own activities and influence.") (emphasis added). The voucher program violates the Establishment Clause because the indoctrination that occurs in Ohio schools funded with program money is attributable to the government.

A. The Establishment Clause Is Violated If Religious Indoctrination Can Be Attributed To The State.

"As [the Court has] repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion." *Agostini*, 521 U.S. at 223-25 (upholding statute because public employees teaching secular remedial classes in private schools would not engage in religious indoctrination). Even where the government does not itself engage in indoctrination, government aid to religious institutions violates the Establishment Clause if the aid program conveys an "imprimatur of state approval," *Mueller*, 463 U.S. at 399, upon the recipients of state funds, resulting in a suggestion that indoctrination "has been done at the behest of the government." *Mitchell*, 530 U.S. at 809.

Government funding of religious schools, such as that provided by the Ohio voucher program, without any limitations on the use or channeling of the funds for particular purposes, inevitably associates the government with the institution's message. In this case, the most striking manifestation of this

problem is the restrictions placed on the doctrines that the schools may teach. Ohio placed restrictions on those doctrines undoubtedly because it recognized that the teachings of schools receiving funds from the voucher program would carry the imprimatur of the State. Indeed, as explained below, the statute's restrictions on speech survive constitutional scrutiny under the Free Speech Clause only because the schools' teachings, in fact, carry the imprimatur of being the government's own message.

Under those circumstances, the statute does not merely subsidize the "private choices of individuals," *Agostini*, 521 U.S. at 226, but rather represents an unconstitutional governmental advancement of religion.

B. The Viewpoint-Related Criteria For Schools To Participate In The Voucher Program Survive Scrutiny Under The Free Speech Clause Because The Schools Are Perceived To Be In Part Communicating The Government's Own Message.

1. The Ohio statute's viewpoint discrimination would normally violate the First Amendment's Free Speech Clause.

The Ohio statute does not allow state funding to go to just any school selected by a voucher program participant. Rather, vouchers can be used only at schools that have registered with the State Superintendent of Public Instruction. The Superintendent may register a school only if, *inter alia*, it does not "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." ORC § 3313.976(A)(6). This viewpoint discrimination would normally violate the First Amendment's Free Speech Clause.

Advocacy of "hatred" and "unlawful behavior" by private actors is subject to First Amendment protections against

government interference, and viewpoint discrimination in such circumstances would be unconstitutional.[3] "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Statutes will be held unconstitutional on their face where they are targeted at ideas the government seeks to suppress. *Cohen v. California*, 403 U.S. 15, 18 (1971). Thus, content-based discrimination against speech is "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and subject to "the most exacting scrutiny," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994).

It has been clear since *Brandenburg v. Ohio*, 395 U.S. 444 (1969), that the First Amendment's free speech guarantees embrace the right to "teach or advocate" violations of law. *Id.* at 445. Restrictions on speech by private parties that advocate violations of law are constitutional only where the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," *id.* at 447, but the Ohio law at issue here contains no such limitation on the advocacy that it seeks to restrict. In *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), this Court reaffirmed this principle, when it upheld the Oregon statute that had the effect of preventing Native Americans from smoking peyote as

3. The state may, of course, bar schools from engaging in discriminatory *conduct*, as it has done in ORC § 3313.976(A)(4), which prohibits a participating school from "discriminat[ing] on the basis of race, religion, or ethnic background." *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding denial of tax exemption to religious schools that had discriminatory admissions policies). But there is a world of difference between restricting discriminatory conduct and mere teaching or speech. As this Court held in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

required by their religion only because there was "no contention that Oregon's drug law represents an attempt to regulate . . . the communication of religious beliefs, or the raising of one's children in those beliefs." *Id.* at 882.

It is similarly clear that the First Amendment protects speech by private parties that advocates or teaches hatred based on race, ethnicity, national origin, or religion. In *R.A.V. v. City of St. Paul*, this Court held unconstitutional a city ordinance that criminalized speech that the speaker "kn[ew] or ha[d] reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380. The Court found impermissible viewpoint discrimination because the content limitation "display[ed] the city council's special hostility towards the particular biases thus singled out," *id.* at 396, and because "the First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391.[4] Similarly, in *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940), this Court overturned on free speech grounds the conviction of a Jehovah's Witness for criticizing other religious groups as "instruments of Satan" — arguably a manifestation of hatred on the basis of religion.

The Ohio voucher program thus contains a straightforward form of viewpoint discrimination. The Superintendent may register schools that "teach" tolerance of other races and religions and "advocate or foster" compliance with law. She may not register schools that "advocate or foster" the opposite viewpoint, not endorsed by the state in the statute.

Although the Ohio statute does not criminalize or otherwise directly regulate speech, it does condition a benefit — the right of schools to accept state-funded vouchers —upon the viewpoint

4. The Court so held even while acknowledging that the ordinance's scope was arguably limited, as the Ohio statute is not, to "fighting words." 505 U.S. at 381.

advocated by the school that seeks to register. Such a financial disincentive for "disfavored" speech, if applied to private actors, violates the First Amendment's free speech guarantee every bit as much as does an outright prohibition. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). *Accord Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (upholding tax deductions for contributions to veterans' groups engaged in lobbying while denying deductions to other groups that lobbied, but observing that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas.") (internal citation and quotation omitted); *Los Angeles Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 43 (1999) ("[I]f the award of the subsidy *is not based on an illegitimate criterion such as viewpoint*, California is free to support some speech without supporting other speech.") (emphasis added).

2. The Ohio Statute does not raise free speech concerns because vouchers are funding in part the government's own message.

Even though viewpoint discrimination — whether through regulation or in the form of discriminatory subsidies — violates the First Amendment's free speech guarantees when applied to private actors, the government may place restrictions on speech when it is subsidizing its own message. The Court addressed this issue directly in *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 541 (2001):

> We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, *see Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229, 235, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000),

> or instances, like *Rust* [*v. Sullivan*, 500 U.S. 173 (1991)], in which the government "used private speakers to transmit specific information pertaining to its own program." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). As we said in *Rosenberger*, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Ibid.*

Thus, under this Court's precedents, restrictions on speech are permitted only "where the government's own message is being delivered" and "when the government speaks . . . to promote its own policies or to advance a particular idea." *Legal Servs. Corp.*, 531 U.S. at 541 (internal citation and quotation omitted). Restrictions on government-funded doctors were acceptable in *Rust* because they were engaged in "governmental speech." *Id.* at 541. But restrictions on student organizations in *Rosenberger* and lawyers in *Legal Services Corp.* were unconstitutional because the programs were "designed to facilitate private speech, not to promote a governmental message." *Id.* at 542.

C. Because The Schools That Accept Vouchers Are Properly Seen To Be Communicating In Part A Governmental Message, The Ohio Voucher Program Violates The Establishment Clause Because Of The Inference Of Government Endorsement Of The Schools' Religious Message.

The State's regulation of the message advocated by schools that receive voucher funds is grounded on the foundation that the schools' message will be seen, accurately, as in part the State's own message. If the message is one of religious indoctrination or the advancement of religion, as it is at many

of the schools that receive voucher funds, the program thus violates the Establishment Clause. *See Mitchell*, 530 U.S. at 808 (plurality opinion).

A "reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in judgment). The schools' message is not "endorsed only by the individuals attending the religious school," but also by the State. *Mitchell*, 530 U.S. at 843 (concurring opinion). The Ohio statute does not "separate the government from endorsement of the religious message." *Id.* Moreover, Ohio has expressly involved itself in the message of schools deemed eligible to accept vouchers through the qualification provisions in the voucher statute. This creates an inference, impermissible under the Establishment Clause, that the State has also endorsed the religious message of the schools.

This case is much like *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), in which the Court addressed a claim that student-led, student-initiated invocations prior to school football games did not violate the Establishment Clause because they were "private student speech." *Id.* at 302. Distinguishing *Rosenberger*, which held that "an individual's contribution to a government-created forum was not government speech," *id.* at 302, the Court found that the invocation was government speech in part because the "invocation . . . is subject to particular regulations that confine the content and topic of the student's message." *Id.* at 303. The student's speech violated the Establishment Clause because it would be "perceive[d] . . . as a state endorsement of prayer in public schools." *Id.* at 308 (internal citation and quotation omitted). Similarly in the case of the Ohio program, the schools that receive vouchers are not merely a government-subsidized forum. Because the State controls elements of the message in the forum, the speech is properly attributable to the government, creating a violation of the Establishment Clause.

As Justice O'Connor recognized in her concurrence in *Mitchell v. Helms*, the question of whether the government is engaged in "'general[] or evenhanded[]'" distribution of funds "'is relevant in judging whether a benefit scheme so characterized should be seen as aiding a sectarian school's religious mission.'" *Mitchell*, 530 U.S. at 840 (quoting *id.* at 883-84 (Souter, J., dissenting)). There is no such "general or evenhanded" distribution of funds under the Ohio statute; funds do not go to schools with a message inconsistent with that endorsed by the State. The factual situation here is thus distinguishable from those in *Mitchell* and *Agostini*, in which aid was available to students at *any* private school. *See Mitchell*, 530 U.S. at 802[5]; *Agostini*, 521 U.S. at 208-210. The Minnesota statute at issue in *Mueller* similarly allowed tax deductions for school expenses regardless of the school's viewpoint. *See* 463 U.S. at 398-99.

If the private schools participating in the Ohio voucher program were merely promoting their own private viewpoint, there would be no reason — and could be no Constitutional basis — for the State of Ohio to deny vouchers to schools that taught hate or promoted violations of law. If the State were merely funding the "genuinely independent and private choices of individuals," *Mitchell*, 530 U.S. at 810 (plurality opinion) (internal citation and quotation omitted), it would be as indifferent to the schools' message as it is to the message promoted by a church to which a government employee donated her paycheck. *Cf. Witters*, 474 U.S. at 486-87. The inference of a governmental endorsement of the message of religious schools funded by the Ohio voucher program, and the State's involvement with and selection among the schools' messages

5. The Chapter 2 aid in *Mitchell* was available to all public schools, but only to nonprofit private schools. *See* 530 U.S. at 802; 20 U.S.C. § 7372(a). This limitation based upon the corporate form of the schools, unlike the viewpoint regulations at issue here, does not suggest a government imprimatur on the viewpoints taught by the recipients of state aid.

that necessarily follows from that inference, renders the statute unconstitutional.

III. THE OHIO VOUCHER PROGRAM ALSO RESULTS IN EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGIOUS ORGANIZATIONS.

The Ohio voucher program, by mandating governmental regulation of the message "advocated" or "fostered" by participating religious schools, creates an excessive entanglement between religious organizations and the State and therefore violates the Establishment Clause for this reason as well.

A. Avoidance Of Entanglement Is A Fundamental Aspect Of Establishment Clause Jurisprudence.

The Court has consistently declared that, in order to survive scrutiny under the Establishment Clause, a statute must do more than offer facial neutrality toward religion. "We must also be sure that the end result — the effect — is not an excessive government entanglement with religion." *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). *See also Mitchell*, 530 U.S. at 839 (O'Connor, J., concurring) ("[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.") (emphasis in original).

For thirty years, the "general nature" of this Court's Establishment Clause analysis has been governed by the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See, e.g., Mueller*, 463 U.S. at 394 (applying the three-pronged test). Despite incremental adjustments to the Court's application of the test, *Lemon* remains the touchstone for determining whether the State has run afoul of the Establishment Clause.

To survive an Establishment Clause challenge, first, a "statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-613 (citations omitted). Under the third prong of *Lemon* and its progeny, the Court examines whether State involvement or monitoring of religious programs is excessive or pervasive. "[S]tate surveillance" that is "comprehensive, discriminating, and continuing" violates the Establishment Clause. *Mueller*, 463 U.S. at 403 (quoting *Lemon*, 403 U.S. at 619). "The intrusion of government into religious schools through grants, supervision, or surveillance may result in establishment of religion in the constitutional sense when what the State does enthrones a particular sect for overt or subtle propagation of its faith." *Lemon*, 403 U.S. at 634 (Douglas, J., concurring). In *Lemon* and *Walz*, the Court characterized this concept as "entanglement." *See id.*; *Walz*, 397 U.S. at 674.

In *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court applied the *Lemon* test and held unconstitutional a New York program whose essential components matched those of the Ohio voucher program. Like the Ohio program, the New York program awarded tuition reimbursements to low-income parents of children attending private schools. *Nyquist*, 413 U.S. at 785-86 ("Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same."). As in Ohio, the vast majority of schools eligible for participation were sectarian. *Id.* at 768. Since parents in the *Nyquist* program paid the schools, there was no restriction on the private schools' use of the tuition reimbursement funds. The Court found that there was "no endeavor to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former." *Id.* at 783 (quoting *Lemon*, 403 U.S. at 613) (internal quotation omitted).

The Court had no occasion to assess the *Nyquist* program under the excessive entanglement prong, having found the program to be unconstitutional under the second *Lemon* prong. *Id.* at 794. The *Nyquist* decision did, however, communicate the Court's fears — relevant to this matter — that "apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion." *Id.*[6]

This Court's recent jurisprudence continues to recognize the dangers of excessive entanglement between government and religion. This Court applied the *Lemon* test in *Agostini* and assessed whether "New York City's Title I program resulted in an excessive entanglement between church and state." 521 U.S. at 232. The Court found in *Agostini* that "[w]hether a government aid program results in such an entanglement has *consistently been an aspect of our Establishment Clause analysis*." *Id.* (emphasis added). The political entanglement analysis has been applied both as "a factor separate and apart from effect" in the *Lemon* test and as "an aspect of the inquiry into a statute's effect." *Id.* at 232-33.

Under the doctrine of *stare decisis*, this Court should hesitate before abandoning the excessive entanglement test for scrutinizing state actions impinging on religious activity. As the Court has held repeatedly, "While *stare decisis* is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure

6. In *Mueller*, the Court stated that its analysis of political divisiveness would be "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." 463 U.S. at 403 n.11. As discussed *supra* pp. 8-9, although the voucher funds are nominally payable in the first instance to the parents of voucher program students, this is a mere formalism to disguise what is in substance a direct payment to the religious schools.

from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal quotations and citations omitted). There is no "special justification" to abandon the examination of excessive entanglement required by *Lemon* and its progeny, including *Nyquist* and *Agostini*.

B. Ohio's Voucher Program Causes Excessive Entanglement Between The State and Religious Schools Because Administrative Enforcement of Ohio's Viewpoint Discrimination Provisions Inevitably Requires The State To Evaluate And Interfere With Religious Doctrines.

"The allocation of public funds is invariably accompanied by limitations and restrictions on the use of such funds, in order to insure that the legislative intent is satisfied." *Pub. Funds for Pub. Sch. v. Marburger*, 358 F. Supp. 29, 38 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974). Here, as in *Marburger*, "[h]aving imposed such limitations and restrictions, the State must enforce them." *Id.* Therein lies the impermissible entanglement. As the Court noted in *Rosenberger*, for a state body "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases." 515 U.S. at 845 (internal citation and quotation omitted). The speech-prohibitive provisions of Ohio's voucher law require just such an inquiry.

Under the Ohio statutory scheme, "[t]he state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any of the provisions of division (A) of this section," ORC § 3313.976(B), including the provisions relating to viewpoint advocacy. Thus, the statute contemplates both (a) a threshold determination by a state official, and (b) continual

monitoring by state officials of the appropriateness of the content of the teachings advanced by the schools that accept vouchers.

In *Lemon* itself, the Court held that less intrusive involvement by the State in a religious school's affairs than that present here gave rise to impermissible entanglement. In *Lemon*, the statute providing for supplementation of the salaries of teachers of secular subjects required only a review of the subject matter that was taught. *See* 403 U.S. at 607-08 ("[T]he records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity."). The Court nevertheless found excessive entanglement because "the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." *Id.* at 621-22.

Ohio's statute restricting the content of teaching by schools participating in the voucher program requires entanglement in an even more sensitive area. Ohio must do more than determine whether teaching is religious. It must determine whether the educational message — including an educational message dictated by the school's religious orientation — constitutes the teaching of hatred or advocacy of violations of law, requiring disqualification of the school from participation in the voucher program.

The concern here is not purely hypothetical. Religions have a long history of "advocat[ing] or fostering unlawful behavior." *See, e.g.*, *United States v. Seeger*, 380 U.S. 163, 186-87 (1965) (noting Quakers' refusal to participate in armed conflict); *Pierson v. Ray*, 386 U.S. 547, 552-53 (1967) (noting arrest of Episcopal clergymen for violating "whites only" ordinance). This Court's cases are replete with examples of religious faiths espousing principles contrary to law.

See, e.g., *Employment Div.*, 494 U.S. 872 (Native American religion requiring use of controlled substance); *United States v. Lee*, 455 U.S. 252 (1982) (Amish employer's objection to collection of Social Security taxes on religious grounds); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (religious principles requiring children to distribute literature in violation of child labor laws); *Reynolds*, 98 U.S. 145 (Mormon practice of polygamy). Moreover, it is not difficult to imagine, especially at this moment, claims that faiths are teaching "hatred" of nonbelievers. *See, e.g.*, Marc Fisher, *Muslim Students Weigh Questions of Allegiance*, WASH. POST, Oct. 16, 2001, at B1 (principal of Muslim school in Potomac, Maryland advocated that Israel, "with its cursed population . . . is founded on a racist, warped, cancerous ideology which says Jews are better than all other people.") (alteration in original).

Although this Court has recently downplayed the importance of "political divisiveness" in evaluating entanglement,[7] it is difficult to imagine a more divisive activity than a state's determination whether religious doctrine teaches hatred or advocates lawlessness. Ohio's Superintendent of Public Instruction is required under the statutory scheme to decide whether a Jewish school's discussion of the concept of the "chosen people" or a Christian

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7. *Mitchell*, 530 U.S. at 825-26 (plurality opinion). *But see id.* at 872 n.2 (Souter, J., dissenting, joined by Stevens and Ginsburg, JJ.)

> The Court may well have moved away from considering the political divisiveness threatened by particular instances of aid as a practical criterion for applying the Establishment Clause case by case, but we have never questioned its importance as a motivating concern behind the Establishment Clause, nor could we change history to find that sectarian conflict did not influence the Framers who wrote it.

school's discussion of the role of Jews in the trial of Jesus "teach hatred of any person or group on the basis of . . . religion." She must similarly determine whether religious doctrine regarding, for example, engaging in civil disobedience in the course of opposing abortion or refusing compulsory military service "advocate[s] or foster[s] unlawful behavior."[8] As in *Marburger*, the content provisions in the Ohio statute make it "necessary to continually review the content of a teacher's instruction in order to see that it adheres to the restrictions imposed by the statute." *Marburger*, 358 F. Supp. at 40.

Moreover, the statute's contemplation of a "hearing," at which alleged infractions would be evaluated prior to revocation of registration, underscores the impropriety of the level of government control and oversight present here. Presumably there would be testimony taken and determinations of credibility regarding the nature and permissibility under the statute of disfavored religious beliefs being conveyed to students. The Court equated that type of process with impermissible entanglement in *NLRB v. Catholic Bishop of Chicago*, 440 U.S 490 (1979), in which it held that the NLRB could not exercise jurisdiction over lay faculty members at church-operated schools. The Court said, with respect to charges of unfair labor practices in which the school responded that the challenged action was mandated by religious creed:

> The resolution of [unfair labor practice] charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by

8. The problematic nature of such monitoring is compounded by the vagueness inherent in the statutory language, which gives administrators charged with enforcing the program much opportunity for arbitrary, subjective, and discretionary application.

> the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Id. at 502.

As this Court has recognized in the past, this is the very sort of entanglement of church and state that the Framers intended the Establishment Clause to guard against. *Cf. Meek v. Pittenger*, 421 U.S. 349, 372 (1975) ("To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed.").[9] Yet, Ohio mandates such entanglement as part of its voucher program.

C. The Intrusion Into Doctrinal Matters Here Distinguishes This Program From The Limited Neutral State Regulatory Oversight That This Court Has Permitted.

To be sure, the Court has from time to time held that subjecting a religious body to a generally applicable regulatory regime does not create an impermissible level of entanglement. For example, "[t]he Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations." *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305 (1985) (citing *Lemon*, 403 U.S. at 614). With regard to the specific regulatory requirements at issue in *Alamo*, the Court reasoned, "the recordkeeping requirements of the Fair Labor

9. *Meek* was overruled by *Mitchell* "[t]o the extent that *Meek* . . . conflict[s] with [*Mitchell*'s] holding." *Mitchell*, 530 U.S. at 835 (plurality opinion). But *Mitchell* recognized that an inquiry into "whether the aid creates an excessive entanglement between government and religion" remains one of the "general principles used to determine whether government aid violates the Establishment Clause." *Id.* at 844-45 (O'Connor, J., concurring).

Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs." *Id.* at 305-06. Key to the Court's conclusion in this regard was that the matters covered by the Fair Labor Standards Act were "routine and factual inquiries" and that "[t]hese requirements apply only to commercial activities undertaken with a 'business purpose,' and would therefore have no impact on petitioners' own evangelical activities." *Id.* at 305. *See also Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 253 (1990) (holding, in the context of a challenge to a statute requiring public schools that established an open forum to give access to religious speech, that a public school teacher's "custodial oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities"); *Hernandez v. Comm'r*, 490 U.S. 680, 696-97 (1989) ("[R]outine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies does not of itself violate the nonentanglement command.") (citations omitted).

In *Lemon* itself, Justice Douglas's concurring opinion recognized that "we have never faced, until recently, the problem of policing sectarian schools. Any surveillance to date has been minor and has related only to the consistently unchallenged matters of accreditation of the sectarian school in the State's school system." *Lemon*, 403 U.S. at 631 (Douglas, J., concurring).

In Ohio's program, the level of entanglement is qualitatively different than in *Alamo*, *Mergens*, and *Hernandez*, and moves far beyond the minor, accreditation-related surveillance noted by Justice Douglas in *Lemon*. The State of Ohio engages in direct supervision, not over undeniably secular matters such as record-keeping or fire inspections, but over what tenets and

doctrines the schools are teaching their students. As far as religious schools are concerned, these inquiries necessarily bring the state directly into issues of curriculum content interwoven with religious concepts and ideals. *See Lemon*, 403 U.S. at 635 (Douglas, J., concurring) ("'It is a commonplace observation that in the parochial school religion permeates the whole curriculum, and is not confined to a single half-hour period of the day.'" (quoting Joseph H. Fichter, *Parochial School: A Sociological Study* 86 (1958))).

Thus, the voucher program, which holds out the promise of government funding, entails an unprecedented scope of governmental involvement in the operation, including the teachings and curricula, of religiously affiliated schools. As Justice Brennan noted in an analogous context, "[p]olicing the content of courses, the specific textbooks used, and indeed the words of teachers is far different from the legitimate policing carried on under state compulsory attendance laws or laws regulating minimum levels of educational achievement." *Lemon*, 403 U.S. at 651 (separate opinion of Brennan, J.). For this reason, the voucher program crosses the line from permissible neutral regulatory oversight into unconstitutional pervasive entanglement in matters of religious belief and doctrine.

IV. THE FLAWS IN THE OHIO VOUCHER PROGRAM CANNOT BE CURED BY SEVERING THE PROVISION BARRING REGISTRATION OF SCHOOLS THAT TEACH HATE OR ADVOCATE UNLAWFUL BEHAVIOR.

The Court cannot solve the constitutional infirmities with the Ohio voucher program by severing section 3313.976(A)(6).

Severability analysis is only appropriate where one discrete provision or aspect of a statute is unconstitutional and the statute would otherwise pass muster. That is not the case here. The problems highlighted by the viewpoint discrimination contained in section 3313.976(A)(6) merely reflect the

underlying flaw in the voucher program. As discussed above, the State felt compelled to restrict the message taught in voucher program schools — and that restriction survives scrutiny under the Free Speech Clause — only because the State recognized that it was providing its stamp of endorsement on the message of voucher program schools, including sectarian schools. Removing the viewpoint restriction from the statute does not eliminate that fundamental flaw in the voucher program itself. Ohio's voucher program violates the Establishment Clause because the program creates the perception of a government imprimatur for the message taught in religious schools. Removing only one symptomatic provision would not cure the underlying defect.

Moreover, even if a severability analysis were in order, it would not be appropriate to sever the provisions at issue and leave the statute otherwise standing. Severance would be improper under Ohio law because the provisions in question are "so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out." *State v. Hochhausler*, 668 N.E.2d 457, 466-67 (Ohio 1996) (internal citations and quotation omitted). This is true even where, as here, there are statutory severability provisions. ORC § 1.50 (general severability clause); 1999 Ohio Law Files 37, Section 54 (severability clause contained in the voucher statute). *See State ex rel. Squire v. City of Cleveland*, 82 N.E.2d 709, 725 (Ohio 1948) ("Although consideration must be given to the fact that an act contains a separability clause, such a clause is not conclusive. . . .").

The essential inquiry is whether the Ohio legislature would have created the voucher program if it knew that the result would be to allow the possible funding of schools that teach hate or advocate unlawful activity. *See State ex rel. Herbert v. Ferguson*, 52 N.E.2d 980, 984 (Ohio 1944) (holding that severance occurs only if the remaining "statute is still capable of fulfilling the

apparent legislative intent"). The text and structure of the statute make clear that Ohio did not intend to fund a voucher program if that meant the possibility of funding schools that meet all of the objective eligibility requirements, but teach hate or advocate unlawful conduct.[10] It would be an extraordinary exercise of judicial power effectively to institute such a program without an express indication from the legislature that it foresaw and intended such a possible result.

Four Justices of this Court recently observed, in the context of a statute (like this one) providing funding but restricting activities by those receiving the funds, that "when an 'excepting proviso is found unconstitutional the substantive provisions which it qualifies cannot stand,' for 'to hold otherwise would be to extend the scope of the law . . . so as to embrace [situations] which the legislature passing the statute had, by its very terms, expressly excluded.'" *Legal Servs. Corp.*, 531 U.S. at 561 (Scalia, J., dissenting, joined by Rehnquist, O'Connor, and Thomas, JJ.) (quoting *Frost v. Corporation Comm'n*, 278 U.S. 515, 525 (1929)).[11] To do so would "'rewrite [the] statute and

10. *Dicta* in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), addressed the severability of a different section of a former version of the voucher program before ultimately holding the entire statute unconstitutional under the "one subject" rule. That discussion is, in any case, inapposite. It concerned a provision of the statute that enabled sectarian schools to give admissions preference to students who belonged to the religious group affiliated with the school. *See id.* at 210. It is one thing to say that the legislature would have intended to have the program go forward without that provision, since the result is simply that students have more equitable access to the program. It is quite another to rewrite the statute to obligate the state to fund schools meeting the objective eligibility requirements for the program even if those schools teach hate or unlawful behavior.

11. Severability of state law provisions is a question of state law. *See, e.g., Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (*per curiam*). Nevertheless, there is no meaningful difference between Ohio's severability standard and that applied by this Court in cases, such as *Legal Services Corp.*, involving federal statutes.

give it an effect altogether different'" from that intended by the legislature. *Id.* at 562 (alteration in original) (quoting *Railroad Ret. Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935)). Section 3313.976(A)(6) is a similar "excepting proviso"; the Ohio legislature's funding of the voucher program and its prohibition on funds going to schools advocating hate or law violations are "conditions, considerations and compensations for each other that cannot be severed" without the substantial likelihood of violating the intent of the Ohio legislature. *Legal Servs. Corp.*, 531 U.S. at 560 (internal quotation and citation omitted). Thus, the Court must invalidate the statute in its entirety.

CONCLUSION

The decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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DEC 13

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, *et al.*,

Petitioners,

-and-

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

-and-

SENEL HERMAN TAYLOR, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE AMERICAN JEWISH COMMITTEE, *et al.* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Interest of the *Amici Curiae*	1
Introduction	4
Summary of the Argument	6
Argument	8
I. The Government Funding Of The Ohio Vouchers Program Is A Direct, Unrestricted Subsidy Of Religious Education.	8
A. The Sixth Circuit Properly Held The Ohio Vouchers Program Unconstitutional Under *Nyquist*.	9
B. Recent Establishment Clause Jurisprudence Reaffirms *Nyquist*'s Prohibition Against Unrestricted State Funding Of Pervasively Religious Schools.	11
II. The Ohio Vouchers Program Is Not Neutral With Respect To Religion, Because Its Participants Lack Meaningful Choice.	16
A. The Ohio Voucher Program's Funding Structure Ensures That the Range of Choices Will Always Be Limited Primarily to Religious Schools.	17

Contents

Page

B. Unlike Other Programs Approved By This Court, The Ohio Vouchers Program By Its Structure Limits The Universe of Options Available to Participants. 22

III. The Ultimate Effect Of The Ohio Vouchers Program Is To Undermine The Separation Of Church And State. 25

Conclusion 28

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Page

Cases:

Agostini v. Felton, 521 U.S. 203 (1997) .. 14, 15, 22, 24, 25

Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994) 16

Bowen v. Kendrick, 487 U.S. 589 (1988) 8, 16

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 6, 8, 9, 10, 11, 12, 14, 15, 25

Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980) 15

DeRolph v. State, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) 21

Everson v. Board of Ed. of Ewing, 330 U.S. 1 (1947) 26

Hunt v. McNair, 413 U.S. 734 (1973) 8

Lemon v. Kurtzman, 403 U.S. 602 (1971) 8

Mitchell v. Helms, 530 U.S. 793 (2000) 12, 13, 14, 16, 22, 24, 25

Mueller v. Allen, 463 U.S. 388 (1983) 10, 11, 12, 17, 22, 23, 25

Norwood v. Harrison, 413 U.S. 455 (1973) 9

Page

Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976) 22

Rosenberger v. Rector and Vistors for the University of Virginia, 515 U.S. 819 (1995) 8

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) 10, 11, 13, 17, 25

Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) 17

Tilton v. Richardson, 403 U.S. 672 (1971) 13

Walz v. Tax Commission of New York, 397 U.S. 664 (1970) 8, 26, 27

Widmar v. Vincent, 454 U.S. 263 (1981) 16

Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) 15, 16, 22, 23

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 14, 15, 22, 23, 26

United States Constitution:

First Amendment 8

Fourteenth Amendment 8

Page

Statutes:

Ohio Rev. Code § 3313.974, *et seq.* 4, 21

Ohio Rev. Code § 3313.974(G) 22

Ohio Rev. Code § 3313.975 22

Ohio Rev. Code § 3313.976(A) 22

Ohio Rev. Code § 3313.976(A)(4) 26

Ohio Rev. Code § 3313.976(A)(5) 20

Ohio Rev. Code § 3313.976(C) 22

Ohio Rev. Code § 3313.978 ..... 22, 24

Ohio Rev. Code § 3313.978(A) 22, 23

Ohio Rev. Code § 3313.978(C) 17

Ohio Rev. Code § 3314.01, *et seq.* 17

Ohio Rev. Code § 3317.03(I)(1) 19

Ohio Rev. Code § 3317.08(A)(1) 19

Ohio Rev. Code § 3317.012 19

Ohio Rev. Code § 3317.022 19

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Page

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INTEREST OF THE *AMICI CURIAE*[1]

Amici represent a broad spectrum of religious and religiously-affiliated organizations whose members' communities are precisely those that stand to benefit from programs such as the Ohio State Pilot Scholarship Program (hereinafter, the "Ohio Vouchers Program" or the "Program"), a program that allows for the use of publicly funded vouchers at private religious schools. *Amici* share the conviction that the Program, in its subsidization of religious education, constitutes a grave threat to the principles underlying the Establishment Clause. Therefore, with the written consent of the parties, the following organizations submit this brief *amici curiae* in support of affirmance of the decision of the United States Court of Appeals for the Sixth Circuit.

The American Jewish Committee ("AJC"), a national organization of over 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC believes that the only way to achieve this goal is to safeguard the civil and religious rights of all Americans. A staunch defender of church-state separation as the surest guarantor of religious liberty and a dedicated supporter of public schools, AJC opposes vouchers as both unconstitutional and bad public policy.

The Baptist Joint Committee on Public Affairs (the "BJCPA") is composed of representatives from various cooperating Baptist conventions and conferences. Because it deals exclusively with issues pertaining to religious liberty and church-state separation, the BJCPA limits its participation in this brief to the Establishment Clause issues. The BJCPA believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

1. Pursuant to United States Supreme Court Rule 37, counsel of record has filed letters with the Clerk of Court consenting to the filing of this brief, and counsel states that no counsel for a party authored this brief in whole or in part. In addition, no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest women's and the largest Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of the American Jewish community. Hadassah opposes any direct or indirect government financing of religious schools, because it endangers church-state separation and undermines the system of public education essential to a pluralistic democracy.

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 13 national and 122 local Jewish community relations organizations, was founded in 1944 to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake — along with an ethical imperative — in assuring that America remains a country wedded to the Bill of Rights and that the wall of separation between church and state is an essential bulwark for religious freedom in the United States.

The National Council of the Churches of Christ in the USA ("NCC") is the nation's leading organization in the movement for Christian ecumenical cooperation. The NCC's 36 Protestant, Anglican and Orthodox member communions and denominations include more than 50 million persons in 140,000 local congregations in communities across the United States.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the NCJW has 90,000 members in over 500 communities nationwide. Given NCJW's National Resolution which states, "Quality public education for all, utilizing public funds for public schools only," NCJW joins this brief.

The Union of American Hebrew Congregations ("UAHC") is the central body of the Reform Jewish Movement in North America, and the Central Conference of American Rabbis ("CCAR") is the organized rabbinate of Reform Judaism. The 900 congregations of the UAHC encompass 1.5 million Reform Jews, and the membership of the CCAR includes 1,700 Reform rabbis. The UAHC and CCAR have long urged Congress, the courts and local officials to support America's public schools and protect the separation of church and state and will continue to do so. In a 1998 resolution adopted by the CCAR, the Reform Movement vowed to "continue to support public education by giving high priority to educating our nation's children and instilling a sense of urgency about the challenges facing public education in our synagogues, in the larger community, and among our elected officials." According to a December 9, 2001 resolution adopted by the UAHC, "one of the most serious threats to our system of public education comes from those who support vouchers for use in private and parochial schools."

The United Church of Christ's Justice and Witness Ministries ("UCC") coordinates and implements the denomination's justice advocacy mandates on behalf of 1.4 million members in over 6,000 congregations in the United States and Puerto Rico. In the tradition of its Pilgrim forebears who brought community schooling and higher education to the colonies, the UCC's history includes the founding of numerous schools for freed slaves throughout the South during and after the Civil War. The UCC has historically worked to strengthen public schools and to oppose any measure that would weaken the nation's public education system. In 2001, the UCC's General Synod, its highest denominational governing assembly, called upon its members and congregations to work to safeguard public education as a basic and fundamental civil right.

INTRODUCTION

The Ohio Vouchers Program is a school voucher program in which a limited number of Cleveland City School District students selected through a lottery process, based in part on financial need, receive state tuition grants, or vouchers, for use at private secular or religious schools within the boundaries of the Cleveland district, or at public schools in adjacent suburban districts that have registered for the Ohio Vouchers Program and have been approved by the State Superintendent of Public Instruction. Depending on income level, students may receive vouchers of up to 90% of a participating school's tuition, which cannot exceed $2,500. *See* Ohio Rev. Code § 3313.974, *et seq.* In the 1999-2000 school year, 3,761 students received scholarships under the Program. Over 82% of the participating schools were religious, and more than 96% of the students enrolled in the Program used their vouchers for tuition at a religious school. Since the Program's inception in 1995, no public school in the adjacent suburban districts has ever participated.

The Ohio Vouchers Program was created in response to Cleveland's ailing public school system. However, despite its laudable goal of improving educational opportunities for a select group of students, the Program is a misguided effort both in policy and law. As a matter of policy, it fails to provide a practical long-term solution to the "educational crisis" in the public school system. Instead, the Ohio Vouchers Program substantially weakens the Cleveland public schools in the short and long term by diverting scarce financial and social resources from them to private schools, the bulk of which are religious, even though the vast majority of elementary school children in Cleveland continue to attend the admittedly sub-standard public schools. Indeed, the vast majority of the funding for the Program comes from a state program created to support Ohio's economically challenged public school districts, the Ohio Disadvantaged Pupil Impact Aid program. Those funds were intended to benefit Cleveland's public school system, but instead, are being diverted

to private schools, the vast majority of which are religious, through the Ohio Vouchers Program. Thus, for the students who are unwilling or unable to take advantage of the Program, the vouchers do nothing to improve the current condition of their schools and, in fact, do much to harm them.

Beyond its tendency to diminish, rather than improve, the quality of Cleveland's public schools, the Program violates bedrock principles embodied in the Establishment Clause. The Ohio Vouchers Program cannot be squared with well-established Supreme Court precedents that prohibit the unrestricted flow of public funds into the general coffers of pervasively religious primary and secondary schools. Moreover, due to incentives inherent in the Program that cause religious schools to participate, and secular schools not to participate, the Program is grossly skewed towards religious education and does not, as Petitioners claim, neutrally present families with a broad spectrum of options from which to choose. By touting its form, Petitioners have ignored the actual substantive effect of the Program, which is that of an impermissible direct subsidy of the religious missions of participating religious schools, and of impermissible State reliance on pervasively religious institutions to accomplish the important governmental goal of educating Cleveland's children.

Finally, the Ohio Vouchers Program results in excessive entanglement between government and religion that is destructive to religion. It is a widely accepted axiom that a natural side effect of government funding is government control. Although the religious schools choose to participate in the Ohio Vouchers Program to receive government funding in the form of tuition vouchers, the Court's affirmation of that choice would usher in a new relationship between government and religion, one that threatens the autonomy of all religious entities. Indeed, in order for a religious school to participate in the Ohio Vouchers Program, and thereby receive funding, it must adopt the non-discriminatory admissions policy promulgated by the Ohio legislature. A determination by this Court that the Program is

consistent with the Establishment Clause will destroy the wall that separates church and state, erected by the founders of our country not only to prevent government from advancing religion, but also to protect religion from the monitoring, direction and control of government agencies.

To be clear, *amici* oppose government programs that provide unrestricted public funds to religious institutions. Indeed, *amici* find it difficult to imagine any voucher program that siphons public funds to religious schools that would pass constitutional muster under the Establishment Clause. However, this case does not present for the Court the overall issue of the desirability or constitutionality of vouchers generally; rather, it is limited to the question of whether this particular voucher program is constitutional. As set forth below, the answer to that narrow question is no — the Ohio Vouchers Program is not constitutional, because the Program (1) results in the transfer of unrestricted funds to religious schools, (2) is not neutral and does not present a real choice, because it creates incentives for parents to send their children to religious school, and (3) has the primary effect of advancing religion.

SUMMARY OF THE ARGUMENT

The Ohio Vouchers Program violates the central tenet of the Establishment Clause by pouring government funds directly into the coffers of religious schools, while providing no restrictions on their use. As a result, government funds, in the form of tuition grants, will finance religious activities and have the primary effect of advancing religion. In that regard, the Ohio Vouchers Program is indistinguishable from the voucher program struck down by this Court in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). The Sixth Circuit's holding in this case is entirely consistent with this Court's decisions regarding public assistance to religious schools. Indeed, this Court has never held that a state's direct and unrestricted funding of religious schools as extensive as that existing under the Program passes constitutional muster.

Moreover, the Ohio Vouchers Program is affirmatively skewed towards religion and offers no real choice among educational institutions. Despite the Program's purported facial "neutrality" and superficial inclusion of "choice," the undeniable effect of the Program is to advance religion by funneling tax dollars to pervasively religious schools. In contrast to other public assistance programs approved by this Court, the structure of the Ohio Vouchers Program has the inevitable effect of ensuring that the overwhelming majority of participating schools will be pervasively religious primary and secondary schools, thus requiring the vast majority of parents, in order to receive the tuition grants, to enroll their children in those pervasively religious schools. Indeed, the funding structure of the Ohio Vouchers Program exacerbates this restriction of choice by affirmatively creating financial incentives for parents to send their children to pervasively religious schools.

In the final analysis, the Ohio Vouchers Program, regardless of the issues of "neutrality" and "choice," is unconstitutional, because it is a direct, unrestricted subsidy of religious education by state government. The Program not only provides direct financial support of pervasively religious schools, but also mandates state involvement in the admissions policies of those religious schools.

Accordingly, the Ohio Vouchers Program, for numerous reasons, violates the tenets of the Establishment Clause; therefore, this Court should affirm the decision of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I.

THE GOVERNMENT FUNDING OF THE OHIO VOUCHERS PROGRAM IS A DIRECT, UNRESTRICTED SUBSIDY OF RELIGIOUS EDUCATION.

The Ohio Vouchers Program violates a fundamental principle of the United States Constitution — that government shall not "use [ ] public funds to finance religious activities." *Rosenberger v. Rector & Vistors of the Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). The First Amendment, made applicable to the states by the Fourteenth Amendment, prohibits government from making laws "respecting an establishment of religion," whether by " 'sponsorship, financial support [or] active involvement . . . in religious activity.' " *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Com. of New York*, 397 U.S. 664, 668 (1970)). Pursuant to that constitutional mandate, this Court has unequivocally struck down programs that provided unrestricted state funding to pervasively religious primary and secondary schools. *See, e.g., Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-85 (1973) (finding unconstitutional government funding for the repair and maintenance of religious schools and the reimbursement of tuition for students attending those schools).

This Court has recognized that unrestricted aid to pervasively religious institutions such as the religious primary and secondary schools dominating the Ohio Vouchers Program poses grave constitutional problems. *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988) (Court has found unconstitutional "programs that entail an unacceptable risk that government funding would be used to 'advance the religious mission' of the religious institution receiving aid.") (citation omitted); *Hunt v. McNair*, 413 U.S. 734, 743 (1973) ("Aid normally may be thought to have a primary effect of advancing religion when it

flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . . ."). Under the Ohio Vouchers Program, public funds in the form of grants will inevitably flow without limitation into the general coffers of religious schools to pay for any or all of the schools' functions, including religious instruction and worship. Thus, no matter how laudable the purpose, the Ohio Vouchers Program is unconstitutional, because it has the primary effect of financing religious indoctrination with state money. *See Norwood v. Harrison*, 413 U.S. 455, 466 (1973) ("The existence of a permissible purpose cannot sustain an action that has an impermissible effect.") (internal quotations and citation omitted).

A. The Sixth Circuit Properly Held the Ohio Vouchers Program Unconstitutional Under *Nyquist*.

In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court struck down a New York program that allowed low-income parents with children attending certain primary and secondary private schools, including private religious schools, to receive partial reimbursement of their tuition bills from the state. *See Nyquist*, 413 U.S. at 780. Like the Ohio Vouchers Program, the overwhelming majority of the schools participating in the program were "religion-oriented," and the aid was technically provided to the parents rather than the schools. *See id.* at 774, 780. Pointing out that no attempt had been made to ensure that the public aid supported only secular functions of the schools, the *Nyquist* Court stated: "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.* at 780, 783. The program was found unconstitutional, notwithstanding the state's contention that the funds did not constitute "direct" state aid because the money was actually disbursed (as reimbursement) to the parents who

then were free to use that money as they wished.[2] *See id.* at 781-86. The manner by which the aid was provided to the schools, the Court held, was not dispositive but "only one among many factors to be considered." *Id.* at 781. The Court ultimately viewed as controlling the "substantive impact" of the program, rather than the route by which the aid traveled. *Id.* at 786. The impact of the program, the Court said, was "unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.

As the Sixth Circuit properly held, the Ohio Vouchers Program is in all material respects indistinguishable from the program in *Nyquist*. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 958 (6th Cir. 2000). As in *Nyquist*, an overwhelming majority of participating Ohio schools are religious, and no attempt has been made to restrict the use of state funds in the schools for secular purposes only. *See Simmons-Harris*, 234 F.3d at 958-59. Indeed, given the overarching religious mission of those schools, it is doubtful that such use restrictions could ever be imposed in a meaningful way. *Compare Nyquist*, 413 U.S. at 774 (noting that the Court did not "think it possible within the context of . . . religious-oriented institutions to impose [restrictions on payments to secular uses]"). As a direct result of the Ohio Vouchers Program, the bulk of the $11.2 million in aid appropriated for the Program by the Ohio General Assembly for the 1999-2000 school year was channeled to pervasively religious institutions to be used for any and all purposes, including religious purposes. And, during that school year, 3,632 Cleveland school children (over 96% of Program participants) received religious instruction — and indoctrination — at state expense. *See Simmons-Harris*, 234 F.3d at 959. The Sixth

2. Consistent with its approach of evaluating the substance, and not merely the form, of aid programs, this Court has subsequently treated *Nyquist* as an example of "direct transmission of assistance from the State to the [parochial] schools . . . ," despite the "reimbursement" aspect of the plan challenged therein. *E.g.*, *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

Circuit, therefore, properly found the Ohio Vouchers Program unconstitutional, because it "involves the grant of state aid directly and predominantly to the coffers of the private, religious schools, and it is unquestioned that these institutions incorporate religious concepts, motives, and themes into all facets of their educational planning." *Id.* at 960-61.

B. Recent Establishment Clause Jurisprudence Reaffirms *Nyquist*'s Prohibition Against Unrestricted State Funding of Pervasively Religious Schools.

This Court's decisions subsequent to *Nyquist* have repeatedly affirmed the continued vitality of *Nyquist*'s holding. Indeed, although the Court has since approved certain forms of limited state aid to religious schools, in each instance, the Court has taken pains to distinguish *Nyquist* from the case at hand. *See, e.g.*, *Mueller v. Allen*, 463 U.S. at 396 n.6 ("genuine tax deduction" for tuition, textbook and transportation expenses incurred in sending children to schools, including religious schools, was permissible, whereas the "outright grants to low-income parents" of *Nyquist* were not).

In recognition of *Nyquist*'s prohibition against unrestricted state subsidies for religious education in primary and secondary schools, this Court has found significant in subsequent challenges to school assistance programs that little or no government funds ever reach the coffers of religious schools. For example, in *Mueller*, this Court upheld a program whereby the parents of any child in Minnesota attending either public or private schools could claim a deduction from gross income for a portion of their expenses for tuition, textbooks and transportation. Because the program in *Mueller* involved tax deductions, no government funds were transferred at all, and thus, no government funds ever reached the coffers of religious schools. This Court recognized the importance of the fact that the *Mueller* program involved a tax deduction rather than the direct flow of government funds to the schools, stating that "[o]ur decisions consistently have recognized that traditionally

legislatures have especially broad latitude in creating classifications and distinctions in tax statutes in part because the familiarity with local conditions enjoyed by legislators especially enables them to achieve an equitable distribution of the tax burden." *Id.* at 396 (internal citations and quotations omitted).

Likewise, in *Mitchell v. Helms*, 530 U.S. 793 (2000), this Court's most recent ruling on the subject of public assistance to private religious schools, both the plurality and the concurrence reaffirmed *Nyquist*'s prohibition against unrestricted government money flowing into the coffers of religious schools. The plurality stated that "we have seen special Establishment Clause dangers . . . when *money* is given to religious schools directly. . . ." 530 U.S. at 818-819 (internal citations and quotations omitted) (emphasis in original). The concurrence similarly noted "[t]his Court has recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." 530 U.S. at 843 (O'Connor, J., concurring) (internal citations and quotations omitted). In *Mitchell*, this Court upheld a program under Chapter 2 of the Education, Consolidation and Improvement Act of 1981, which provided educational materials such as library books and computers to qualifying public and private schools. The program in *Mitchell* contained the following safeguards to ensure that no unrestricted funds flowed directly to religious private schools: (1) the program provided that all of the materials provided to the schools had to be secular, neutral, and nonideological; (2) the program prohibited the schools from using the aid for religious worship or instruction and required all private schools to agree in writing that they would use the aid provided only for secular purposes; (3) the aid was only supplemental — it did not supplant funds from non-government sources; and (4) the program provided that private schools could not acquire title to the educational materials provided by the program. Those safeguards were crucial to both the plurality and concurring opinions in *Mitchell*, because they prevented the unrestricted flow of funds to religious

institutions. None of those safeguards is present in the Ohio Vouchers Program.

Indeed, under the reasoning set forth in the *Mitchell* concurrence, the Ohio Vouchers Program bears all the hallmarks of a violation of the Establishment Clause. The Program contains no requirement that the aid be used only for secular purposes, nor does it require participating schools to certify that they will not use the aid for religious purposes. Instead, the Ohio Vouchers Program provides unrestricted government funding for participating religious schools.

It is undisputed that religious teachings permeate the educational activities undertaken by the religious schools participating in the Ohio Vouchers Program. The handbooks and mission statements of the participating religious schools "reflect that most believe in interweaving religious beliefs with secular subjects" requiring, for example, that "all learning take place in an atmosphere of religious ideals." *Simmons-Harris*, 234 F.3d at 949. Given the degree to which religion is a part of the fabric of the teachings of the participating religious schools, there can be no doubt that the Ohio Vouchers Program funds are actually being diverted in large part to support religious activities. Under the Program, nothing prevents voucher funds from being used to buy religious texts, repair buildings used for religious purposes, pay for theology teachers, or sponsor religious speakers, to name a few examples. The lack of a secular content restriction alone should render the Ohio Vouchers Program unconstitutional. *See Mitchell*, 530 U.S. at 840 (stating that this Court's decisions "provide no precedent for the use of public funds to finance religious activities") (O'Connor, J., concurring) (internal quotations omitted); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (holding unconstitutional a statute that authorized federal grants to universities to be used for the construction of buildings to the extent that the secular content restriction in the statute expired after 20 years).

Moreover, unlike the program at issue in *Mitchell*, the Ohio Vouchers Program does not merely provide supplemental aid to religious schools for programs or materials that those schools would otherwise not have provided. Rather, the Ohio Vouchers Program supplants private funds with state money by providing the religious schools with tuition money that the schools could only receive from private sources, absent the existence of the Program. The funds provided by the Ohio Vouchers Program are completely unrestricted, whereas the supplemental aid provided by the *Mitchell* program by its nature limited the uses to which it could be put. In addition, the Ohio Vouchers Program provides at least some parents who would not otherwise send their children to religious schools with a financial incentive to do so. In this respect, as discussed more fully in Point II below, the Ohio Vouchers Program is not truly neutral. All these characteristics distinguish the Ohio Vouchers Program from the program at issue in *Mitchell* and inescapably lead to the conclusion that the Ohio Vouchers Program is unconstitutional.

In *Agostini v. Felton*, 521 U.S. 203 (1997), another recent ruling on the subject, this Court rejected an invitation to overrule *Nyquist*'s prohibition against state tuition grants and unrestricted subsidies for religious education in primary and secondary schools. In upholding the constitutionality of providing remedial education services, pursuant to Title I of the Elementary and Secondary Education Act of 1965, through public school teachers teaching on parochial school grounds, the majority specifically distinguished the program at issue in *Agostini* from the program in *Nyquist*, pointing out that "[n]o Title I funds ever reach the coffers of religious schools." *Id.* at 228. The aid provided by the program at issue in *Agostini* was also clearly supplemental to the services normally provided by the religious schools. In so finding, this Court explained, "Title I services are by law supplemental to the regular curricula. . . . [and] do not, therefore, relieve sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at 228 (internal quotation and citations omitted); *see also Zobrest v.*

Catalina Foothills Sch. Dist., 509 U.S. 1, 10, 12 (1993) (holding that the government's provision of an interpreter to a deaf student attending a religious school was not unconstitutional because "no funds traceable to the government ever find their way into sectarian schools' coffers" and because the school "is not relieved of an expense that it otherwise would have assumed in educating its students").

In fact, in all of the school assistance programs upheld by this Court in the face of Establishment Clause challenges, "no more than a minuscule amount of aid awarded under the program[s]," if any, was "likely to flow to religious education." *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 486 (1986); *see also Agostini*, 521 U.S. at 226 (remedial instruction program upheld where there was no reason to believe that publicly-funded teachers would attempt "to inculcate religion in students"); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (program upheld where "ample safeguards" existed to ensure that reimbursements would cover only secular services). The Ohio Vouchers Program, in contrast, does nothing to preclude — and much to ensure (*see infra* at 26) — the likelihood that a substantial portion of the government funds appropriated will be used by religious schools to pay the salaries of clergy and other religious instructors, and to purchase Bibles and other religious texts.

In sum, no Supreme Court opinion has ever upheld the constitutionality of a program that provides such direct, substantial, unrestricted and widespread governmental support to the religious mission of private elementary and secondary faith-based schools as does the Ohio Vouchers Program. Therefore, the Sixth Circuit properly held the Ohio Vouchers Program unconstitutional under *Nyquist* and its progeny.

II.

THE OHIO VOUCHERS PROGRAM IS NOT NEUTRAL WITH RESPECT TO RELIGION, BECAUSE ITS PARTICIPANTS LACK MEANINGFUL CHOICE.

In assessing whether a statute is neutral for purposes of an Establishment Clause analysis, this Court has consistently found that context is as important as the face of the statute. *See, e.g., Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994). Even if a "challenged statute appears to be neutral on its face, [this Court] ha[s] always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion." *Bowen*, 487 U.S. at 609. Consistent with this view, this Court's recent jurisprudence has emphasized the importance of meaningful choice in evaluating the neutrality of a government-sponsored program, stressing the significance of "neutrality and private choice, and their relationship to each other." *Mitchell*, 530 U.S. at 810. Thus, while facial neutrality is an important "index of secular effect," it may not trump "empirical evidence that religious groups will dominate" as beneficiaries of the challenged program. *Widmar v. Vincent*, 454 U.S. 263, 275 (1981).

To the extent that the Ohio Vouchers Program is facially neutral, in that it permits both religious and nonreligious schools, and public and private schools, to participate, a cursory glance beneath the surface of the statute demonstrates that the Program is "neutral" only in the most formal sense. In fact, the Ohio Vouchers Program is "skewed towards religion," *Witters*, 474 U.S. at 488, because it constrains the choices of voucher recipients to such a degree that government subsidization of religious indoctrination will inevitably result.

A. The Ohio Voucher Program's Funding Structure Ensures That the Range of Choices Will Always Be Limited Primarily to Religious Schools.

The Program's funding structure ensures that religious schools will dominate the universe of options available to voucher recipients,[3] because the Program's grant of tuition is too low to meet the basic financial needs of virtually all secular schools, private or public.[4] With respect to private schools, by statute, the State caps a participating school's tuition at a mere $2,500 per pupil, *see* Ohio Rev. Code § 3313.978(C), an amount wholly insufficient to satisfy the budgetary requirements of the vast majority of nonreligious private schools. As evidenced by the 1999-2000 roster of participants in the Program, very few secular private schools

3. Petitioners' reliance on the Community Schools, a system of independently chartered public schools, as a nonreligious alternative to the Ohio Vouchers Program is misplaced, because the two programs are entirely separate and cannot be considered together. As the Sixth Circuit properly found, the Program was "enacted as a complete program in the Ohio Revised Code," *Simmons-Harris*, 234 F.3d at 958, and is independent and distinct from "the Community Schools program [which] is codified in its own chapter." *Id.* at 958. Moreover, private schools, by statute, may not participate in the Community Schools Program, *see* Ohio Rev. Code §§ 3314.01, *et seq.*, rendering the Community Schools program entirely irrelevant in the context of any discussion concerning meaningful choice under the Ohio Vouchers Program. Therefore, any discussion of the Community Schools program here is irrelevant on either statutory or practical grounds.

4. The Court's refusal in *Mueller* to consider the extent to which certain classes of citizens took advantage of the options available to them under the challenged law, *Mueller*, 463 U.S. at 401, does not in any way preclude this Court from considering evidence that the universe of options available to parents and schoolchildren under the Ohio Vouchers Program is heavily skewed in favor of religious education. As the district court explained, "determining whether an aid recipient has *neutral options* available under a program is not the same as probing how the recipient has chosen to exercise those options." *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 852 (N.D. Ohio 1999) (emphasis added).

are willing to set their tuition at or below the statutory cap, resulting in an educational pool dramatically skewed in favor of parochial schools. The religious schools' domination of the institutional roster is therefore not mere coincidence.

Even more significant is the enormous financial disincentive that the Program poses for Ohio's own public schools. The Ohio State system of public school funding requires virtually all school districts to rely primarily upon local tax contributions, derived from local property and income taxes, to make up the bulk of their financing for the academic year. *See* Ohio Dept. Taxation, Mike Sobul, *Property Taxation and School Funding* (May 2000), http://www.state.oh.us/tax/Publications/trs001.pdf. Indeed, local sources of funding may amount to more than 90% of the district's entire budget. *See, e.g.*, Ohio Dept. Educ. District Profile for Cuyahoga Heights (1999-2000), http://www.ode.state.oh.us/reportcard01/county_files/rc_cuyahogaco.htm (hereinafter, "District Profile for __"). Predictably, the Ohio school districts' extreme dependence on local property and income taxes inexorably results in wide disparities in funding from district to district: communities with high property valuations and rates of income generate significant revenue for their school districts; communities with low property valuation and low rates of income generate significantly lesser amounts of revenue for education.[5] *Compare, e.g.*, District Profile for Cuyahoga Heights *with* District Profile for Cleveland City. For its part, the State

5. This difference is particularly striking when comparing the school budgets of Cuyahoga Heights, a suburb of Cleveland, and that of Cleveland City. For the 1999-2000 school year, Cuyahoga Heights had available, from local taxes and state and federal sources, a total of $16,235 per pupil in school funding. Of that amount, $14,751, or 90.9 % of the district's total funding, was derived from local taxes. By contrast, Cleveland had available a total of $8,187 per pupil — nearly *half* the amount available in adjacent Cuyahoga Heights — of which only a scant $2,918 per pupil was generated by local taxes. *Compare* District Profile for Cuyahoga Heights *with* District Profile for Cleveland City.

contributes to each district's budget and attempts to rectify the funding inequity by providing a greater amount of state funds to the less affluent school districts. *See* Ohio Rev. Code §§ 3317.012, 3317.0212, 3317.022. However, the State's increased funding of less affluent school districts does not come close to equalizing the funding imbalance.[6]

It is a foregone conclusion, therefore, that no Cleveland suburban public school — or any Ohio public school adjacent to the Cleveland district — will ever participate in the Ohio Vouchers Program, because the amount of funding provided by the Program on a per pupil basis will never equal the amount of funding, on a per pupil basis, generated for local students by local taxes. By statute, the Ohio Vouchers Program provides $2,500 for each voucher student, plus an amount equal to the participating district's per pupil allotment from the State. *See* Ohio Rev. Code §§ 3317.03(I)(1), 3327.06, 3317.08(A)(1). Because the more affluent school districts adjacent to the Cleveland City School District pay for the cost of educating their students primarily with local funding generated from local taxes, funding from the State accounts for a relatively small portion of virtually every school district's budget. Therefore, the amount of state funding per voucher student falls well short of the amount the district normally receives and spends per student.

For example, according to Ohio Department of Education statistics for the 1999-2000 academic year, the Cuyahoga Heights school district generated $14,751 per pupil in local funds, $1,385 per pupil in state funds, and $99 in federal funds. *See* District Profile for Cuyahoga Heights. If the Cuyahoga Heights school district were to accept voucher students, the district would receive a mere $3,885 per voucher student ($2,500

6. Federal funds also contribute to each district's overall budget. However, federal funds only constitute a small percentage of the total financing package.

in tuition from the Program, plus $1,385 from the State).[7] As a result, the State would effectively require the Cuyahoga Heights school district to budget for a deficit of $12,350 per voucher recipient.

The Program, therefore, would force each participating district to dilute its funding pool, resulting in fewer local tax dollars being available on a per pupil basis as more voucher students are added to the district's student population. Indeed, the Program requires participating schools to enroll, at a minimum, ten voucher students per class (grades K-3) or at least 25 voucher students in all classes offered (grades K-8). *See* Ohio Rev. Code § 3313.976(A)(5). Assuming that the Cuyahoga Heights school district accepted the statutory minimum of 25 voucher students, the district would be required to dilute its entire school budget by $308,750. The Ohio Vouchers Program would therefore cause each participating district to suffer an enormous dilution of its school funding pool. Certainly, considering the already critical state of many of the Ohio State schools, no "healthy" school district would accept students under the Program if such action would reduce overall per pupil spending. Accordingly, no adjacent school district has chosen, or will ever choose, to shoulder the additional cost of educating voucher students.

The amount of the tuition grant under the Program is so low that not even the ailing school districts in Cuyahoga County, including Cleveland itself, would, hypothetically, be able to afford to take voucher students without diluting the available funds for students within the district. The irony of this situation is palpably clear. For the 1999-2000 academic year, Cleveland's total school funding per pupil amounted to $8,187. *See* District Profile for Cleveland City. Thus, it would not have been financially prudent for even the deteriorating Cleveland public schools to accept voucher students from an adjacent district for whom it would have received funding amounting to a mere

7. The $99 in federal funds does not follow the voucher student.

$7,120 ($2,500 from the Program, plus $4,620 from the State).[8] Under these circumstances, no adjacent suburban public school is likely ever to participate voluntarily in the Ohio Vouchers Program.[9]

Religious schools, in comparison, do not face such financial disincentives from participating in the Ohio Vouchers Program, since they are often subsidized by the churches with which they are affiliated; have lower overhead costs, with members of the clergy often serving as teachers; and have the extra-economic goal of exposing potential adherents to a specific religious faith. Indeed, by and large, the tuition of religious schools is below $2,500 per pupil. *See* Senel Taylor Brief at 39 ("Average Catholic school tuition is $1,628 annually."); State Brief at 40 ("the [voucher] amount is actually *higher* than the tuition costs of most participating schools") (emphasis in original). Religious schools have every incentive to participate, because they may increase student enrollment and receive *unrestricted* government subsidies, while still preserving the central role of their respective religious faiths in their educational enterprise. *See, e.g.*, Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999); *see generally* Ohio Rev. Code §§ 3313.974, *et seq*. In sum, private religious schools are much more willing and able to set their tuition at or below the $2,500

8. The Petitioners incorrectly assume that the State would contribute a fixed amount of approximately $4,500 in state funds to each school district, in addition to the $2,500 for each voucher student. *See* Senel Taylor Brief at 39 *and* Hanna Perkins Brief at 22. As discussed above, the State determines the amount of state funding based on the school district's funding from local taxes. Thus, in virtually all adjacent public school districts, the resulting state contribution will always be significantly lower than $4,500.

9. It should be noted that, although the Ohio Legislature could have mandated that adjacent public schools participate in the Program, it chose not to do so. *See DeRolph v. State*, 78 Ohio St. 3d 193, 210-11, 213, 677 N.E.2d 733, 745-47 (1997) (the State has ultimate control over Ohio's public schools). This suggests that the nominal inclusion of public schools was, in fact, merely a cosmetic addition to the statute.

cap, and are thus far more likely to participate in the Program than their secular counterparts.

The exceedingly low value of the tuition grants, relative to the tuition of secular schools, results in the over-participation of religious schools and the under- or non-participation of private and public secular schools, thereby constraining the institutional choices of voucher recipients. The Ohio Vouchers Program, therefore, has the inevitable effect, therefore, of promoting religious educational institutions and cannot be considered neutral with respect to religion.[10]

B. Unlike Other Programs Approved By This Court, The Ohio Vouchers Program By Its Structure Limits The Universe of Options Available to Participants.

Choice under the Program is constrained, even prior to the decision-making of individual parents and students, because, by statute, the institutional options of the student participants of the Program are limited to only those schools that participate in the Program. *See* Ohio Rev. Code §§ 3313.974(G), 3313.976(A),(C), 3313.978(A). Unlike the programs reviewed by this Court in *Mitchell*, *Agostini*, *Zobrest*, *Witters*, or *Mueller*, the Program's participants are not permitted to select among a "huge variety," *Witters*, 474 U.S. at 488, or a "broad [ ] spectrum" of options, *Mueller*, 463 U.S. at 397 (citation omitted). Instead, participants must select a school from a small, self-selected

10. It is worth noting that initial participation in the Ohio Vouchers Program is limited to students in grades K-3. *See* Ohio Rev. Code §§ 3313.975, 3313.978. Once a student is enrolled in the Program, however, he or she is entitled to funding through the eighth grade. *See* Ohio Rev. Code § 3313.975. This provision of the Program effectively guarantees that student participants will receive between *six* and *nine* years of religious education at state expense. This Court has noted that such programs involving young children should be scrutinized more carefully, due to the impressionable age of the participants. *See, e.g., Roemer v. Board of Pub. Works of Maryland*, 426 U.S. 736 (1976).

group of overwhelmingly religious options. This Court has never approved of any program so restrictive of choice.

In *Witters* and *Zobrest*, the educational programs at issue provided government aid for use at "the educational institution of [the student's] choice," *Witters*, 474 U.S. at 488, "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* (internal quotation omitted); *see also Zobrest*, 509 U.S. at 10 (same) (internal quotations omitted). Under the *Witters* and *Zobrest* programs, the pool of educational institutions from which each student could choose was not limited by any strictures inherent in the programs or by any government incentive for the participants to undertake a religious education. *See Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 10. In other words, the programs presented recipients with a real choice, since government funding was available to *any* eligible student attending *any* school anywhere.

By contrast, the Ohio Vouchers Program mandates that aid recipients attend a school among the limited number that participate in the Program. *See* Ohio Rev. Code § 3313.978(A). No "huge variety" or "broad [ ] spectrum" of nonreligious alternatives may exist under such circumstances, especially where, as discussed above, the vast majority of the schools, by virtue of the way in which the State has structured the Program, are religious. *See Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 397 (citation omitted). The Program is therefore entirely unlike the commonly cited example of a government employee donating his or her paycheck to a religious organization, wherein the employee has a distinct, independent possessory interest in the government funds and the unrestricted ability to use those funds for any purpose he or she chooses. Here, the vouchers can *only* be used as payment towards tuition and can *only* be redeemed at one of the Program's participating schools. This inherent dual restriction on the voucher's use collapses the degree of attenuation between the individual choice of parents and the direct subsidization of religion by the government.

The Ohio Vouchers Program is also vastly different from the programs recently evaluated by this Court in *Mitchell* and *Agostini*. As discussed above, *supra*, at pp. 12-15, the government aid at issue was reserved exclusively for secular purposes and could not be diverted to religious use. Here, there is no such limitation on the government funds. Indeed, under the Program, use of the voucher grants is completely *unrestricted* and will likely be applied towards religious indoctrination. Moreover, because funding under those programs only supplemented the school's budget and did not alleviate any educational expenses parents would have otherwise paid, they provided no financial incentives for parents to select any particular school for their children. Here, the vouchers absorb up to 90% of the cost of educating a child. Because most of the options available under the Program are religious in nature, the Program has the undeniable effect of encouraging parents, who would not otherwise select a religious education for their children, through financial incentives, to participate in the Program. As consistently noted by this Court, such financial incentives restrict an individual's free choice. *See, e.g., Agostini*, 521 U.S. at 231.

Indeed, the Program's funding scheme further constricts individual choice by creating additional financial incentives for parents to send their children to religious schools. Inasmuch as the Program is targeted towards children of low-income families, because the Program requires a parental contribution of ten percent of the lower of the school's rate of tuition or $2,500, *see* Ohio Rev. Code § 3313.978, many families would specifically send their children to religious educational institutions to avoid paying the relatively higher costs of the few private secular institutions participating in the Program, regardless of the parents' religious beliefs or those they wish to impart to their children. Thus, in order to escape the failing Cleveland public schools, many parents may compromise their own religious beliefs by sending their children to a school of a different faith.

Moreover, the sheer practical limitations in enrollment that each institution must maintain will ensure that most Cleveland schoolchildren participating in the Program will have no choice but to enroll in a private religious school. Of the 56 participating schools in the 1999-2000 roster, 82% were religiously affiliated. Even assuming that each participating school would accept the same number of students, the structure of the Program ensures that an overwhelming percentage of the tuition recipients will be enrolled in religious schools. Considering that religious schools generally can accept more voucher students than secular private schools, that percentage is guaranteed to be considerably higher. *See Simmons-Harris*, 234 F.3d at 959. The sheer enormity of the numbers of voucher students who would have no choice but to attend religious schools leads to the inescapable conclusion that the Ohio Vouchers Program is not neutral with respect to religion and actively fosters the advancement of religion.

The multi-layered restrictions of choice inherent in the Program ensure that governmental funds are inevitably directed towards religious institutions. The Program, therefore, advances religious indoctrination and violates the Establishment Clause.

III.

THE ULTIMATE EFFECT OF THE OHIO VOUCHERS PROGRAM IS TO UNDERMINE THE SEPARATION OF CHURCH AND STATE.

As this Court has consistently recognized, there are no "bright line" tests in Establishment Clause jurisprudence. *See Nyquist*, 413 U.S. at 761 n.5. "Neutrality" and "choice," therefore, are not dispositive of the question presented. *See Mitchell*, 530 U.S. at 844 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 253. Instead, those two factors are mere indicia of the crux of every Establishment Clause analysis: whether the challenged state action has the primary effect of advancing the aims of religious institutions. *See, e.g., Agostini*, 521 U.S. at 223; *Mueller*, 463 U.S. at 396. Here, it is undeniable

that the ultimate effect of the Program impinges on the foundation of the Establishment Clause — the separation of church and state.

As discussed above, the Ohio Vouchers Program invariably results in the provision of substantial, unrestricted government funds to the coffers of private religious schools. *Cf. Zobrest*, 509 U.S. at 10 ("[N]o funds traceable to the government ever find their way into sectarian schools' coffers."). Because the educational mission of those schools is inextricably intertwined with their religious mission, a substantial portion of the government funds expended under the Program will be used to pay for a full-range of religious activities, including religious instruction, training and prayer, and the construction and maintenance of facilities used for worship. As a result, the Ohio Vouchers Program effectively achieves exactly the sort of state involvement with religious institutions that the Framers meant to foreclose, namely, the "use [of] essentially religious means to serve governmental ends, where secular means would suffice." *Walz* , 397 U.S. at 680 (1970) (Brennan, J., concurring).

Furthermore, the Ohio Vouchers Program necessarily results in the ongoing entanglement between church and state, since the Program calls for continuing surveillance of religious institutions by the government. While a religious school would typically be entitled to consider an applicant's religious affiliation in making an admissions decision, under the Program, participating religious schools are barred from making such determinations on the basis of religion. *See* Ohio Rev. Code § 3313.976(A)(4). Such implicit government policing of the operations and composition of religious schools promotes entanglement between church and state, and threatens the independence of those religious institutions by financially enticing them to participate in the Program. *See Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 53 (1947) (5-4 decision) (Rutledge, J., dissenting) ("The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting.").

As Chief Justice Burger wrote: "Obviously a direct money subsidy [is] a relationship pregnant with involvement and, as with most governmental grant programs, c[an] encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . ." *Walz*, 397 U.S. at 675.

The Establishment Clause was intended to safeguard religious liberty by ensuring that government would not involve itself in the affairs of religious institutions, and this principle finds no clearer statement than in the words of James Madison in his *Memorial and Remonstrance*:

> We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. . . . Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body.

If the Ohio Vouchers Program, with its direct financial support of religious schools and its involvement of the government in the operation of the participating religious schools, survives Establishment Clause scrutiny, the separation between church and state that is among the founding principles of this country will be all but destroyed.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Sixth Circuit in favor of the Respondents.

December 14, 2001

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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL., PETITIONERS,
v.
DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

HANNA PERKINS SCHOOL, ET AL., PETITIONERS,
v.
DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

SENEL TAYLOR, ET AL., PETITIONERS,
v.
DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amici* 1

Summary of Argument 3

ARGUMENT —

Introduction 3

I **The Voucher Program Involved In This Action Was Neither Designed, Nor Can It Operate, To Fulfill The Promise Of *Brown* For African-American Pupils In The Cleveland Public Schools, The Same Class Of Students Found By The Federal Courts To Have Suffered From Long-Maintained *De Jure* Segregation In The Cleveland Public Schools** 6

II **Private School Tuition Voucher Programs Such As The One Involved In This Case Contain The Seeds Of Educational Resegregation And Lack Safeguards To Prevent This Result** 13

Conclusion 18

TABLE OF AUTHORITIES

Page

Cases:

Board of Education of Oklahoma City Public Schools v. Dowell,
498 U.S. 237 (1991) 15

Brown v. Board of Education,
347 U.S. 483 (1954) ..... *passim*

Brown v. South Carolina State Board of Education,
296 F. Supp. 199 (D.S.C.), *aff'd per curiam*,
393 U.S. 222 (1968) 14n

Cappachione v. Charlotte-Mecklenburg Schools,
57 F. Supp. 2d 228 (W.D.N.C. 1999),
aff'd in part and rev'd in part en banc sub nom. Belk v. Charlotte-Mecklenburg Board of Education, 2001 U.S. App. LEXIS 10712
(4th Cir. 1001) 16

Coffey v. State Educational Finance Commission,
296 F. Supp. 1389 (S.D. Miss. 1969) 14n

Columbus Board of Education v. Penick,
443 U.S. 449 (1979) 15

Cooper v. Aaron,
358 U.S. 1 (1958) 15

Dayton Board of Education v. Brinkman,
443 U.S. 526 (1979) 15

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

DeRolph v. State,
93 Ohio St. 3d 309, 754 N.E.2d 1184 (2001) 2

DeRolph v. State,
89 Ohio St. 3d 1, 728 N.E.2d 993 (1999) 2

DeRolph v. State,
78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) 2

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197 F.3d 123 (4th Cir. 1999), *cert. denied*,
146 L. Ed. 2d 312 (2000) 16

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503 U.S. 467 (1992) 4, 5, 9, 15-16

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391 U.S. 430 (1968) 15

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296 F. Supp. 1178 (E.D. Va. 1969) ... 14n, 16n-17n

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267 F. Supp. 458 (M.D. Ala. 1967) 14n

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418 U.S. 717 (1974) 15

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515 U.S. 70 (1995) 12n, 15, 16

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Page

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411 U.S. 1 (1973) 12n, 16

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Page

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402 U.S. 1 (1971) 4, 15

Tuttle v. Arlington County School Board,
195 F.3d 123 (4th Cir. 1999) 16

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160 F.3d 790 (1st Cir. 1998) 16

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Ohio Rev. Code § 3313.977 10

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Page

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INTEREST OF *AMICI*[*]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades, LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination, including in the seminal case of *Brown v. Board of Education*, 347 U.S. 483 (1954).

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has appeared before courts throughout the nation in numerous civil rights cases.

Throughout their existence, LDF and the NAACP have worked to redeem the guarantee of equal protection of the laws. In no area have they placed higher priority than on education — especially in public schools, where the overwhelming majority of African-American students have been and will continue to be enrolled. In the struggle for an equal and quality education

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[*]All parties have consented to the filing of briefs *amici curiae* in support of any party's position. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

for these pupils, the impact of racial segregation and concentrated poverty have been daunting impediments. No individuals or institutions have brought these issues to this Court more often than LDF and the NAACP, with the hope that this Court would remove the barriers that impede the process of undoing the effects of centuries of discrimination that have systematically and systemically limited educational opportunity for African-American children.

The enrollment in the Cleveland public school system today is nearly three-quarters African-American. For generations, the Cleveland district practiced intentional racial discrimination and segregation that limited educational opportunities for African-American children. Today, the system suffers from financial shortfalls associated with deficiencies in Ohio's school funding mechanism, *see DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997); *id.*, 89 Ohio St. 3d 1, 728 N.E.2d 993 (1999); *id.*, 93 Ohio St. 3d 309, 754 N.E.2d 1184 (2001). As Petitioners' briefs in these cases indicate, the school system continues to struggle to provide minimally adequate educational opportunities to its students, let alone high-quality results.

Against this background, LDF and the NAACP believe, Ohio's decision to address Cleveland's desperate needs by enacting a program that pays a limited amount toward private sectarian schools' tuition charges for a limited number of Cleveland students raises grave dangers of dissipating resources that are essential to the preservation and ultimate improvement of public education in Cleveland and of fostering the resegregation of schooling in Cleveland (developments completely inconsistent with the purposes of the *Brown* decisions). Because Petitioners have urged the Court to uphold Ohio's private school voucher program on the theory that such action will bring to fruition the goals of *Brown v. Board of Education*, an assertion we find so unlikely as to be nearly

frivolous, LDF and the NAACP file this brief in support of the right of *every* child within the Cleveland Public School System to a quality education.

SUMMARY OF ARGUMENT

The voucher program at issue before this Court should not be upheld against a First Amendment challenge on the ground that the improvement it will bring to the education of African-American students now attending Cleveland's public schools outweighs Establishment Clause concerns. Structural and funding limitations make hollow any hope or expectation that the vouchers awarded by lottery to a small number of Cleveland students under this program will fulfill *Brown*'s promise of "equal educational opportunity" for all.

Moreover, the program — especially if it is expanded or modified to loosen constraints on choice — creates serious dangers of increased school segregation of publicly funded education in the Cleveland area, particularly distressing in light of the long-maintained *de jure* racially segregated system previously operated by the Cleveland public schools.

ARGUMENT

Introduction

The precise issues presented in these cases involve the permissibility of unrestricted state tuition assistance to pervasively sectarian institutions offering elementary and secondary education. LDF and the NAACP believe that the compelling doctrinal considerations warranting affirmance of the ruling below on those issues will be fully and adequately presented to the Court by Respondents and other *amici* filing in support of Respondents.

We therefore limit our observations to one aspect of the grounds asserted by Petitioners to support their requests that the

judgment below be reversed. Specifically, Senel Taylor *et al.*, Petitioners in No. 00-1779, seek to persuade this Court that reversal would not only be consistent with a correct understanding and interpretation of the Religion Clauses of the First Amendment — but that, in addition, it would bring to fruition, at long last, the "sacred promise of equal educational opportunities for all American schoolchildren" that the Court made to the American people in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Br. for Taylor Petitioners, No. 00-1779 [hereinafter, "Pet. Br."] at 4-5.

If this assertion were even faintly well-founded, it would be a powerful practical encouragement to a decision in favor of Petitioners. The *Brown* ruling is regarded by nearly all commentators and observers of the American judicial system as the most important decision of this Court in the twentieth century. The Court and its members have expressed both continued support for its core holding and an appreciation of the difficulties that have attended its effectuation. *E.g.*, *Freeman v. Pitts*, 503 U.S. 467, 505 (1992) (Scalia, J., concurring) ("[W]e must continue to prohibit, without qualification, all racial discrimination in the operation of public schools, and to afford remedies that eliminate not only the discrimination but its identified consequences."); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 13-14 (1971) (referring to history of "[d]eliberate resistance of some to the Court's mandates" and "the dilatory tactics of many school authorities").

The Court has further recognized the fact that the effects of long-maintained racially dual school systems in this nation have not been fully extirpated, *e.g.*, *Freeman v. Pitts*, 503 U.S. at 495 ("In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And

stubborn facts of history linger and persist."), even in situations in which practical remedies to excise them fully no longer exist, *see id.*, 503 U.S. at 491-92 ("[W]ith the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision.").

Thus, were there reason to believe that modifying well-established First Amendment principles would have the ancillary effect of bringing about substantial and lasting improvement in the educational opportunities of African-American pupils in this country, that would inevitably constitute a subtle — but hardly insubstantial — consideration for members of this Court, which must decide whether there is adequate justification for altering its interpretation of the Religion Clauses.[1] But the premise and conclusion are wrong.

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[1]Taylor Petitioners are careful to eschew a direct appeal to this Court on such grounds: "Petitioners do not ask this Court to endorse parental choice as a matter of public policy, nor would it be proper for the Court to do so." (Pet. Br. at 6). But they follow that statement immediately with the suggestion that if the Court determines that the First Amendment, properly construed, requires reversal, "the Court will affirm good-faith efforts directed toward the *constitutional imperative* of extending educational opportunities to children who need them desperately." (*Id.* at 7 (emphasis added)). This is patent rhetoric and exhortation, not just a demonstration of "context" (see *id.* at 25), and it requires a response.

I

The Voucher Program Involved In This Action Was Neither Designed, Nor Can It Operate, To Fulfill The Promise Of *Brown* For African-American Pupils In The Cleveland Public Schools, The Same Class Of Students Found By The Federal Courts To Have Suffered From Long-Maintained *De Jure* Segregation In The Cleveland Public Schools

Taylor Petitioners characterize this matter as closely reflective of the themes and issues raised in *Brown v. Board of Education*, 347 U.S. 483 (1954) (Br. at 49), analogizing the situation of African-American children in this country prior to *Brown* — subject to the most pernicious forms of official racial discrimination — with the limitations that are imposed by the Constitution on public support for students to attend private schools.[2] The analogy is not merely manipulative[3] and

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[2]"[In *Brown*], children were forced to travel past good neighborhood schools to attend inferior schools because the *children happened to be black*; today, many poor children are forced to travel past good schools to attend inferior schools because the *schools happen to be private*." (Pet. Br. at 49) (emphasis added).

[3]For example, Taylor Petitioners mislead the Court when they represent that a greater proportion of voucher recipients are African-American students than are Cleveland public school students taken as a whole (Pet. Br. at 27, citing J.A. 215a-216a). The figures given on those pages come from a 1999 study of the Cleveland voucher program, *see* J.A. 216a n.9, but the percentages reported in that study are based on *surveys* of a *sample* of 505 parents of voucher recipients and 327 parents of public school students, not upon an enumeration of all Cleveland public school and voucher program pupils. Joint Appendix, Vol. IV, at 965, 977,

shallow; it is insulting to the thousands of courageous African-

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Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000). In fact, Taylor Petitioners themselves submitted an affidavit in support of their motion for summary judgment in the trial court reporting that "[s]lightly over 70% of the students in the Cleveland City School District are African-American" (Joint Appendix, Vol. II, at 468 ¶ 11, *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000)), and this figure is supported by a separate study which found that 53 per cent of the students in the voucher program were black, compared to 71 per cent of students in the public schools. Piet van Lier & Caitlin Scott, *Fewer choices, longer commutes for black voucher students*, CATALYST FOR CLEVELAND SCHOOLS, Oct/Nov 2001, <http://www.catalyst-cleveland.org/10-01/1001extra4.htm> (visited Nov. 27, 2001).

It is also a distortion of the record in this case to suggest that most of the students participating in the Cleveland voucher program are attending "good" schools closer to their residences than "inferior" public schools to which they would otherwise be assigned. Piet van Lier & Caitlin Scott, *Fewer choices, longer commutes for black voucher students*, CATALYST FOR CLEVELAND SCHOOLS, Oct/Nov 2001, <http://www.catalyst-cleveland.org/10-01/1001extra4.htm> (visited Nov. 27, 2001) ("The Cleveland school district is required to provide or pay for transportation of all voucher students who live more than a mile from the school they attend. About 75 percent of students using vouchers are eligible for district transportation service because they live a mile or more from the school they attend, estimates Mark Cegelski, planning manager for the district's transportation department. . . . [S]ome voucher students are bused across the district on special runs that take as long as an hour-and-a-half and include as many as three voucher schools, says Cegelski. In contrast, the district's return to neighborhood schools in 1998 after the desegregation order was lifted, has meant shorter bus rides for most public school students, transportation department officials says [*sic*].").

American parents and students who made this Court's *Brown* decision become a reality, in the face of determined official and public resistance. Moreover, the Taylor Petitioners' suggestion that the impediment to public funding of pre-collegiate private educational institutions that is created by the Establishment Clause is the major barrier today to providing equal educational opportunities for African-American and other children of color in this country, is entirely unconvincing.

For many years, African-American students in the Cleveland public schools were the victims of intentionally discriminatory policies that isolated them in racially segregated school facilities and limited their access to high-quality educational opportunities. *Reed v. Rhodes*, 422 F. Supp. 708, 793 (N.D. Ohio 1976), *remanded per curiam*, 559 F.2d 1220 (6th Cir. 1978), *supplemental opinion on remand*, 455 F. Supp. 569 (N.D. Ohio 1978), *aff'd in relevant part and remanded on other grounds*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 455 U.S. 935 (1980). *See id.*, 422 F. Supp. at 793 (state requirements for minimum number of hours devoted to instruction per day waived in predominantly black schools); *Reed v. Rhodes*, 662 F.2d 1219, 1226 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) (same); *Reed v. Rhodes*, 455 F. Supp. 546, 565 (N.D. Ohio 1978) (inferior facilities and educational offerings at predominantly black high school), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Reed v. Rhodes*, 455 F. Supp. 569, 598-99 (N.D. Ohio 1978) (lower reading scores of black students are "mainly a result of differing racial treatment" by school system), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982). Today, these students and their successors constitute more than 70% of all pupils in the Cleveland public school

district,[4] but the "stubborn facts of history linger and persist," *Freeman*, 503 U.S. at 492. Taylor Petitioners themselves document the severe educational and operational problems that beset the Cleveland public schools. *See* Pet. Br. at 25-26.

In these circumstances, the fact that some African-American parents in Cleveland have taken advantage of the proffered opportunity for their children to attend non-public schools that are not similarly stigmatized as ineffectual or burdened is hardly surprising. But the issue before the Court is not dependent on an assessment of the degree of benefit the program offers the limited number of individual African-American and other Cleveland students who have been able to take advantage of the chance to attend non-public schools. Rather, the issues in this case must be judged in the context of a system erected by the Ohio Legislature that at once promises to breach a line of separation between sectarian schools and the public fisc that has long been a part of our nation's basic constitutional fabric — and also is inescapably inadequate to deliver on *Brown*'s promise of public education free of racial discrimination, and of "equal educational opportunity" for minority children, *see* 347 U.S. at 493 ("Where the state has undertaken to provide [an opportunity for public education], it is a right which must be available to all on equal terms.").

On that score, the numbers are telling. No matter how great the level of interest, only a small fraction of the African-American and other minority students, whose only real option

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[4]Joint Appendix, Vol. II, at 468 ¶ 11, *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000) (Oct. 26, 1999 affidavit of Howard Fuller submitted by Taylor Petitioners to district court in support of their motion for summary judgment). The lower figure cited in Pet. Br. at 27 (45.9 per cent) is based upon a *sample* of 327 parents of students in Cleveland public schools in 1998, not a count of all public school pupils. See *supra* note 3.

is to attend the public schools of Cleveland, can be selected to receive scholarships to attend non-public facilities under the Legislature's program. This is so despite the fact that the purpose of the program, according to Taylor Petitioners, is to help solve the massive educational problems in that city.[5]

Under the voucher plan involved in this case, students whom a local superintendent concludes are eligible because they come from a low-income family are given a *third* priority in admission to private schools, after "[s]tudents who were enrolled in the school during the preceding year" and siblings of such students. The third priority preference operates only until students from low-income families constitute 20 per cent of the total number of students in a particular grade — as determined by enrollment figures for that grade in the previous year. Once that proportion is reached, "[a]ll other applicants residing anywhere," including, presumably, children from higher-income families (as well as those from low-income families who were not admitted under the third priority category) are eligible to be selected by lottery to receive a voucher. OHIO REV. CODE § 3313.977.

The results of this structure are not surprising. One report found that nearly 33 per cent of the students participating in the Cleveland voucher program had previously attended private schools, while only 21 per cent had gone to public

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[5]*See* BRIAN P. GILL, MICHAEL TIMPANE, KAREN E. ROSS, AND DOMINIC J. BREWER, RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS xviii, 52, 213-14 (Rand Corp. 2001), available at http://www.rand.org/publications/MR/MR1118 (visited Dec. 9, 2001) (hereinafter cited as "RHETORIC VERSUS REALITY") (Cleveland's voucher program is an "escape valve" program, "i.e., targeted to a smaller number of at-risk children." "Such programs will not be the silver bullet that will rescue urban education.").

schools in Cleveland before receiving vouchers. The remaining 46 per cent of participants came from outside the Cleveland district or enrolled as kindergartners — and of these latter pupils, "at least 216, or 6 percent of the total receiving vouchers, were previously enrolled in preschool at private schools that are now participating in the voucher program . . . suggest[ing] that at least 39 per cent of the students receiving aid came from a private school background." Zach Schiller, Policy Matters Ohio, *Cleveland School Vouchers: Where the Students Come From* (2001), at 2-3 (available at http://www.policymattersohio.org) (visited Dec. 4, 2001).

Such limited efficacy is not atypical. We are not aware of any voucher program that provides sufficient resources to make it possible financially for all, or even most, pupils attending public schools in large, urban systems who are from families of limited means to attend any private institution of their choice.

> No one in the voucher debate suggests that vouchers would provide unlimited choices. For example, no one suggests that vouchers would cover the full cost of any tuition set by the private school. Instead, vouchers would provide limited empowerment that would free individuals who already enjoy advantage to maximize that advantage. Both logic and historical experience suggest that vouchers will exacerbate existing inequity.

Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 404 (1997) (footnotes omitted). *Accord*, RHETORIC VERSUS REALITY, *supra* note 5, at 145 ("Vouchers that fall short of tuition costs will have much lower take-up rates among low-income families than will more generous vouchers").

In short, the Legislature's voucher program may coincidentally offer some increased educational opportunities

for the fortunate few students selected by lot to participate in it, but it also represents a deliberate decision not to focus the State's resources on the larger group of children whose educational circumstances are so severely limited.

The Court should, then, understand the "context" of this matter with precision. The program at issue is *not* one which offers any promise, or even hope, of achieving "equal educational opportunities" for the scores of thousands of African-American and other minority students in the Cleveland public schools. Instead, it is a device to open the doors for public support of pervasively sectarian pre-collegiate educational institutions while ignoring the desperate educational plight of the mass of African-American and other minority students for whose benefit *Brown v. Board of Education* was brought and litigated.[6]

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[6]It is particularly ironic for Taylor Petitioners to advance considerations of unequal educational outputs by poor and minority students and a heavily poor and minority school system in support of reversing the judgment below. Similar arguments have been consistently rejected by this Court over the past generation and a half when they were advanced, not by private schools or their students, but by poor and minority parents and students themselves, whether in the school finance context, *see San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), or in the school desegregation context, *see, e.g., Missouri v. Jenkins*, 515 U.S. 70 (1995).

II

Private School Tuition Voucher Programs Such As The One Involved In This Case Contain The Seeds Of Educational Resegregation And Lack Safeguards To Prevent This Result

While the Cleveland voucher program is too limited to offer any realistic promise of affording equal educational opportunities to all of the city's African-American schoolchildren, nothing in Petitioners' reading of the Religion Clauses would require Ohio to achieve the goal they ascribe to the program in order to preserve its constitutionality. At the same time, the voucher program may — especially if its targeting provisions are relaxed by the state in the future — provide a vehicle for resegregating schooling in the Cleveland area along racial lines; and nothing in Petitioners' reading of the Religion Clauses would prevent Ohio from modifying the program in this direction. Thus, not only does the program fail to deliver on *Brown*'s promise of equal educational quality, but it raises the spectre of restoring the very evil against which *Brown* was directed: state-sponsored racial separation.

Cleveland's voucher program, limited as it may be at the present time, already has facilitated white student attendance at non-public schools in Cleveland in proportions that exceed their representation in the public system. See *supra* note 3 (white participation rate in voucher programs greater than white share of Cleveland public schools' enrollment). None of the predominantly white suburban school systems surrounding the city participate in the program. And the limits on tuition payment that the courts below found had the primary effect of directing state support overwhelmingly toward sectarian institutions also serve to suppress minority

enrollment, given the powerful association between race and poverty attributable to this country's long history of official racial discrimination. *See* Brief for the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Respondents, *Adarand Constructors, Inc. v. Mineta*, 2000 U.S. LEXIS 10814 (U.S. November 27, 2001) (No. 00-730).

These operational characteristics of the voucher plan will only be accentuated and increased if the program is expanded,[7] especially if the limited income guidelines and priorities that now exist, see *supra* at 10, are relaxed in the future,[8] allowing the voucher program to become as effective a resegregation tool as tuition grants could have been in the 1950's and 1960's but for the rulings of this Court and lower federal courts.[9]

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[7]*See* RHETORIC VERSUS REALITY, *supra* note 5, at xix ("[L]arge-scale choice programs (whether voucher or charter) are more likely to undermine school-level integration than are escape-valve vouchers that put low-income children in existing private schools.").

[8]*See id.* at 174 ("In sum, these findings about parental preferences suggest that unconstrained choice in a voucher or charter program could lead to higher levels of stratification").

[9]*See* Molly Townes O'Brien, 64 TENN. L. Rev. at 386 & n.179 (citing *Coffey v. State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Griffin v. State Board of Education*, 296 F. Supp. 1178 (E.D. Va. 1969); *Brown v. South Carolina State Board of Education*, 296 F. Supp. 199 (D.S.C.), *aff'd per curiam*, 393 U.S. 222 (1968); *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968); *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967)).

Parents of poor and minority schoolchildren have no illusion that school reform and educational quality are, in the first instance, matters lending themselves to judicial resolution. But the judiciary (including specifically this Court) has played a critical role in addressing practices that perpetuate the effects of the racially discriminatory policies of the past, including their impact upon educational quality, *cf. Freeman v. Pitts*, 503 U.S. at 492 (quality of education offered minority students is appropriate factor to be considered in determining whether past vestiges of discrimination had been eliminated to the extent practicable); *Missouri v. Jenkins*, 515 U.S. at 101 ("The basic task of the District Court is to decide whether the reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable"). This case presents another occasion on which the Court must provide such leadership.

LDF or the NAACP represented the plaintiff schoolchildren in the five cases that constituted *Brown v. Board of Education* and many of the major cases aimed at implementing *Brown*'s promise, from *Cooper v. Aaron*, 358 U.S. 1 (1958) through this Court's most recent desegregation decision, *Missouri v. Jenkins*, 515 U.S. 70 (1995). While we have won significant victories (including in *Brown*, *Cooper*, *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), and *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979)), we and others seeking to integrate public schools within the United States have also faced formidable obstacles. For example, this Court has limited the circumstances, means, and duration of desegregation remedies. *E.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974); *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503

U.S. 467 (1992); *Missouri v. Jenkins*, 515 U.S. 70 (1995). And in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), this Court foreclosed federal constitutional challenges to property tax-based school funding systems that produce severe resource inequality between wealthier and poorer districts.

Currently, opponents of school desegregation do not stop at advocating further limitations on the role of the judiciary; they argue that *any* consideration of race, even in the context of facilitating *voluntary* desegregation, is unconstitutional, *see, e.g.*, *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Tuttle v. Arlington County School Board*, 195 F.3d 123 (4th Cir. 1999); *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 146 L. Ed. 2d 312 (2000), and even in the case of a school system that was long operated on a *de jure* segregated basis. *See Cappachione v. Charlotte-Mecklenburg Schools*, 57 F. Supp. 2d 228 (W.D.N.C. 1999), *aff'd in part and rev'd in part en banc sub nom. Belk v. Charlotte-Mecklenburg Board of Education*, 2001 U.S. App. LEXIS 10712 (4th Cir. 2001).

Ironically, in the present cases, the Petitioners *invoke* race, by referring to the "sacred promise" of *Brown*, to support the constitutionality of a voucher program that, as discussed above, offers not integration, but further racial separation in publicly funded education.[10]

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[10] *Cf. Griffin v. State Board of Education*, 296 F. Supp. at 1181 (emphasis in original):

> To repeat, our translation of the imprimatur placed upon *Poindexter* by the final authority is that *any* assist *whatever* by the State towards provision of a racially segregated education, exceeds the pale of tolerance demarked by the Constitution. In our judgment, it follows,

This Court should act to prevent the establishment of separate private, predominantly white educational systems and public, predominantly minority educational systems by rejecting the Taylor Petitioners' invocation of *Brown*.

> that neither [illegible]ve nor purpose is an indispensable element of the breach. The *effect* of the State's contribution is a sufficient determinant, with effect ascertained entirely objectively.

Conclusion

For the reasons given above, as well as those urged by Respondents, the judgment below should be affirmed

Respectfully submitted,

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In the

Supreme Court of the United States

SUSAN TAVE ZELMAN, et al.,
Petitioners,
v.
DORIS SIMMONS-HARRIS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF IRA J. PAUL AND ROBERT N. WRIGHT, FLORIDA PUBLIC SCHOOL TEACHERS; INDEPENDENT VOICES FOR BETTER EDUCATION; TEACHERS FOR BETTER EDUCATION; THE JAMES MADISON INSTITUTE; PACIFIC RESEARCH INSTITUTE; AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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32 pp

QUESTION PRESENTED

Does the Establishment Clause of the First Amendment prohibit Ohio's Pilot Scholarship and Tutorial Program, its school choice program, from authorizing parents to use tax-funded scholarships at any private school, whether religious or not?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 8

ARGUMENT 11

I. THIS COURT SHOULD OVERTURN *LEMON v. KURTZMAN* 11

A. The Application of the *Lemon* Test Has Led to Inconsistent and Confusing Results in Aid to Education Cases 11

B. This Court's Failure to Overrule *Lemon* Has Resulted in a Two-Tiered System of Establishment Clause Jurisprudence 16

C. The Decaying *Lemon* Precedent Has Created Confusion Among the Lower Courts as to Which Line of Cases to Apply 20

II. PRINCIPLES OF NEUTRALITY AND PRIVATE DECISION MAKING ESTABLISH THE CONSTITUTIONALITY OF SCHOOL CHOICE PROGRAMS 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Agostini v. Felton, 521 U.S. 203 (1997) ..... *passim*

Aguilar v. Felton, 473 U.S. 402 (1985) 18

Bagley v. Raymond School Department, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999) 21

Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968) 12-13

Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994) 9, 17, 23

Campbell v. Manchester Board of School Directors, 641 A.2d 352 (Vt. 1994) 21

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 7, 12-13, 22

Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980) 12

Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947) 10, 12, 23

Helms v. Picard, 151 F.3d 347 (5th Cir. 1998) 19

Holmes v. Bush (Circuit Court of the Second Judicial Circuit for Leon County, Florida, Case Nos. CV 99-3370, CV 99-4110) 1, 15

Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998) 21

Kotterman v. Killian, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999) 21

TABLE OF AUTHORITIES—Continued

Page

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... *passim*

Meek v. Pittenger, 421 U.S. 349 (1975) 19

Mitchell v. Helms, 530 U.S. 793 (2000) ..... *passim*

Mueller v. Allen, 463 U.S. 388 (1983) 9, 22, 25

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 3, 23

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 6, 21

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) 5-8, 20, 24

Strout v. Albanese, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999) 21

Widmar v. Vincent, 454 U.S. 263 (1981) 25

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) ..... *passim*

Wolman v. Walter, 433 U.S. 229 (1977) 19

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) ..... *passim*

United States Constitution

Amend 1 6

Statutes

Ohio Revised Code 3313.975(A) 5

3313.976(A)(1)(3) 5

3313.976(C) 5

3313.978(A) 5

TABLE OF AUTHORITIES—Continued

Page

3313.979 5

Rules

Supreme Court Rule 37 1

Rule 37.6 1

Miscellaneous

Bodemer, Jo Ann, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test*, 70 St. John's L. Rev. 273 (1996) 3, 11, 15

Fridy, Matthew D., *What Wall? Government Neutrality and the Cleveland Voucher Program*, 31 Cumb. L. Rev. 709 (2000/2001) 3, 15

Shokraii Rees, Nina, *School Choice 2000* (The Heritage Foundation 2000) 3

National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* (2001) 26

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Ira J. Paul and Robert N. Wright, Florida public school teachers; Independent Voices for Better Education; Teachers for Better Education; The James Madison Institute; Pacific Research Institute; and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of Petitioners, Susan Tave Zelman, *et al.*[1] Consent to the filing of this brief has been granted by counsel for all parties. Copies of the general letters of consent have been lodged with the Clerk of the Court.

Amici Ira J. Paul and Robert N. Wright are teachers in the Florida public schools and members of Amicus Independent Voices for Better Education, a nonprofit, tax-exempt Florida corporation. Amicus Independent Voices for Better Education together with Teachers for Better Education, its affiliate, have more than 1,000 members and supporters consisting of parents and teachers. These groups were formed to improve the quality of education in Florida's public schools. The education reforms they advocate include: limited class size, funding classrooms before administrative functions, the elimination of teacher tenure, meaningful teacher competency testing, and vouchers for low-income families.

Amici Ira J. Paul, Robert N. Wright, Independent Voices for Better Education, and Teachers for Better Education, are also amici curiae in *Holmes v. Bush* (Circuit Court of the Second Judicial Circuit for Leon County, Florida, Case Nos. CV 99-3370, CV 99-4110). *Holmes v. Bush* involves a challenge to Florida's opportunity scholarship program—a school choice plan substantially similar to the Ohio Scholarship Program at issue in this case—as violating the federal

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Establishment Clause and state law. The Florida A-Plus program has motivated failing schools to improve their academic performance. Under this program, each public school is assigned a grade, "A" through "F", based on the proportion of its students passing the Florida Comprehensive Assessment Test. Students attending schools that receive two "F" grades in four years are eligible to receive vouchers that enable them to attend private schools or to transfer to another public school. Currently, more than 50 students in Pensacola are attending private schools through this program, and more than 70 Pensacola students are using the program to attend higher-performing public schools. Significantly, since the implementation of the Florida A-Plus choice and accountability program two years ago, the number of failing public schools in Florida has dropped from 78 to only 4. Nina Shokraii Rees, *School Choice 2000* at v-vii (The Heritage Foundation 2000). Clearly, the prospect of having vouchers offered to their students has had a positive impact on improving Florida's public schools. As amici, Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Robert N. Wright support the school choice program before the Florida court.

Amicus The James Madison Institute is a Florida based nonprofit, nonpartisan, research and education organization. It has published many papers and articles on school choice, charter schools, education vouchers, and other school reform issues and has served as an information resource for education practitioners in these substantive areas. It is dedicated to advancing economic freedom, limited government, federalism, traditional values, the rule of law, and individual liberty coupled with responsibility.

Amicus Pacific Research Institute for Public Policy (Institute) promotes the principles of individual freedom and personal responsibility. The Institute believes that these principles are best encouraged through policies that emphasize

a free economy, private initiative, and limited government. By focusing on public policy issues such as education, the Institute strives to foster a better understanding of the principles of a free society among leaders in government, academia, the media, and the business community. Towards this end, the Institute works to provide all parents the basic right to choose the best educational opportunities for their children. Through research and grassroots outreach, the Institute advances parental choice in education, high academic standards, charter schools, teacher quality, and school finance reform.

Amicus Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation affecting the public interest. PLF is submitting this brief because it believes its public policy perspective and litigation experience in the area of the First Amendment to the United States Constitution will be of assistance to this Court in its deliberations. PLF has participated in numerous cases before this Court including *Mitchell v. Helms*, 530 U.S. 793 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). PLF participated in this case as amicus curiae in the court below and, along with amici Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Robert N. Wright, filed a brief amicus curiae in support of the petition for writ of certiorari.

Amici are interested primarily in improving the quality of educational opportunities offered to children from low-income families. They believe that the solution to the crisis in education must include school choice programs. Among the many proposals offered to improve the quality of education, school voucher programs are emerging as the preferred option. *See* Jo Ann Bodemer, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test*, 70 St. John's L. Rev. 273, 285-86 (1996); Matthew D. Fridy, *What*

Wall? Government Neutrality and the Cleveland Voucher Program, 31 Cumb. L. Rev. 709, 710-13 (2000/2001). School voucher programs allow families with school-age children to have a voucher worth a particular amount of public tax money for the purpose of sending their children to the family's school of choice, regardless of whether it is a public school, a nonsectarian private school, or a religious school. As the Florida A-Plus program demonstrates such programs can motivate failing public schools to improve their academic performance. Unfortunately, these innovative and promising proposals have encountered a wall of resistence created by a tortured and inconsistent Establishment Clause jurisprudence. Until this wall is breached, widespread implementation of these desperately needed education reforms will be impossible. Educators understand that adopting such programs will only embroil them in costly and divisive litigation. This Court should open the doorway which will allow broad implementation of school choice proposals by overruling *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and confirming that *Agostini v. Felton*, 521 U.S. 203, and *Mitchell v. Helms*, 530 U.S. 793, embody the Establishment Clause analysis applicable to school choice programs.

STATEMENT OF THE CASE

Factual Background. In the summer of 1995, the Cleveland City School District was one of the most troubled urban school districts in the nation. A public school student's prospect of getting a decent education was dismal. Susan Tave Zelman, et al., Petition for a Writ of Certiorari (Zelman Petition) at 2. In March, 1996, the State Auditor noted that only "9% of the district's high school students had passed all four sections of Ohio's ninth grade proficiency test." *Id.* (citing Cleveland City School District Performance Audit, March 15, 1996). Most of the district's families with school-age children were economically disadvantaged. *Id.* at 3.

Responding to the education crisis, Ohio's General Assembly adopted the Pilot Project Scholarship Program (Scholarship Program or Program) to address the educational crisis within the Cleveland City School District. *Id.* The Scholarship Program first went into effect in the Fall of 1996. It established a pilot project for *any* school district in the state that has been the subject of a federal court order " 'requiring supervision and operational management of the district by the state superintendent.' " *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000) (citation omitted). Cleveland is the only school district presently in this category.

The Scholarship Program provides scholarships to children residing in the Cleveland school district and enrolled in kindergarten through eighth grade. Ohio Revised Code (R.C.) 3313.975(A). In admitting students to the program, preference is given to students from low-income families, which the program defines as families whose income is below 200% of the poverty line. R.C. 3313.978(A).

The Scholarship Program permits the participation of all private schools, whether religious or nonreligious, if they are located within the boundaries of the Cleveland school district and meet the state's secular standards for providing an adequate education for all children in the state. R.C. 3313.976(A)(1)(3). Each scholarship awarded is payable to the parents of the student entitled to the scholarship, to be used at whichever participating school has been selected by the student's parents. R.C. 3313.979. The Program also permits public school districts adjacent to the pilot project district to participate in the Program and "receive scholarship payments on behalf of parents." R.C. 3313.976(C).

Proceedings Below. In 1996, soon after the Scholarship Program was enacted, it was challenged as violating the Establishment Clause of the United States Constitution's First

Amendment[2] and state law in state court by individuals and the Ohio Federation of Teachers. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). The Ohio Supreme Court found the program constitutional under the First Amendment's Establishment Clause for two reasons: First, it is perfectly neutral. There is nothing about the program that prevents a school from participating, or facilitates its participation, based on its status as religious or nonreligious, private or public. Second, not one penny of state money goes to a religious school except through the individual choices of participating families. No child is assigned to a religious school—and therefore, no program revenues are received by religious schools—except through the intervening personal choice of the student's parents.

The Ohio Supreme Court's affirmation of the constitutionality of the Program was based on a careful review of this Court's Establishment Clause jurisprudence. The court relied primarily on *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and the modified *Lemon* test announced in *Agostini v. Felton*, 521 U.S. 203. However, the Ohio high court found the adoption of the Ohio Scholarship Program had violated the single-subject rule of the state constitution. *Simmons-Harris v. Goff*, 711 N.E.2d at 216.

The Ohio State General Assembly cured the deficiency and re-enacted the Program in all pertinent respects in 1999. *Simmons-Harris v. Zelman*, 234 F.3d at 949-50. Some of the same plaintiffs then filed a second lawsuit challenging the program in *federal* court. *Id.* On December 11, 2000, by a 2-1 vote, the Sixth Circuit Court of Appeals, in the opinion below, affirmed a permanent injunction preventing the State of Ohio from operating the Scholarship Program. Relying on the test set

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[2] The First Amendment of the United States Constitution states, in pertinent part, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. 1.

out in *Lemon v. Kurtzman*, 403 U.S. at 612-13, the court of appeals held that the Program violates the Establishment Clause on the grounds that it has the primary effect of advancing religion and that it constitutes an endorsement of religion and sectarian education. *Simmons-Harris v. Zelman*, 234 F.3d at 961.

The lower court looked to the decisions issued by this Court applying the *Lemon* test and determined the "most persuasive, in that it is on point with the matter at hand, to be *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)." *Simmons-Harris v. Zelman*, 234 F.3d at 953. In *Nyquist*, this Court invalidated a tuition-reimbursement and tax credit program where public education assistance was made available to parents of children in *private* schools. 413 U.S. at 780. The *Nyquist* Court recognized that such a narrow class of recipients "cannot be squared with the principle of neutrality established by the decisions of this Court." *Id.* at 793. As the dissent below noted,

> [t]he purpose of the Ohio statute, on the other hand, is to provide financial help to poverty-level students attending the **public schools** in Cleveland in order to enable them, if they wish, to attend nonreligious private schools, religious private schools, public schools in neighboring districts that wish to participate in the voucher program, or to obtain special tutoring while remaining in the Cleveland public schools.

Simmons-Harris v. Zelman, 234 F.3d at 964-65 (Ryan, J., dissenting).

The Sixth Circuit rejected the Ohio Supreme Court's reasoning that "'the *Nyquist* holding [had been] undermined' by subsequent cases and was thus no longer good law." *Simmons-Harris v. Zelman*, 234 F.3d. at 949 (citation omitted). Instead, the court below noted that "[t]he Supreme Court has not

overturned or rescinded the *Lemon* test even as it has used its framework to shape differing analyses," *id.* at 952, and read this Court's recent pronouncements as illustrating the "flexibility" of the *Lemon* test. *Id.* at 953.

The Sixth Circuit also recognized that this Court's decision in *Mitchell v. Helms*, 530 U.S. 793, was sharply divided. Instead of applying Justice Thomas' plurality opinion upholding the constitutionality of a federally mandated Louisiana program in which the principles of neutrality and private choice were emphasized, the Sixth Circuit applied Justice O'Connor's narrow opinion concurring in the judgment. *Simmons-Harris v. Zelman*, 234 F.3d at 957. Thus, according to the court below, *Mitchell* requires an inquiry into whether state funds have been diverted to religious uses. *Id.* But this type of diversion inquiry is applicable only in the context of a public program in which the government provides funds directly to religious schools. The diversion inquiry does not apply when the program instead gives funds to the "student beneficiary" who "can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education." *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring).

Despite the urging of the dissenting judge to take the case for *en banc* review because of the "immense importance to the Cleveland children who are directly affected, and indeed to the nation," *Simmons-Harris v. Zelman*, 234 F.3d. at 974 (Ryan, J., dissenting), the Sixth Circuit denied the motion.

On September 25, 2001, this Court granted the writ of certiorari in this case.

SUMMARY OF ARGUMENT

Thirty years ago in *Lemon v. Kurtzman,* this Court articulated a three-part test to evaluate possible Establishment Clause violations. *Lemon* stated that to pass constitutional

muster under the Establishment Clause a statute or government action must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. Until this Court expressly declares that *Lemon* is no longer the law, courts throughout this country will continue to struggle with *Lemon*'s imprecise test.

While this Court has not formally repudiated *Lemon*, its recent decisions have failed to rely on the three-pronged test set forth in that decision. Instead of passing Establishment Clause claims through the three prongs of *Lemon*, this Court has applied a variety of alternative tests. *See Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (whether the government's action was a neutral benefit available to all handicapped children); *Mueller v. Allen,* 463 U.S. 388 (1983) (whether the aid program was neutral toward religion instead of focusing on the actual effect of the aid); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) (whether the act is neutral towards religion); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (whether the aid is provided for the benefit of all students).

Although this Court modified the *Lemon* test in *Agostini v. Felton*, 521 U.S. 203, it did not expressly overrule *Lemon*. As a consequence, educators trying to improve the public education system in this country and the nation's lower courts must struggle to apply the confusing and indeterminate *Lemon* test, only to have this Court review those decisions under different constitutional standards. An inefficient and unpredictable two-tiered system of Establishment Clause jurisprudence has emerged with this Court analyzing a program differently than the lower courts. This uncertainty in the standard of review to be applied has constructed a wall of resistance to innovative, meritorious school choice programs.

The overruling of *Lemon* would establish a uniform standard of constitutional review.

In recent Establishment Clause cases, this Court has explained that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive an indirect benefit. *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 18 (1947); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1. This Court should expressly declare that the neutrality test laid out in *Agostini*, and not the test announced in *Lemon*, should be used to determine whether the Constitution has been violated. School choice programs that are neutral with respect to religion and where funds are directed to religious schools only through the private and independent decisions of individual parents do not violate the Establishment Clause. General government programs which distribute benefits to any qualifying child without regard to the sectarian-nonsectarian or public-nonpublic nature of the school the child attends and which provide parents the freedom to select a school of their choice ensure that a government benefit will be present in a sectarian school only as a result of the private decision of individual parents. Any government aid that goes to a religious institution does so only as a result of the independent and private choices of parents. The Scholarship Program in the case at bar neutrally provides a benefit to the educationally deprived children of Ohio, and thus does not violate the Establishment Clause.

ARGUMENT

I

THIS COURT SHOULD OVERTURN *LEMON v. KURTZMAN*

This Court's Establishment Clause jurisprudence remains in disarray even after its decisions in *Agostini v. Felton*, 521 U.S. 203, and *Mitchell v. Helms*, 530 U.S. 793. Although *Agostini* was heralded by legal scholars as eliminating the inconsistency of Establishment Clause jurisprudence,[3] the meaning of *Agostini* is not clear. In fact, the subsequent decision in *Mitchell v. Helms* shows that this Court itself is divided on how to interpret and apply *Agostini*. Justice Thomas, writing for a plurality of four in *Mitchell*, cited *Agostini* as establishing that "aid that is offered to a broad range of groups of persons without regard to religion" is neutral and therefore constitutional. 530 U.S. at 800. However, Justice O'Connor disagreed, stating that "[the Court] has never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid." *Id.* at 839 (O'Connor, J., concurring).

The unresolved inconsistency surrounding this Court's Establishment Clause jurisprudence results directly from the doctrinal deficiency of the three-part test of *Lemon v. Kurtzman* that guides government aid to education cases. For the reasons that follow, this Court should explicitly overrule *Lemon*.

A. The Application of the *Lemon* Test Has Led to Inconsistent and Confusing Results in Aid to Education Cases

This Court has recognized that the Establishment Clause raises difficult issues of interpretation, and cases arising under it "have presented some of the most perplexing questions to

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[3] *See, e.g.*, Jo Ann Bodemer, *supra*, at 298-99 and n.127.

come before [the] Court." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 760.

Thirty years ago in *Lemon v. Kurtzman*, this Court formulated a three-part test for determining whether state and federal aid to sectarian schools complies with the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-13 (citations omitted). Yet, this Court candidly admits that in applying the *Lemon* test, it has "sacrifice[d] clarity and predictability for flexibility." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980). Not surprisingly, even this Court has had trouble applying the *Lemon* test in the area of public aid to education programs involving religious schools. Not only are the cases inconsistent with each other, but they contradict cases decided prior to the adoption of the *Lemon* test.

In 1947, this Court in *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, upheld a New Jersey statute authorizing local school districts to reimburse parents for the cost of transporting their children to and from school on public transportation. *Id.* at 17. The reimbursement was available to all parents irrespective of whether their children went to public or private schools. The Court recognized that general welfare programs neutrally benefitting all persons did not offend the Establishment Clause. *Id.* at 18.

Twenty-one years later, in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968), this Court upheld the constitutionality of a New York statute that required public schools to loan textbooks free of charge to all students, including students attending parochial schools. *Id.* at 238. The *Allen* Court found that the New York statute was a part of a neutrally applied general welfare program. The statute neither

advanced nor inhibited religion because the textbooks were merely lent to parochial schools as part of a general program to benefit all schoolchildren regardless of the school attended. *Id.* at 243-44.

In the 1970s, however, this Court moved away from applying a neutrality test to aid to education programs. In *Lemon*, the Court examined the constitutionality of a program loaning secular textbooks to private schools and providing salary supplements for teachers. The Court began its inquiry by confessing that

> [c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

Lemon, 403 U.S. at 612. Relying on *Allen*, the *Lemon* Court found that the loan of textbooks was constitutional, while simultaneously holding that the salary supplements resulted in excessive entanglement with religion. 403 U.S at 614.

This Court's subsequent use of the *Lemon* test has resulted in inconsistent and contradictory holdings. For example, applying *Lemon* in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, this Court held unconstitutional a New York program that provided cash for maintenance and equipment to private schools serving low-income families. The program also provided a partial tuition reimbursement to low-income parents of students in private schools and a tax deduction for other parents of private school students. *Id.* at 764-69. The *Nyquist* Court held there was no way to ensure that the moneys received pursuant to the tuition-reimbursement portion of the program, even though received directly by the parents and only indirectly by the schools, would be restricted to secular purposes. *Id.* at 756.

Another example is *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481. There, this Court overturned the Washington Supreme Court and sustained a program that used government funds to provide vocational rehabilitation services to a blind student attending a Christian college. Reaffirming that "the lines of demarcation in this extraordinarily sensitive area of constitutional law" have been only dimly perceived, *id.* at 485 (quoting *Lemon v. Kurtzan*, 403 U.S. at 612), this Court found no Establishment Clause violation because the aid did not directly subsidize religion. *Id.* "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 487.

In *Agostini v. Felton*, 521 U.S. at 203, this Court retooled the *Lemon* test, holding that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees" who are monitored for religious neutrality in monthly visits. *Agostini*, 521 U.S. at 234-35. The *Agostini* Court stressed that it was not revising "the general principles we use to evaluate whether government aid violates the Establishment Clause." *Id.* at 222. *Agostini* simply modified the analytical framework of the *Lemon* test.

The confusion of Establishment Clause jurisprudence was highlighted by this Court's application of the retooled *Lemon* test announced in *Agostini* to the school aid program addressed in *Mitchell v. Helms*, 530 U.S. 793. The plurality opinion in *Mitchell* applied these tests in a narrow fashion, reaffirming that neutrality would be established if the aid flowing to the

religious institution was the result of the private decisions of individuals, not the state. Justice O'Connor, concurring in the judgment, disagreed, stating that "[the Court] has never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid." *Id.* at 839 (O'Connor, J., concurring). As explained in Part "C" below, in the aftermath of *Mitchell*, lower courts have declined to follow *Mitchell*'s plurality opinion and refused to apply the retooled *Lemon* test announced in *Agostini*, opting instead to follow the discredited three-part test of *Lemon v. Kurtzman*. This uncertainty in the standard of review to be applied has constructed a wall of resistance to innovative, meritorious school choice programs.

Voucher programs have been introduced in over twenty state legislatures since the early 1990s, most failing, but a few, like the Scholarship Program at issue here, have passed successfully through the legislative process only to become embroiled in costly and divisive litigation.[4] Similarly, immediately after Florida's opportunity scholarship program was enacted in 1999, it was embroiled in litigation involving whether the program violates the Establish Clause. *Holmes v. Bush*, Case Nos. CV 99-3370, CV 99-4110. Although Florida's school choice and accountability program demonstrates that failing public schools in Florida can be motivated to improve their academic performance as a result of the adoption of school choice programs, the program's success and ability to continue is dependent upon which line of cases the trial court will follow and which line of cases the trial court will discount. This uncertainty in the standard of review to be applied to school choice programs leaves educators with limited tools to improve the nation's failing public education system *Lemon* should be

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[4] *See*, Fridy, *What Wall? Government Neutrality and the Cleveland Voucher Program*, 31 Cumb. L. Rev. at 712; Bodemer, *School Choice Through Vouchers*, 70 St. John's L. Rev. at 286-87.

overruled in order to provide a uniform framework for the evaluation of claims brought under the Establishment Clause.

B. This Court's Failure to Overrule *Lemon* Has Resulted in a Two-Tiered System of Establishment Clause Jurisprudence

The uncertainty surrounding the applicability of *Lemon* has resulted in a two-tiered system of Establishment Clause jurisprudence, with lower courts applying the *Lemon* framework and this Court applying a more flexible test. The discordant results achieved by this split-level system can be seen by evaluating this Court's more recent Establishment Clause cases.

Zobrest v. Catalina Foothills School District, 509 U.S. 1, involved a challenge by a deaf student to a school district's refusal to provide him with a sign-language interpreter to aid in his studies at a parochial high school. The school district contended that the Establishment Clause prohibited it from providing the requested interpreter. The Ninth Circuit applied the *Lemon* test and concluded that the placement of the interpreter in the parochial school would violate the Establishment Clause. *Id.* at 5. This Court reversed that ruling because the provision of interpreters was a neutral benefit available to all handicapped children in the school district, regardless of the sectarian or nonsectarian nature of the school; thus, the Establishment Clause was not violated. *Id.* at 10.

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion" it follows under our prior decisions that provision of that service does not offend the Establishment Clause.

Zobrest, 509 U.S. at 10 (quoting in part *Witters v. Washington Department of Services for Blind*, 474 U.S. at 488).

This Court employed a similar analysis in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687. There, taxpayers brought an action challenging the constitutionality of a New York statute that created a special school district for members of an Hasidic Jewish community. The state trial court found that the statute failed all three prongs of the *Lemon* test and, therefore, violated the Establishment Clause. *Id.* at 695. The state appellate court agreed. *Id.* Although this Court ultimately agreed with the conclusion of the lower courts, it did so by employing a wholly different analysis. Instead of applying *Lemon*, this Court rested its decision on the fact that the statute in question extended a governmental benefit in a nonneutral fashion. *Id.* at 710.

The judicial inefficiency of using one test throughout the lower courts, only to modify the analysis when the case reaches the Nation's highest court, was not lost on the dissenting Justice.

> [T]he Court's snub of *Lemon* today (it receives only two "see also" citations, in the course of the opinion's description of *Grendel's Den*) is particularly noteworthy because all three courts below (who are not free to ignore Supreme Court precedent at will) relied on it, and the parties (also bound by our case law) dedicated over 80 pages of briefing to the application and continued vitality of the *Lemon* test. In addition to other sound reasons for abandoning *Lemon*, it seems quite inefficient for this Court, which in reaching its decisions relies heavily on the briefing of the parties and, to a lesser extent, the opinions of lower courts, to mislead lower courts and parties about the relevance of the *Lemon* test.

Id. at 750-51 (Scalia, J., dissenting) (citations omitted).

This two-tiered standard was dramatically highlighted in *Agostini v. Felton*, wherein petitioners sought to have this Court reconsider its earlier decision in *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, this Court applied *Lemon* to bar New York City from sending public school teachers into parochial schools to provide remedial education for disadvantaged children under a congressionally mandated program. *Id.* at 404. This ruling forced school districts throughout the nation to seek creative ways to provide sorely needed educational assistance to children attending parochial schools. *Agostini*, 521 U.S. at 213.

Frustrated with the exorbitant costs of maintaining this program, New York City, along with parents of parochial school students in *Agostini*, brought a motion seeking relief from the permanent injunction imposed under *Aguilar*. The Second Circuit Court of Appeals observed that the landscape of Establishment Clause jurisprudence had changed, but felt bound by the precedent of *Aguilar*. *Id.* at 212. Granting certiorari in *Agostini*, this Court announced a new, modified *Lemon* test. "[A] federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here." *Id.* at 234-35. Unfortunately, this Court did not expressly overrule *Lemon*.

A similar frustrating result occurred in *Mitchell v. Helms*, 539 U.S. 793. There, the lower court was asked whether federally-funded programs that provided special education teachers, instructional materials, and transportation services to students in both public and private schools under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 violated the Establishment Clause. The Fifth Circuit Court of Appeals acknowledged that it was faced with a dilemma because this Court has not abandoned, nor even fundamentally changed, the *Lemon* test used to evaluate whether government

aid violates the Establishment Clause. In fact, it acknowledged this Court's admonition to lower courts to abide by any applicable holding of this Court even though that holding might seem inconsistent with subsequent decisions. The lower court held that, while the provision of teachers and transportation did not violate the Establishment Clause, the loaning of state-owned instructional materials to religious schools did. *Helms v. Picard*, 151 F.3d 347, 372 (5th Cir. 1998). The lower court relied on decisions of this Court that were subsequently overruled.[5]

In the *Mitchell* plurality opinion, this Court applied the retooled *Lemon* test announced in *Agostini* and reaffirmed the significance of neutrality in sustaining aid to students in religious schools. The plurality opinion candidly recognized the dilemma faced by the lower court: "The case's tortuous history... indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle." 530 U.S. at 804.

In each of these cases, the lower courts reviewed the Establishment Clause issue under the *Lemon* test, and in each instance, this Court ultimately employed a different standard to determine whether that clause had been violated. Not only is this dual regimen inefficient and confusing, it makes the level of constitutional protection indeterminate, varying according to the facts of each case. Until this Court expressly declares that *Lemon* is no longer the law, courts throughout the country will continue to scrutinize fact patterns in search of secular purposes, primary effects, and excessive entanglements in lieu of a more relevant examination of religious neutrality. This

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[5] The lower court relied primarily on *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). In *Mitchell*, this Court overruled *Meek* and *Wolman* because they were inconsistent with the reasoning set out in *Agostini*. 530 U.S. at 835.

Court should explicitly overrule *Lemon* to end the current two-tiered system of Establishment Clause jurisprudence and to hold that so long as the government provides benefits in a neutral manner, the Establishment Clause is not offended.

C. The Decaying *Lemon* Precedent Has Created Confusion Among the Lower Courts as to Which Line of Cases to Apply

Lower courts nationwide are unsure how recent Establishment Clause jurisprudence applies to school choice programs. Although this Court's recent decisions suggest that *Lemon* may have fallen out of favor with this Court, lower state and federal courts are constrained to apply the three-part test until it is expressly overruled. In *Agostini v. Felton,* this Court reminded the lower courts:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, 521 U.S. at 237 (citation omitted).

One need look no further than the facts of this case to see the strange results the *Lemon* test has generated. The Sixth Circuit relied upon the *Nyquist* decision and Justice O'Connor's narrow concurring opinion in *Mitchell* to find the Ohio Scholarship Program unconstitutional, *Simmons-Harris v. Zelman*, 234 F. 3d 945; whereas, the Ohio Supreme Court, examining the same Program, relied primarily upon *Zobrest, Witters*, and the retooled *Lemon* test in *Agostini* to find it constitutionally sound, *Simmons-Harris v. Goff*, 711 N.W. 2d 203.

The split in authority over the constitutionality of school choice programs is evident in other lower court decisions as well. The Vermont Supreme Court in *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994), ruled that the Establishment Clause permitted the State to reimburse parents for tuition paid to religious schools in a school district that does not maintain its own public schools but instead provides tuition for the public or private schools of the parents' choice. In *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998), the Wisconsin Supreme Court upheld against an Establishment Clause challenge a school choice program that, like the Ohio Scholarship Program, allows economically disadvantaged children to use public funds to pay for private school tuition. In *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999), the Arizona Supreme Court sustained under the Establishment Clause a state income tax credit for contributions to private scholarship programs.

On the other hand, other courts have found school choice programs unconstitutional. The Maine Supreme Court and the United States Court of Appeals for the First Circuit both rejected claims by families seeking reimbursement for religious school tuition in a program similar to Vermont's on the grounds that including religious schools among the range of options would violate the Establishment Clause. *Bagley v. Raymond School Department*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999).

These cases illustrate the confusion of the lower courts over how to apply this Court's Establishment Clause jurisprudence. All these cases applied the *Lemon* test and

addressed whether *Nyquist* should or should not be followed. In analyzing programs under the primary effects prong, these lower courts recognized that if there is a difference between *Nyquist* and the later *Mueller, Zobrest,* and *Witters* decisions, it lies in the weight to be given the intervention of parental choice. *Nyquist* considered this factor as "only one among many factors to be considered," 413 U.S. at 781, but held that aid was prohibited whether labeled "a reimbursement, a reward, or a subsidy." *Id.* at 786. The post *Nyquist* decisions stress the importance of neutrality.

> [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest, 509 U.S. at 8. *Mueller* said that an "attenuated financial benefit, ultimately controlled by the private choices of individual parents" is not encompassed with the historic purposes of the Establishment Clause. 463 U.S. at 400. *Witters* stressed that any financial benefit to religious institutions was the "result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487.

Lower courts recognize that application of the concepts set forth in *Nyquist* lead to the inevitable conclusion that a school choice program will violate the Establishment Clause. But, *Nyquist* has not withstood the test of time. What has changed is this Court's articulation of "the criteria used to assess whether aid to religion has an impermissible effect." *Agostini*, 521 U.S. at 223. As *Agostini* and *Mitchell* illustrate, those criteria have recently come into much sharper focus--where (1) a non-religious category of benefit is (2) conferred on a neutrally defined class (3) in circumstances of true private choice, no Establishment Clause violation exists.

It is apparent that the outcome of school choice programs challenged as violating the Establishment Clause is dependent upon which line of cases the lower court chooses to follow, and which line they choose to discount. Now is the time for this Court to overturn *Lemon* and clarify that a neutral program that benefits religious schools solely as a result of independent choice does not violate the Establishment Clause.

II

PRINCIPLES OF NEUTRALITY AND PRIVATE DECISION MAKING ESTABLISH THE CONSTITUTIONALITY OF SCHOOL CHOICE PROGRAMS

This Court has long recognized that the First Amendment requires the government to remain neutral toward religion.

> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Everson v. Board of Education of the Township of Ewing, 330 U.S. at 18.

> [T]he [neutrality] principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.

Kiryas Joel, 512 U.S. at 704.

In *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. at 839, this Court noted that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."

Again, in *Agostini v. Felton*, 521 U.S. at 231, this Court emphasized that a program does not create a financial incentive to undertake religious education where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." And in *Mitchell v. Helms*, a plurality of this Court observed that "we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." 530 U.S. at 809 (plurality opinion).

In *Mitchell v. Helms*, both the plurality opinion and the concurring opinion stressed the importance of independent choice. Both opinions noted that governmental aid is permissible when, as the concurrence puts it, "the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. at 488, and *Zobrest v. Catalina Foothills School District*, 509 U.S. at 10). In these circumstances, "any aid. . .that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (internal citations omitted).

Had the court below applied this test, the Ohio Scholarship Program would have survived constitutional scrutiny. The focus of the program is on low income families with children trapped in the failing Cleveland public school system, and the scholarship aid is available to students regardless of the public or nonpublic nature of their school of choice. *Simmons-Harris v. Zelman*, 234 F.3d at 948. Participation in the Scholarship Program by educational institutions is based entirely on religiously neutral criteria. *Id.* at 948-49. No preference for religious schools is given; no preference for secular schools is given. *Id.*

Moreover, the Scholarship Program offers parents a range of educational options: attending a public school, attending a private school, or attending a public school outside of the Cleveland School District. It is only through the "independent and private choices" of parents that any government aid flows to a religious school. Parents decide whether to participate in the Scholarship Program and parents decide on what schools their children will attend. Because each individual parent independently directs the flow of the scholarship, public funds ultimately reach individual schools only as a result of the "genuinely independent and private choices" of parents. This Court has consistently held that when "aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller*, 463 U.S. at 399 (citing *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)) (internal citations omitted).

Amici believe that a school choice program that provides for the participation of all school children and enables their parents to select the school of their choice comes within the principle of neutrality. Yet few such programs have been introduced. The students of Florida and their schools are fortunate to have a school choice program that passed successfully through the legislative process. But like so many other innovative and meritorious programs, it was hauled into court. Like the Scholarship Program at issue here, the issue of whether it is permissible for a state to use public funds for student tuition in private schools is before the lower court. Amici urge this Court to open the doorway which will allow educators the ability to implement school choice programs by overruling *Lemon* and clarify that the neutrality test laid out in *Agostini* should be used to determine whether the Constitution has been violated.

CONCLUSION

There is little doubt that the public education system in this country is in need of reform.[6] Educators throughout this nation need the widest range of tools to provide educational opportunities for our nation's children, such tools should include school choice programs. Yet by not explicitly overruling *Lemon*, these innovative and meritorious programs will be embroiled in costly litigation over whether public funded scholarships may be used at private schools whether religious or not. By not explicitly overruling *Lemon*, this Court has condemned the lower courts to toil under the three-part *Lemon* test to scrutinize fact patterns in search of secular purposes, primary effects, and entanglements. This Court should expressly overrule *Lemon* and clarify, once and for all, that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive an indirect benefit.

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Respectfully submitted,

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[6] The 2000 National Assessment of Educational Progress disclosed that 63% of black and 56% of Hispanic fourth-graders are below the most basic levels of proficiency in reading. National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* (2001) at 31, 33.

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SUPREME COURT OF THE UNITED STATES

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,
PETITIONERS,
v.
DORIS SIMMONS-HARRIS, ET AL.,
RESPONDENTS

On Writ of Certiorari to the
United States Court of Appeals
For The Sixth Circuit

BRIEF OF THE STATES OF FLORIDA, ALABAMA, DELAWARE, NEBRASKA, PENNSYLVANIA, SOUTH CAROLINA AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT STATES FROM IMPROVING AILING SCHOOL SYSTEMS THROUGH RELIGIOUSLY NEUTRAL, ALTERNATIVE SCHOOL CHOICE PROGRAMS. 5

A. THE PURPOSE AND INTENDED EFFECT OF ALTERNATIVE SCHOOL CHOICE PROGRAMS ARE TO CORRECT PROBLEMS IN PUBLIC SCHOOLS. 6

B. THE ESTABLISHMENT CLAUSE PERMITS PARENTS TO DIRECT EDUCATIONAL AID TO SECTARIAN OR NONSECTARIAN SCHOOLS THROUGH RELIGIOUSLY NEUTRAL EDUCATION PROGRAMS. 9

II. THE USE OF RELIGIOUSLY NEUTRAL CRITERIA TO IDENTIFY ALTERNATIVE SCHOOLS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE UNLESS THE CRITERIA ARBITRARILY OR INTENTIONALLY DISCOURAGE NONSECTARIAN SCHOOLS' PARTICIPATION IN THE PROGRAMS. 11

A. OHIO'S TUITION LIMITATION DOES NOT ADVANCE RELIGION BECAUSE IT HAS NOT BEEN SHOWN TO BE ARBITRARY OR INTENTIONALLY DISCOURAGE NONSECTARIAN SCHOOLS' PARTICIPATION IN THE PROGRAM. .. 12

B. NEITHER THE PERCENTAGE OF PARTICIPATING SECTARIAN SCHOOLS NOR THE PERCENTAGE OF STUDENTS SELECTING SECTARIAN SCHOOLS SHOULD BE CONSTITUTIONALLY RELEVANT. 14

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 18

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 2, 8-9

Mueller v. Allen, 463 U.S. 388 (1983) 3, 5, 9-10, 18

Simmons-Harris v. Zelman, 234 F.2d 945 (6th Cir. 2000) 1, 12

Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) 3, 9-10

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 3, 10

STATUTES

Fla. Stat. § 229.0537 (2001) 6, 11

STATE CONSTITUTIONS

Ala. Const. Art 14, § 256 5

Alaska Const. Art 17, § 1 5

Ariz. Const. Art 11, § 8 5

Ark. Const. Art 14, § 1 5

Cal. Const. Art 9, § 1 5

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Conn. Const. Art 8, § 1 5

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Fla. Const. Art 9, § 1 5

Ga. Const. Art 8, § 1 5

Haw. Const. Art 11, § 1 5

Idaho Const. Art 9, § 4 5

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Ind. Const. Art 8, § 1 5

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Kan. Const. Art 6, § 1 5

Ky. Const. Art 6, § 1 5

La. Const. Art 8, § 1 5

Me. Const. Art 8, § 1 5

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Mass. Const. Pt. 2, C5, § 2 5

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Minn. Const. Art 13, § 1 5

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Mo. Const. Art 9, § 1a 5

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Neb. Const. Art 7, § 1 5

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Pa. Const. Art 3, § 14 5

R.I. Const. Art 1, § 12 5

S.C. Const. Art 11, § 3 5

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INTEREST OF THE *AMICI*

The *amici* are States that take seriously their constitutional responsibilities to educate children. Various crises have created the need, and a demand, for substantial improvements in the quality of state-supplied education, and one effective solution being implemented or considered by some *amici* is the alternative school choice program. These programs provide the parents of public school students the opportunity to send their children to alternative schools, including, at the option of individual parents, religious schools.

The Sixth Circuit's decision in *Simmons-Harris v. Zelman*, 234 F.2d 945 (6th Cir. 2000), threatens to undermine the constitutional legitimacy of these initiatives and embroil States' public school systems in extensive litigation regarding these programs. That decision should be reversed.

Through this brief, the *amici* will attempt to offer the Court their unique perspective on alternative school choice programs, explaining why state legislatures have deemed them important tools to improve the quality of public school education and the educations of current public school students. The *amici* will also discuss the factors the Sixth Circuit relied upon in declaring the Ohio program unconstitutional and show that those factors do not support the circuit court's decision.

Ultimately, the *amici* urge the Court to reverse the Sixth Circuit's decision and confirm that these initiatives satisfy the requirements of the Establishment Clause. The *amici* also ask that, at a minimum, the Court provide much needed guidance regarding how alternative school choice programs may be constitutionally implemented to achieve their goal of correcting problems in public schools while educating public school children.

SUMMARY OF ARGUMENT

Consistent with the well-recognized notion that an educated populace is essential to the Nation's success, States have undertaken to educate children through public schools. Where problems in those schools undermine their educational purpose, and the common solution of simply increasing public school spending has proven ineffective, States have sought a solution in alternative school choice programs.

Alternative school choice programs can take on many forms and address any of numerous potential problems. For instance, Florida grades each public school and permits students who attend certain "failing" schools the opportunity to attend higher performing public schools or participating private schools, whether sectarian or nonsectarian. Florida's program thus focuses on individual "failing" schools. Ohio's program focuses on school districts placed under state supervision by federal courts.

Regardless of their form, the purpose and intended effect of these programs are to correct public schools' deficiencies. This is done by encouraging public schools to improve and, concomitantly, offering alternative educational opportunities to the students who are being disserved by their generally assigned public schools. Recent studies have shown these programs to be successful.

Accordingly, the Sixth Circuit erred in analogizing the Ohio alternative school choice program to the New York school aid program at issue in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). The New York program provided tuition to students in both sectarian and nonsectarian private schools in order to keep students enrolled in those schools, while alternative school choice programs seek to improve public schools and, in the meantime, to give parents the option of sending their children to public or private schools.

Rather than *Nyquist*, the Sixth Circuit should have relied on this Court's well-established case law holding that

government funds may constitutionally be used to enroll in sectarian institutions where private individuals chose to direct those funds through otherwise religiously neutral government programs. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding a federal program that supplied an interpreter for a deaf child attending a sectarian school); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation program that funded a disabled student's religious education at a private Christian college); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a state law permitting parents tax deductions for certain expenses incurred in sending children to sectarian schools). These cases confirm that the basic structure of alternative school choice programs is constitutionally sound.

The Sixth Circuit distinguished *Mueller* and its progeny from the instant case by holding that the Ohio program fails to give students a meaningful choice of alternative schools and thus promotes religion by coercing students to enroll in sectarian schools. The court offered two bases for that conclusion: the Ohio program's $2500 limitation on tuition that private schools may charge participating students, and the court's observations that 82 percent of the participating schools were sectarian and approximately 96 percent of participating students attended sectarian schools. Neither of these bases supported the court's conclusion.

First, the tuition limitation fails to show that the Ohio program promotes religion. The Sixth Circuit assumed that any tuition limitation favors sectarian schools because sectarian schools supposedly have lower tuition rates. Nothing in the record supports that generalization, and, more importantly, even if that generalization were appropriate in the case of Cleveland's private schools, the Sixth Circuit made no finding whatsoever that the Ohio legislature adopted that provision arbitrarily or intentionally to discourage participation in the program by nonsectarian schools. Nothing short of such proof should suffice before a court may declare that a tuition limitation, implemented

in the course of an otherwise religiously neutral, private choice-based alternative school choice program, has the purpose or primary effect of promoting religion. States require latitude to examine the particular conditions of their public and private school markets and to set such limitations in accordance with those conditions.

Further, the Sixth Circuit misplaced its reliance on statistical evidence showing how many of the schools participating in the Ohio program were sectarian and how many of the participating students chose to attend sectarian schools. States have no control whatsoever regarding the makeup of the private school market, which, as the information detailed *infra* demonstrates, varies considerably between and within States. Nor do States have any control over the decisions regarding participation made by private schools or individual parents. The constitutionality of an otherwise religiously neutral alternative school choice program should not turn on the result of such private decision-making, and, standing alone, statistical evidence regarding what schools chose to participate in the program and what choices parents and students make should not be constitutionally relevant.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT STATES FROM IMPROVING AILING SCHOOL SYSTEMS THROUGH RELIGIOUSLY NEUTRAL, ALTERNATIVE SCHOOL CHOICE PROGRAMS.

This Court has recognized that "[a]n educated populace is essential to the political and economic health of any community . . . ." *Mueller v. Allen*, 463 U.S. 388, 395 (1983). Not surprisingly, then, each State is obliged by its constitution to educate children.[1]

Where a State's educational mission is hindered by problems in its public school system, that State holds a responsibility to its citizens, and to its students in particular, to identify and correct those problems. The Ohio alternative school

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[1] *See* Ala. Const. Art 14, § 256, Alaska. Const. Art 17, § 1, Ariz. Const. Art 11, § 8, Ark. Const. Art 14, § 1, Cal. Const. Art 9, § 1, Colo. Const. Art 9, § 2, Conn. Const. Art 8, § 1, Del. Const. Art 10, § 1, Fla. Const. Art 9, § 1, Ga. Const. Art 8, § 1, Haw. Const. Art 11, § 1, Idaho Const. Art 9, § 4, Ill. Const. Art 10, § 1, Ind. Const. Art 8, § 1, Iowa Const. Art 9, § 1, Kan. Const. Art 6, § 1, Ky. Const. Art 6, § 1, La. Const. Art 8, § 1, Me. Const. Art 8, § 1, Md. Const. Art 8, § 1, Mass. Const. Pt. 2,C5, § 2, Mich. Const. Art 8, § 1, Minn. Const. Art 13, § 1, Miss. Const. Art 8, § 201, Mo. Const. Art 9, §1a, Mont. Const. Art 10, § 1, Neb. Const. Art 7, § 1, Nev. Const. Art 11, § 1, N.H. Const. Pt.2, Art 83, N.J. Const. Art 8, § 4, N.M. Const. Art 12, § 1, N.Y. Const. Art 11, § 1, N.C. Const. Art 9, § 1, N.D. Const. Art 8, § 1, Ohio Const. Art 6, § 2, Okla. Const. Art 13, § 1, Or. Const. Art 8, § 2, Pa. Const. Art 3, § 14, R.I. Const. Art 1, § 12, S.C. Const. Art 11, § 3, S.D. Const. Art 8, § 1, Tenn. Const. Art 11, § 12, Tex. Const. Art 1, § 1, Utah Const. Art 10, § 1, Vt. Const. Ch.11, § 1, Va. Const. Art 8, § 1, Wash. Const. Art 9, § 1, W. Va. Const. Art 12, § 2, Wis. Const. Art 10, § 1, Wyo. Const. Art 1, § 23.

choice program represents Ohio's attempt to fulfill that responsibility.

The Sixth Circuit's decision below misinterpreted the purpose and primary effect of Ohio's alternative school choice program and misapplied the Establishment Clause, relying upon suppositions and considerations that have no place in Establishment Clause analysis. States must devise effective responses to crises facing their public schools, and, contrary to the Sixth Circuit's decision, the Constitution does not prohibit States from adopting religiously neutral alternative school choice programs.

A. THE PURPOSE AND INTENDED EFFECT OF ALTERNATIVE SCHOOL CHOICE PROGRAMS ARE TO CORRECT PROBLEMS IN PUBLIC SCHOOLS.

Alternative school choice programs represent a response by States to critical and substantial problems facing the quality of public school systems and the education they provide. Such problems have long resisted correction by a mere influx of additional public monies, and they directly impede, if not undermine, States' education efforts and responsibilities.

In Florida, for instance, each public school is graded annually along the traditional "A" through "F" range, and students who attend public schools receiving a failing grade – "F" – twice in a four-year period are offered the opportunity to attend higher performing public schools or qualified private schools. Fla. Stat. § 229.0537 (2001). Florida therefore directs its alternative school choice program at individual failing public schools. By comparison, the Ohio Program now under review provides alternative school choice options to students enrolled in any school district that, by federal court order, has been placed under the supervision and management of Ohio's Superintendent of Public Instruction. Thus, Ohio directs its alternative school choice program at students attending schools in districts where a

federal court has found local control to be sufficiently ineffective to warrant state supervision.

Alternative school choice programs may be used to address a myriad of problems, including poor test scores, poor graduation rates, overcrowding, and poor services for students with disabilities. However, regardless of the situation addressed by a particular program, alternative school choice programs focus squarely on correcting an identified deficiency in the public school system and, at the same time, supplying alternative educational opportunities to the students who are being disserved by that system.

By design, the latter goal supports the former. A student's selection of an alternative school results in a reallocation, partial or whole, of public monies that would ordinarily be used to finance that student's education in the public school he or she would otherwise attend. That reallocation, and even its mere threat, encourages local public school systems to correct whatever deficiencies triggered or may trigger implementation of an alternative school choice program.

Other incentives may operate as well. For example, Florida's system of grading individual schools is meant to create an objective, easily understood spectrum along which a school's performance may be judged by educators, administrators, and the public alike. No school finds a source of pride in being labeled an "F" school or, for that matter, a "D" school. The incentive of competition for grades among public schools, and the considerable stigma attached to low or failing grades, may spur poor schools to improve their quality and thus their grades.

From the States' perspective, the critical point regarding alternative school choice programs is that they succeed. For example, following the Florida legislature's 1999 adoption of Governor Jeb Bush's A+ Plan for Education, which includes Florida's Opportunity Scholarship Program, two reports, the most recent of which was commissioned by Florida's Department of Education, confirmed that Florida's alternative school choice

program had, in fact, begun to improve the performance of the state's public schools. Jay P. Greene, An Evaluation of the Florida A-Plus Accountability and School Choice Program (Feb. 2001); Carol Innerst, Competing to Win: How Florida's A+ Plan Has Triggered Public School Reform (Apr. 2000).[2] Such reports and studies provide strong support for the potential of alternative school choice programs to foster substantial and sorely needed improvements in our Nation's public schools.

The *amici* believe that alternative school choice programs represent an important tool by which state legislatures may meet citizens' demands to improve poorly performing public school systems. Neither the advancement of religion nor its inhibition has any place in the motivation behind such programs, as their focus lies squarely on the States' public schools and the students they serve.

In this respect, the Sixth Circuit's reliance on *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), was wholly misplaced. There, this Court rejected a New York program designed to aid financially ailing private schools by, among other things, granting all private school students a fixed amount of money to use towards tuition. The clear purpose and intended effect of that program were to provide financial aid not only to New York's nonsectarian private schools but to its sectarian private schools – in order to keep all of those schools in operation.

Alternative school choice programs, by comparison, do not reflect any legislative effort to perpetuate the existence of fiscally unsound sectarian or nonsectarian schools. Alternative school choice programs seek to correct deficiencies in public schools. Accordingly, the Sixth Circuit erred in failing to

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[2] A copy of the Greene report may be found on the Internet at http://www.ksg.harvard.edu/pepg/pdf/Florida%20A+.pdf. A copy of the Innerst report may be found at http://www.edreform.com/school_choice/compete.htm.

recognize the critical distinction between alternative school choice programs and programs that specifically seek out and support ailing religious institutions, such as the New York program at issue in *Nyquist*. That case should simply be inapposite here.

B. THE ESTABLISHMENT CLAUSE PERMITS PARENTS TO DIRECT EDUCATIONAL AID TO SECTARIAN OR NONSECTARIAN SCHOOLS THROUGH RELIGIOUSLY NEUTRAL EDUCATION PROGRAMS.

Rather than *Nyquist*, the Sixth Circuit should have focused its attention on a well-established line of Supreme Court cases holding that the use of public funds to finance religious educations does not contravene the Establishment Clause where that use results from the private choices of individuals in the context of a religiously neutral government program. For example, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court approved, on Establishment Clause grounds, a Minnesota tax law that permitted parents to deduct their children's education expenses, including religious school tuition, textbooks and transportation. The Court held that no "imprimatur of State approval" exists where public funds reach sectarian schools only as a result of individual parents' decisions regarding where to educate their children. *Id.* at 399 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

The Court subsequently held that a state vocational rehabilitation program would not violate the Establish Clause by providing financial assistance to a disabled student who chose to use his aid monies to attend a private Christian college and study to be a religious pastor, missionary, or youth director. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). The Court observed that the program could aid religious institutions "only as a result of the genuinely independent and

private choices of aid recipients." *Id.* at 488.

Similarly, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court held that the Establishment Clause did not prohibit federal funds from being used to provide an interpreter in school for a deaf student where the student chose to attend a Catholic high school. The Court explained that where government offers a neutral service as part of a program that "is in no way skewed towards religion," then the provision of that service does not violate the Establishment Clause.

As with the aid programs at issue in these cases, no principled reason suggests that alternative school choice programs cannot survive Establishment Clause scrutiny. To the contrary, *Mueller*, *Witters*, and *Zobrest* demonstrate that the choice format utilized by alternative school choice programs satisfies the constitutional proscription against state-sponsored religious indoctrination. Parents may chose to send their children to their generally assigned public schools, or parents may opt to send their children to one of whichever public or private schools participate in the alternative school choice program. The existence of sectarian or nonsectarian schools in the particular private school market impacted by the alternative school choice program, the participation of those schools in the program, and students' enrollment in those schools are the results of private actors' decisions, unattributable to any State. Under these circumstances, constitutionally sufficient neutrality and private choice separate the State from any religious institution that ultimately receives public aid.

It bears emphasis at this point that the breadth of options available to parents can vary from program to program. For instance, while Ohio permits public schools in neighboring districts to elect whether to participate in the alternative school choice program, Florida directs that parents of children in failing schools may send their children not only to qualified private schools that opt to participate in the program but to public schools in the same district that received at least a "C" grade or, space permitting, an adjacent district's public schools that graded

higher than the students' assigned schools. Fla. Stat. § 229.0537(3).

Thus, as in Florida, the public school alternatives available to parents may extend to include schools other than a student's generally assigned public school. In Ohio, by comparison, where these programs are run on a district-wide basis, students may attend public schools in other districts only where those schools elect to participate in the program. The characteristics of different States' programs should be expected to reflect the unique dynamics of the States' education systems, including the many different balances struck between state and local control of public education.

In sum, while individual State legislatures may tailor alternative school choice programs to meet their States' particular needs, the general format of alternative school choice programs is based on well established principles of neutrality and private choice. Consequently, the basic nature of such programs is wholly consistent with, and does not contravene, the Establishment Clause.

II. THE USE OF RELIGIOUSLY NEUTRAL CRITERIA TO IDENTIFY ALTERNATIVE SCHOOLS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE UNLESS THE CRITERIA ARBITRARILY OR INTENTIONALLY DISCOURAGE NONSECTARIAN SCHOOLS' PARTICIPATION IN THE PROGRAMS.

In examining Ohio's alternative school program, the Sixth Circuit held that, despite the program's facial neutrality with regard to sectarian schools, the program is not, in fact, religiously neutral because it discourages participation by schools not funded by religious institutions. Therefore, the Sixth Circuit found, the Ohio program has the impermissible effect of promoting sectarian schools.

This Court should reject the circuit court's supposedly "as applied" examination, which was based on supposition and constitutionally irrelevant observations, and reverse the decision below. The Court should confirm that, where neutral criteria are used to define a pool of eligible alternative schools, the Establishment Clause is not violated absent a showing that the program arbitrarily or intentionally discourages participation by nonsectarian schools. The Court should also confirm that, standing alone, the percentage of sectarian schools participating in an otherwise religiously neutral program, and the percentage of participating children who chose to attend sectarian schools, are not relevant to the constitutional analysis.

A. OHIO'S TUITION LIMITATION DOES NOT ADVANCE RELIGION BECAUSE IT HAS NOT BEEN SHOWN TO BE ARBITRARY OR INTENTIONALLY DISCOURAGE NONSECTARIAN SCHOOLS' PARTICIPATION IN THE PROGRAM.

The first basis offered by the Sixth Circuit to support its conclusion that nonsectarian schools are discouraged from participating in Ohio's alternative school choice program is the Ohio legislature's decision to place a $2500 limit on the tuition that private schools may charge participating students, of which the program's scholarship will fund either 90 or 75 percent, depending on various circumstances. The court concluded that this limitation served to discourage participation from schools not funded by religious organizations because "religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." 234 F.3d at 959. As Judge Ryan pointed out in his partial dissent, the court's conclusion was entirely unsupported.

Simply put, nothing in the record shows that the tuition limitation has arbitrarily discouraged participation by any

nonsectarian school or that the Ohio legislature selected the $2500 figure with the intent of discouraging nonsectarian schools from participating in the alternative school choice program. In fact, nothing in the record before this Court shows that the tuition limitation has discouraged nonsectarian schools at all from participating in the Ohio program.

Common sense likewise offers no support for the Sixth Circuit's supposition. Even assuming *arguendo* that all or most sectarian schools are subsidized – an unsupported assumption – no basis exists to presume that nonsectarian schools are not also subsidized, whether through endowments or private grant programs. Perhaps more importantly, there is no basis to presume that the Ohio legislature did not take all of these considerations into account when setting the tuition limitation for participating private schools.

In point of fact, levels of public school funding and private school tuition, as well as whether sectarian schools in a given area are more or less subsidized than their nonsectarian counterparts, are local issues that deserve localized attention by individual State legislatures. In crafting alternative school choice programs, States should not be constitutionally prohibited from examining their particular circumstances and, where deemed appropriate, setting tuition limitations that are less than or equal to the amount that would otherwise be spent on children's public education, so long as such limitations do not arbitrarily or intentionally discourage participation by nonsectarian schools.

This Court should not presume that, in setting a tuition level, a State legislature acted with an unconstitutional motive. Nor should this Court simply presume that a tuition limitation arbitrarily discourages nonsectarian schools from an otherwise religiously neutral alternative school choice program. Rather, the Court should require that, to declare an alternative school choice program infirm under the Establishment Clause due to a tuition limitation, a court must find that the limitation arbitrarily or intentionally discourages participation by nonsectarian schools. Absent such proof, no basis exists for a reasonable person to

believe that the State has set out to sponsor the religious indoctrination of students, and the program cannot be said to have either the purpose or primary effect of promoting religion.

The respondents made no showing whatsoever either that the Ohio program's tuition limitation arbitrarily discourages nonsectarian schools' participation or that the Ohio legislature adopted the limitation to discourage their participation. Nor did the district court or the circuit court make any such findings. Accordingly, this Court should reject the Sixth Circuit's erroneous and unfounded conclusion that the Ohio program's tuition limitation unconstitutionally advances religion.

B. NEITHER THE PERCENTAGE OF PARTICIPATING SECTARIAN SCHOOLS NOR THE PERCENTAGE OF STUDENTS SELECTING SECTARIAN SCHOOLS SHOULD BE CONSTITUTIONALLY RELEVANT.

The second basis offered by the Sixth Circuit for its conclusion that the Ohio alternative school choice program discouraged participation from nonsectarian schools was the high percentage of participating schools that were sectarian – specifically, 82 percent – and the high percentage of students utilizing the program who elected to enroll in sectarian schools – approximately 96 percent. Both of these factors are beyond the control of Ohio, and neither should be constitutionally relevant, let alone determinative, in Establishment Clause analysis.

According to data from a recent United States Department of Education study released in August 2001, 78.4 percent of the country's 27,223 private elementary and secondary schools are sectarian. The study also indicates that the distribution of nonsectarian to sectarian schools is not consistent. Rather, it varies across the nation, as shown by the following table:

State	Total	Nonsectarian	Sectarian	Percentage Nonsectarian
AL	347	98	249	28.24%
AK	67	19	48	28.36%
AZ	335	123	212	36.72%
AR	184	27	157	14.67%
CA	3,832	1,605	2,227	41.88%
CO	418	172	246	41.15%
CT	387	165	222	42.64%
DE	120	43	77	35.83%
DC	83	42	41	50.60%
FL	1,460	436	1,024	29.86%
GA	527	147	380	27.89%
HI	128	30	98	23.44%
ID	110	30	80	27.27%
IL	1,536	449	1,087	29.23%
IN	720	122	598	16.94%
IA	250	10	240	4.00%
KS	213	18	195	8.45%
KY	411	82	329	19.95%
LA	417	78	339	18.71%
ME	137	69	68	50.37%
MD	788	288	500	36.55%
MA	861	471	390	54.70%
MI	997	136	861	13.64%
MN	547	90	457	16.45%
MS	186	54	132	29.03%
MO	572	100	472	17.48%
MT	92	22	70	23.91%

State	Total	Nonsectarian	Sectarian	Percentage Nonsectarian
NE	232	20	212	8.62%
NV	104	38	66	36.54%
NH	372	265	107	71.24%
NJ	1,006	341	665	33.90%
NM	208	87	121	41.83%
NY	2,010	493	1,517	24.53%
NC	509	129	380	25.34%
ND	54	7	47	12.96%
OH	1,051	200	851	19.03%
OK	168	28	140	16.67%
OR	376	132	244	35.11%
PA	2,238	592	1,646	26.45%
RI	168	94	74	55.95%
SC	387	97	290	25.06%
SD	77	10	67	12.99%
TN	479	128	351	26.72%
TX	1,318	296	1,022	22.46%
UT	100	59	41	59.00%
VT	122	80	42	65.57%
VA	606	232	374	38.28%
WA	482	149	333	30.91%
WV	130	18	112	13.85%
WI	975	112	863	11.49%
WY	41	9	32	21.95%

Source: *Private School Universe Survey: 1999-2000*, U.S. Department of Education, Office of Educational Research and Improvement, National Center for Educational Statistics, Doc. No. NCES 2001-330 (Aug. 2001), *available at* http://nces.ed.gov/surveys/pss/ *and searchable through* "Private School Locator" *at* http://nces.ed.gov/surveys/pss/locator/locator.asp.

Thus, while over 90 percent of private schools in Iowa, Kansas, and Nebraska are sectarian, that figure drops to less than 50 percent in Maine, Massachusetts, New Hampshire, Rhode Island, Utah and Vermont. The lowest percentage of sectarian schools is found in New Hampshire, where only 28.76 percent of the private schools are sectarian.

Similar variations can be seen on a local level. For example, Florida's most recent data show that while 66.58 percent of Florida's private schools are sectarian, the percentages of sectarian to nonsectarian private schools within Florida's 67 school districts, each of which is countywide, vary from zero to 100 percent.

These observations compel two conclusions. First, the fact that 82 percent of the schools participating in the Ohio program were sectarian did not show, as the Sixth Circuit concluded, that the program discouraged participation by nonsectarian schools. To the contrary, the Ohio program appears to have captured a remarkably fair cross-section of the state's private schools, as the U.S. Department of Education survey shows that 80.97 percent of Ohio's private schools are sectarian.

Second, none of these figures, standing alone, should hold constitutional significance in the context of alternative school choice programs. Decisions regarding whether to open and maintain a private school, sectarian or otherwise, are made by private actors based on a plethora of factors, all of which are beyond any State's control. The net result of such private, independent decisions should not, as a matter of constitutional law, preclude States from employing an alternative school choice program in one locale while permitting States to employ the identical program in another. Otherwise, a program could be constitutional in New Hampshire, because of its largely nonsectarian private school market, but unconstitutional in Ohio, where the percentage of sectarian schools is more than twice as high. The Establishment Clause should not be so fickle.

Nor should a particular program's constitutionality turn

on the extent to which private schools elect to participate in an alternative school choice program or the extent to which parents who choose to participate select sectarian or nonsectarian schools for their children. This Court has previously refused to consider such factors in evaluating a program's legitimacy under the Establishment Clause. *See Agostini v. Felton*, 521 U.S. 203, 229 (1997) ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); *Mueller v. Allen*, 463 U.S. 388, 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

These decisions, like those that produce the private school market in a given area, are inherently private and unrelated to any State actor. Whatever their results, which can be expected to change from time to time in any given State or locale, any religious indoctrination stemming from voluntary enrollment in a sectarian private school through an alternative school choice program cannot reasonably be attributed to governmental action. Accordingly, the Sixth Circuit erred when it used the percentage of sectarian schools in the Ohio program and the percentage of participating students enrolled in such schools to conclude that the Ohio program impermissibly advances religion.

CONCLUSION

Alternative school choice programs are a religiously neutral means of improving deficiencies in States' public school systems. To the best of their abilities, States have attempted to craft these programs not to produce governmental indoctrination of religion but rather to permit private and independent choices by parents to determine where their children receive their education. The States' goal is, ultimately, to educate children, and to do so while neither advancing nor inhibiting religion.

The *amici* respectfully request this Court to reverse the Sixth Circuit's decision and to confirm the constitutional validity of these programs. In all events, the *amici* request this Court to provide much needed guidance on how alternative school choice programs may be crafted in a manner that comports with the Constitution and permits States to achieve their goal of educating children.

Respectfully submitted,

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Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

And Related Cases

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICI CURIAE* OF JESSE H. CHOPER, *ET AL.* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. ALTHOUGH NO SINGLE TEST HAS BEEN EXPLICITLY ADOPTED TO EVALUATE WHETHER A GOVERNMENT PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE, THE COURT HAS BEEN GUIDED BY TWO GENERAL THEMES WHICH, IN TURN, HAVE BEEN INFLUENCED BY A SERIES OF SPECIFIC FACTORS 7

II. THE PURPOSE OF THE SCHOLARSHIP PROGRAM IS SECULAR AND ITS EFFECT IS NOT TO ADVANCE RELIGION 10

III. THE PROGRAM'S ELIGIBILITY REQUIREMENTS ARE NEUTRAL 11

IV. THE INDEPENDENT CHOICES OF PARENTS DETERMINE WHERE THE SCHOLARSHIP WILL BE USED 14

V. THE PERCENTAGE OF PARENTS WHO CHOOSE TO SEND THEIR CHILD TO A RELIGIOUS SCHOOL IS NOT CONSTITUTIONALLY SIGNIFICANT 17

VI. THE PROGRAM DOES NOT HAVE THE IMPERMISSIBLE EFFECT OF INCULCATING RELIGIOUS BELIEFS 18

TABLE OF CONTENTS – Continued

Page

VII. A REASONABLE OBSERVER WILL NOT PERCEIVE THE PROGRAM TO BE STATE ENDORSEMENT OF RELIGION 19

VIII. SINCE THE SCHOLARSHIP PROGRAM COSTS THE STATE SUBSTANTIALLY LESS THAN TO SEND STUDENTS TO PUBLIC SCHOOLS, THE STATE RECEIVES FULL SECULAR VALUE FOR ITS EXPENDITURE, AND IT DOES NOT SUPPORT THE RELIGIOUS MISSION OF RECIPIENT SCHOOLS 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 8, 12, 17, 18, 22, 24

Bowen v. Kendrick, 487 U.S. 589 (1988) 14

Capitol Square Review v. Pinette, 515 U.S. 753 (1995) ..9, 20

County of Allegheny v. ACLU, 492 U.S. 573 (1995) ...8, 9

DeRolph v. State of Ohio, 677 N.E. 2d 733 (Ohio 1997) 22

Lee v. Weisman, 505 U.S. 577 (1992) 9

Lemon v. Kurtzman, 403 U.S. 602 (1971) ...7, 8, 9, 10, 12

Lynch v. Donnelly, 465 U.S. 668 (1984) 9

Mitchell v. Helms, 530 U.S. 793 (2000) ..... *passim*

Mueller v. Allen, 463 U.S. 388 (1983) 11, 15, 17

Reed v. Rhodes, 455 F. Supp. 546 (N.D. Ohio 1978) 2

Reed v. Rhodes, 869 F. Supp. 1274 (N.D. Ohio 1994) 4

Reed v. Rhodes, slip op., No. 1:73 CV 1300 (N.D. Ohio, Mar. 3, 1995) 3

Reed v. Rhodes, 934 F. Supp. 1459 (N.D. Ohio 1996) 3

Reed v. Rhodes, 1 F. Supp. 2d 705 (N.D. Ohio 1998) 2

Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819 (1995) 10, 12, 24

Wallace v. Jaffree, 472 U.S. 38 (1985) 9, 10

Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) 12, 15, 19, 23

TABLE OF AUTHORITIES – Continued

Page

Wolman v. Walter, 433 U.S. 229 (1977) 11

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CODES AND STATUTES

Ohio Rev. Code §§ 3313.974-3313.979 2

§ 3313.974(G) 4

§ 3313.975(A) 2, 4

§ 3313.976(4) 13

§ 3313.976(6) 13

§ 3313.976(8) 4

§ 3313.977(A)(1)(c) 13

§ 3313.978(C)(1) 4

§ 3313.979 6

§ 3314.01 4

§ 3317 21

§ 3317.012(A) 4, 5

§ 3317.02 21

§ 3317.02(B) 21

§ 3317.02(D)(1) 21

§ 3317.02(N) 21

TABLE OF AUTHORITIES – Continued

Page

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Jay Greene, *A Survey of Results from Voucher Experiments* (2000) 5

INTEREST OF THE AMICI CURIAE

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[1] Counsel for the parties did not author this brief in whole or in part. The American Education Reform Council, which is not a party to the case, provided a contribution towards the preparation and submission of this brief.

Rice, University of Notre Dame; Rosemary Salomone, St. John's University; Bernard Siegan, University of San Diego; Gregory Sisk, Drake University; Steve Smith, University of Notre Dame; Andrew Spiropoulis, Oklahoma City University; Harry Tepker, University of Oklahoma; Eugene Volokh, University of California, Los Angeles; Richard Wilkins, Brigham Young University; John Witte, Emory Law School. The law professors joining in this brief may not subscribe in all particulars to each of the arguments set forth; but all agree that under the Court's Establishment Clause jurisprudence, the challenged program is constitutional.

STATEMENT OF THE CASE

The Pilot Project Scholarship Program, Ohio Rev. Code §§ 3313.974-3313.979, provides funding for parents to send their children to "alternative schools" in districts that "are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent." Ohio Rev. Code § 3313.975(A). This unusual criterion only applies to one district, the Cleveland City School District (CCSD), and can only be understood in the context of its troubled history.

In 1973, many African-American parents filed an anti-discrimination lawsuit against CCSD. *See Reed v. Rhodes*, 1 F. Supp. 2d 705, 709 (N.D. Ohio 1998). In 1978, the Federal District Court for the Northern District of Ohio found over 200 specific constitutional violations by CCSD. *Reed v. Rhodes*, 455 F. Supp. 546, 552 (N.D. Ohio

1978). The problems that have plagued CCSD were not limited to a failure to follow desegregation orders, but also included abysmal retention rates, dismal academic performance, and a frightful safety record.

This litigation has continued into the 1990s as have CCSD's many troubles. By 1995, the court described CCSD as a system in "total fiscal and administrative collapse." *Reed v. Rhodes*, 934 F. Supp. 1459, 1464 (N.D. Ohio 1996 (quoting its order of March 3, 1995)). CCSD's budget between 1992 and 1995 soared while its academic performance plummeted.[2] Absentee rates, dropout rates, and non-promotion rates all rose as test scores fell to the lowest level in the state.[3] CCSD itself could no longer meet payroll, despite its increased budget. It failed to account for a $40 million advance loaned to it by the state in 1994-95.[4] The court found that CCSD had "no credit rating . . . no credibility . . . was without educational, fiscal and administrative direction . . . [and] was without an available, viable contingency plan designed to confront and correct its cascading catastrophic predicament." *Reed v. Rhodes*, 934 F. Supp. at 1464. As a consequence, the court transferred control of the district to the Ohio State Superintendent for Education. *Reed v. Rhodes*, slip op., No. 1:73 CV 1300 (N.D. Ohio, Mar. 3, 1995).

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[2] CCSD's indebtedness rose from $35 million in 1992 to $140 million in 1995. CCSD overspent its $500 million budget by $70 million in 1995. *Reed v. Rhodes*, 934 F. Supp. at 1461 n. 1.

[3] By the close of the 1994 school year, the student absentee rate in grades 9-12 increased to 29%; the dropout rate rose to 35%; the non-promotion rate was 42% in 1994 and rose to 61% in 1995. *Reed v. Rhodes*, 934 F. Supp. at 1461 n. 1.

[4] *Reed v. Rhodes*, 934 F. Supp. at 1464.

During the course of the litigation, the court urged the state "to think about innovative programs and undertakings. . . . " *Reed v. Rhodes*, 869 F. Supp. 1274, 1277 (N.D. Ohio 1994). The scholarship program was enacted in this context to help remedy the complete collapse of the education system in the state's largest city.[5] Providing alternatives to parents is the sole reason for the program. It particularly enables low income parents to remove their children from the failed Cleveland public schools and send them to "alternative schools" or, if the parents choose to have their children remain in a CCSD public school, it authorizes funds for extra tutoring. Ohio Rev. Code § 3313.975(A).

An alternative school is defined as "a registered private school located in a [scholarship program] school district or a public school located in an adjacent school district." Ohio Rev. Code § 3313.974(G). If parents choose to send their child to a private school, the program will provide a grant for 90 percent of tuition up to $2,500 (making $2,250 the maximum scholarship) per eligible child for low income families, and 75 percent of tuition per child for other families (making $1,875 the maximum scholarship for such families).[6] If parents choose to send their child to a public school in an adjacent district, the program will provide that public school with $2,250 (the

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[5] Additional remedies include the Community School Program. Ohio Rev. Code § 3314.01 *et seq*. This program has been enlarged to include Pilot Project Scholarship Program districts and districts in addition to Cleveland that are in a state of academic emergency. Ohio Rev. Code § 3314.02(A)(3).

[6] Ohio Rev. Code § 3313.976(8) and Ohio Rev. Code § 3313.978(C)(1).

maximum scholarship amount) in addition to the base per pupil cost funded by the state (approximately $4,334 for Cuyahoga County, where CCSD is located), Ohio Rev. Code § 3317.012(A), for a total of $6,584. Despite this financial incentive, no public school in an adjacent district has chosen to participate in the program.

In the 1999-2000 academic year, 56 private schools in the Cleveland district (46 of which are religious) participated in the program. The parents of 96 percent of the students receiving a scholarship from this program chose to have their child attend a religious school. The overwhelming majority of children who participate in the program are members of underrepresented minority racial groups,[7] and are from single parent, low income families.[8] This year alone, the scholarship program is providing 4,000 students who live in CCSD with new opportunity to realize their potential by attending a more

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[7] Approximately 73.4% of students in 1999 were minorities: approximately 57.4% African American; 6.1% Hispanic; 3.8% Multi-Racial; 2.8% Other. Gen. Accounting Office. GAO 01-914 (August, 2001) *Publicly Funded Voucher Programs*, at 17.

[8] 70% of students in 1999 were from single parent low income families. Overall, 78% of the students participating are from low income families. Jay Greene, *A Survey of Results from Voucher Experiments*, Harvard University (2000).

68.7% of the mothers of scholarship students were African American compared to 45.9% in the CCSD public school population. 4.2% of the mothers were Hispanic and 2.2% were Asian compared to 8.0% Hispanic and 0.9% Asian in the public school population. Jay Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, Harvard University (1999) Table 1.

promising new school (or getting tutoring at their existing school).

SUMMARY OF THE ARGUMENT

The scholarship program satisfies the major criteria that this Court has articulated in recent years to test potential Establishment Clause violations. Neither its "purpose" nor its "effect" is to advance religion. Its eligibility criteria are religiously neutral. Parents have the opportunity to choose from a variety of schools, public and private, sectarian and non-sectarian. The public schools within the program's available choices include those in Cleveland's suburbs, which were provided a significant financial incentive to participate. Their decision not to do so, for their own reasons and against their own financial interests, should certainly not be used to diminish the breadth of the program's facial neutrality in respect to the number of options afforded to Cleveland parents. Regardless of the decision by public schools in adjacent districts, parents still have a wide array of choices. If parents select a religious school, they may choose from a diverse group including Roman Catholic, Islamic, and those of various Protestant denominations.

Since the dollar amount of the benefit does not change based on the school that parents select, the state provides no financial incentive for parents to choose a particular private school. Since the program makes the grants payable only to parents and not to schools, Ohio Rev. Code § 3313.979, a school can benefit under the

program only after the parents have independently chosen the school for their child.

All of the factors stated above should cause a reasonable observer, familiar with the history of the Cleveland public schools, to perceive the state scholarship program (which includes the new opportunity to attend private schools within the district and suburban public schools outside it) not as an endorsement of religion, but rather as an effort to ensure that all children who live in Ohio receive an adequate education.

Finally, since the maximum scholarship available under the program is markedly less than half of the state's cost to educate each student in Ohio's public schools, there is a strong assurance that the state benefit will not support the religious mission of any recipient school, result in government inculcation of religious beliefs, or directly fund core religious activities.

ARGUMENT

I. ALTHOUGH NO SINGLE TEST HAS BEEN EXPLICITLY ADOPTED TO EVALUATE WHETHER A GOVERNMENT PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE, THE COURT HAS BEEN GUIDED BY TWO GENERAL THEMES WHICH, IN TURN, HAVE BEEN INFLUENCED BY A SERIES OF SPECIFIC FACTORS.

The Court's opinions over the last fifteen years have suggested, but not explicitly adopted, a standard for judging Establishment Clause issues to replace the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602

(1971). Two somewhat overlapping themes have recently garnered substantial support, both of which have drawn on the *Lemon* test by continuing "to ask whether the government acted with the purpose of advancing or inhibiting religion, and . . . likewise . . . whether the aid has the 'effect' of advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 223 (1997).

The first theme, put forward by the prevailing plurality (Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) in *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court's most recent ruling on the issue of aid to religious schools, emphasizes "the principle of neutrality." This principle was directly applied to the issue in the instant case by the *Mitchell* plurality's statement that "if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." *Id.* at 810.

The second theme, the "endorsement" test, initially developed by Justice O'Connor and invoked a number of times in opinions of the Court, finds an Establishment Clause violation when government "endorses religion," which occurs when government makes a "statement that religion or a particular religious belief is favored or preferred,"[9] or when a reasonably informed observer would conclude that official activity "sends a message to nonadherents that they are outsiders, not full members of the

[9] *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1995).

political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[10] At varying times, the endorsement test has been approved by Justice Stevens,[11] Justice Souter,[12] Justice Ginsburg,[13] and Justice Breyer.[14]

In applying these general themes, the Court has also enumerated a series of specific factors to analyze the constitutionality of government action under the Establishment Clause. The sections below will discuss these factors – who chooses where government aid is put to use, and whether government itself inculcates religious beliefs or directly funds core religious activities – in addition to the "endorsement" and "neutrality" themes and *Lemon's* "purpose" and "effect" criteria upon which both themes draw.

[10] *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). More extensive elaboration and application of the endorsement test, may be found in Justice O'Connor's concurring opinions in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 772-95 (1995); *County of Allegheny v. ACLU*, 492 U.S. 573, 623-37 (1989); and *Wallace v. Jaffree*, 472 U.S. 38, 67-79 (1985).

[11] *Wallace, supra* note 10; *Lee v. Weisman*, 505 U.S. 577 (1992); *Capitol Square, supra* note 10.

[12] *Lee, supra* note 10; *Capitol Square, supra* note 10.

[13] *Capitol Square, supra* note 10.

[14] *Capitol Square, supra* note 10; *Mitchell v. Helms*, 530 U.S. 793 (2000).

II. THE PURPOSE OF THE SCHOLARSHIP PROGRAM IS SECULAR AND ITS EFFECT IS NOT TO ADVANCE RELIGION

In an important, early exposition of the endorsement test, Justice O'Connor explained in *Wallace v. Jaffree*, 472 U.S. 38 (1985):

> The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect. In this country, . . . it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

Wallace at 69-70 (O'Connor, J., concurring). Similarly, in *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court reasoned that "if there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, [the Court] must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation." *Id.* at 838-839.

The secular purpose of the scholarship program in this case is compelling. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court held "[t]he State has . . . a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them." *Id.* at 395 (quoting *Wolman v. Walter*, 433 U.S. at 262 (Powell, J., concurring)). The Cleveland public schools were failing their students, and the program was enacted not to provide financial relief for existing private religious or nonsectarian schools, but to remedy CCSD's abysmal record by expanding educational opportunities for the students who were the victims of this record. Further, as will be discussed in the sections that follow, the practical details of the program's operation demonstrate that its "effect" – as that term has been understood in this Court's recent rulings – does not advance religion.

III. THE PROGRAM'S ELIGIBILITY REQUIREMENTS ARE NEUTRAL

Although a majority of the Court has not found that a program's neutrality is determinative of its validity, the Court has agreed that neutrality is a prime criterion in determining whether a government aid program's effect is to advance or endorse religion. "A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. . . . [T]he guarantee of neutrality is respected, not offended, when the government, following evenhanded policies, extends benefits to recipients whose ideologies and viewpoints,

including religious ones, are broad and diverse." *Rosenberger* at 839. "We have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated benefit." *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 8 (1993). "[T]he mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion." *Agostini*, 521 U.S. at 235, quoting *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488-89 (1986). In *Mitchell v. Helms*, 530 U.S. at 838 (O'Connor, J., concurring), Justice O'Connor, joined by Justice Breyer, concurred in the result, stating that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges. Our cases have described neutrality in precisely this manner, and we have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid." Justice Powell wrote in *Witters*, 474 U.S. at 490-91 (Powell, J., concurring), that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of *Lemon v. Kurtzman*, because any aid to religion results from the private decisions of beneficiaries." See also *id.* at 493 (O'Connor, J., concurring).

The scholarship program plainly satisfies the neutrality criterion. It applies to all parents who live in the district. Students in all Cleveland schools may participate and the only preference is for children of low income

families[15] – a religiously neutral criterion that furthers the program's secular purpose of providing expanded opportunities for students in the inner city public schools who generally are financially unable to move to the suburbs or attend private schools. Students may use scholarship program funding to receive additional tutoring in Cleveland public schools. Students who choose to attend private schools may use their scholarships at any participating private school in the district. Students who wish to attend a public school in adjacent districts bring a financial bonus for the school – the scholarship – in addition to the formula amount.

Schools that participate in the program cannot discriminate on the basis of "race, religion, or ethnic background" in respect to admission of scholarship students, Ohio Rev. Code § 3313.976(4), nor "teach hatred of any person or group," Ohio Rev. Code § 3313.976(6). They must also agree not to require low-income scholarship recipients to pay more than 10 percent of tuition up to a maximum of $250, thus making this new opportunity meaningful for low-income students. The schools' eligibility to participate in the program is based on secular criteria (for example their geographic location, their willingness to comply with certain health and safety standards, etc.). None of these criteria concern religion except to guarantee that religion is not a factor in the selection of

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[15] Ohio Rev. Code § 3313.977(A)(1)(c) gives children from low income families a preference in the selection process for the scholarship program.

scholarship students. Islamic, Protestant, Roman Catholic, and purely secular schools all participate, thus representing the diversity of the community.

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court upheld a program that included religious groups in the organizations to which aid was distributed. The program defined a potential recipient as a "public or nonprofit private organization or agency which demonstrates the capability of providing the requisite services." *Id.* at 608 (citations omitted). The Court found "a fairly wide spectrum of organizations [was] eligible to apply for and receive funding under the Act, and nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution." *Id.* at 608.

IV. THE INDEPENDENT CHOICES OF PARENTS DETERMINE WHERE THE SCHOLARSHIP WILL BE USED.

Another highly important factor, recognized by the Court in a series of decisions involving programs that resulted in government aid being used in religious schools, concerns the identity of the recipients. As stated by Justice O'Connor, joined by Justice Breyer, concurring in *Mitchell v. Helms*, when the aid is "provided directly to the individual student [or parent] who, in turn, ma[kes] the choice of where to put that aid to use," it is "less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution. . . . Any money that ultimately went to religious institutions did

so only as a result of the genuinely independent and private choices of aid recipients." *Mitchell* at 841 (citations omitted).

In *Mueller v. Allen*, the Court upheld a tax deduction available to all parents whose children incurred certain educational expenses regardless of whether the child attended a public school, a private secular school, or a private religious school. The Court held that "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. . . . Under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children." *Id.*, 463 U.S. at 399.

In *Witters*, beneficiaries of a vocational retraining program could use their aid to train for a religious profession at a religious institution. The Court held that "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Id.* at 487. As Justice White wrote in his concurrence, "[s]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* test, because any aid to religion results from the private choices of individual beneficiaries." *Id.* at 490-91 (White, J., concurring).

In *Zobrest*, the Court upheld a program that allowed a state-paid sign language interpreter to translate for a hearing-impaired child in the school of the child's choice:

> By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the . . . [program] creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking.

Id. at 10.

Under the scholarship program in this case, the parents and not the state determine where the benefit will be applied. The program does not provide a financial incentive that could influence parents' decisions to send their children to a religious school. (In fact, there is a financial disincentive to send children to a private school, religious or nonsectarian: parents who send their child to any private school are responsible for at least 10 percent of tuition and are not eligible for tutoring grants.) Further, there is no financial incentive for private schools to seek students based on religious criteria. All students bring an equal benefit with them to attend the private school of their family's choice. Public schools in adjacent districts do have a special financial incentive to participate, unlike private schools in the Cleveland district, but this incentive is not based on religious status.

V. THE PERCENTAGE OF PARENTS WHO CHOOSE TO SEND THEIR CHILD TO A RELIGIOUS SCHOOL IS NOT CONSTITUTIONALLY SIGNIFICANT.

In *Agostini*, 521 U.S. at 229, the Court held:

> [The Court is not] willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest, at the time of litigation, had been the only child using a publicly funded sign-language instructor to attend a parochial school.

In upholding the program in *Mueller*, 463 U.S. at 401, where about 95 percent of the participating children were alleged to have attended religious schools, the Court held "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." It should be noted that in this case, the percentage of students attending private schools is affected not only by parents' independent choices, but also by the decisions of suburban public schools that chose not to participate despite favorable financial incentives. Third parties' choices should not determine the constitutionality of this program and penalize families who seek better education for their children. These parents chose from options then available, and no doubt many hope that over time, as new schools arise and perhaps public suburban schools begin to participate, even more options will become open to them.

VI. THE PROGRAM DOES NOT HAVE THE IMPERMISSIBLE EFFECT OF INCULCATING RELIGIOUS BELIEFS.

The Court has "repeatedly recognized" that "government inculcation of religious beliefs has the impermissible effect of advancing religion." *Agostini*, 521 U.S. at 223. But the Court has also made clear that when government aid is not provided directly to the schools but is "disbursed directly to students, who then use the money to pay for tuition at the educational institution of their choice," then the aid "will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination." *Id.* at 226. Further, the Court has noted that

> the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling the Court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. . . . This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.

Id. at 230-32.

This is precisely the situation in the scholarship program in this case where the aid is provided directly to parents based on neutral criteria for use at a school based on the parents' choice. These Cleveland parents made

several choices. Many continued to keep their children in the Cleveland public schools where they were promised extra tutoring. Some selected private non-religious schools. In all likelihood, some would have preferred to send their children to public schools in the suburbs, but that option was foreclosed by their nonparticipation. Other parents chose religious schools. Some of those parents, no doubt, did so because they valued religious education, others because they felt that the education in those schools was better for their children even though they followed a different faith.[16]

VII. A REASONABLE OBSERVER WILL NOT PERCEIVE THE PROGRAM TO BE STATE ENDORSEMENT OF RELIGION.

In *Mitchell v. Helms*, Justice O'Connor, joined by Justice Breyer, also examined the relationship of "true private choice" in the context of an endorsement analysis. In contrasting the program in *Mitchell* to those in *Witters* and *Zobrest*, Justice O'Connor wrote:

> In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same

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[16] In 1999, the religious affiliation of mothers who had children participating in the program was as follows: 43.4% Baptist; 10.3% other Protestant; 18.9% Roman Catholic; 13.7% other religion; and 12.1% no religious affiliation. Jay Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, Harvard University (1999) Table 1.

> religious schools. . . . [W]hen government aid supports a school's religious mission only because of independent choices made by numerous private individuals to guide their secular aid to that school, no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief. . . . Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.

Id. at 842-43 (citations omitted) (O'Connor, J., concurring).

As is evident from all that has been said, the program in this case falls into the category just described. Students who attend a religious school cannot send a message that "they are insiders" or "favored members of the community." Rather, the only message is that they do not cease to be equal members of the community by choosing one school – public or private – from among the many that participate in the program.

Moreover, it would seem extremely unlikely that a reasonably informed observer – especially one "aware of the history and context of the community," *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring), and of Ohio's effort to provide improved educational opportunities to children whose local public schools have failed them – would conclude that the scholarship program was meant to endorse religion. That a participating religious school is forbidden from preferring scholarship program students of its own faith only adds to this perception of nonendorsement.

VIII. SINCE THE SCHOLARSHIP PROGRAM COSTS THE STATE SUBSTANTIALLY LESS THAN TO SEND STUDENTS TO PUBLIC SCHOOLS, THE STATE RECEIVES FULL SECULAR VALUE FOR ITS EXPENDITURE, AND IT DOES NOT SUPPORT THE RELIGIOUS MISSION OF RECIPIENT SCHOOLS.

The exact sum the state spends for each child's public school education is difficult to ascertain. At present, Ohio allocates a specific amount to every public school, for every pupil enrolled in the school. This funding amount, called the "base formula amount," Ohio Rev. Code § 3317.02,[17] was $4,294 for the 2001 fiscal year. Ohio Rev. Code § 3317.02(B). The formula amount is multiplied by a "cost of doing business formula" for each locality in Ohio. Ohio Rev. Code § 3317.02(N).[18]

As the name implies, the "base formula amount" does not represent the total per student expenditure by the state. In addition, Ohio allocates funds for building repairs, summer school remedial programs, various incentives to lower class sizes, and other programs too numerous to list here, *see* Ohio Rev. Code Chapter 3317. Consequently, the Ohio Supreme Court has stated that "the formula amount has no real relation to what it

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[17] Rather than change the appropriation as each child enters or exits school, the state uses an "average daily membership" formula to determine the number of students attending a particular school. Ohio Rev. Code § 3317.02(D)(1). The number of students in a school's average daily membership is multiplied by the per student "base formula amount."

[18] For Cuyahoga County this formula is 1.0697.

actually costs to educate a pupil." *DeRolph v. State of Ohio*, 677 N.E.2d 733, 738 (Ohio 1997).

What is central to this case is that because Ohio pays a maximum of $2,250 to educate each student who participates in the scholarship program – an amount just slightly more than half of the base formula amount – it is fair to conclude that the scholarship program enables the state to finance a child's education for markedly less than half of the state's per capita public education cost.

In the most recent decisions of this Court involving the issue of government aid to religious schools, Justice O'Connor recognized that the Court has "departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid," *Agostini*, 521 U.S. at 225, but also expressed the Court's concern "that secular government aid not be diverted to the advancement of religion," *Mitchell v. Helms*, 530 U.S. at 840, or to "government inculcation of religious beliefs," *Agostini*, 521 U.S. at 223. In addressing this latter concern in *Mitchell*, Justice O'Connor, joined by Justice Breyer, urged that

> To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes. . . . In *Agostini*, we repeatedly emphasized that . . . plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination.

Id. at 857-58.

Although the Court has not developed the scope of plaintiffs' burden of proof in any detail, it is sensible to assume that as long as the state's scholarship is significantly less than what the state pays to educate students in public schools, the private school is not being paid more than the value of the secular services it renders. Like the transaction in *Witters*, which was characterized as a paycheck, the transaction of a state procuring an education for one of its residents through a private contractor is no different than other purchases by the state.

A prime criterion on which such a transaction should be evaluated is the value the state is receiving for its expenditure. Here, the benefit is an education for a child. In fact, the state is using far fewer tax dollars to pay for an education through the scholarship program than would be used to pay for a child's education at a public school. Under these circumstances, there is strong assurance that the scholarship program will not support the religious mission of any recipient school or result in government indoctrination of religion.

CONCLUSION

The Cleveland scholarship program would not be perceived by a reasonable observer to constitute an endorsement of religion. Neither its "purpose" nor "effect," as these terms are explained in this Court's recent decisions, is to advance religion. The program's criteria for recipients are neutral in respect to religion

(except to prohibit participating schools from discriminating on the basis of "race, religion, or ethnic background"). Its only preference is for children of low income families seeking improved education for their children who badly need it. The scholarship is provided to the parents, not directly to schools. Although a high percentage have chosen to have their children attend private religious schools, rather than to have them receive additional tutoring in Cleveland public schools or to attend a private nonsectarian school, this was the product of their genuinely independent and private choice, a result likely accentuated by the refusal of public schools in districts adjacent to Cleveland to participate in the program. The state provides no incentive for parents to choose a particular type of school. Finally, the fact that the scholarship program costs the state markedly less than half the amount it spends for public education strongly assures that (1) public funds will "not be diverted [either] to the advancement of religion," *Mitchell v. Helms* at 840 (O'Connor, J., concurring), or to "government inculcation of religious beliefs," *Agostini* at 223, and that (2) the state will not provide "direct funding of core religious activities," *Rosenberger* at 863 (Souter, J., dissenting).

We therefore urge the Court to affirm the constitutionality of the program.

Respectfully submitted,

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Nos. 00-1751, 00-1777, and 00-1779

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF OHIO, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

HANNA PERKINS SCHOOL, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

SENEL TAYLOR, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR CLEVELAND CITY COUNCILWOMAN FANNIE LEWIS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Establishment Clause permits a State to enact an educational program for the benefit of low-income children in its most economically depressed city, under which eligible children are provided scholarships to attend the school of their choice, whether it is public or private, secular or religious.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 2

I. Evenhanded School Choice Programs Comport With The History And Purposes Of The First Amendment 3

A. History Does Not Support Exclusion Of Religious Institutions From Neutral And Generally Applicable Programs Of Aid 5

B. This Court's Recent Establishment Clause Cases Support The Constitutionality Of Evenhanded School Choice Programs 10

C. This Court's Focus On Neutrality And Private Choice Serves The Fundamental Purposes Of The First Amendment 13

II. The Ohio Pilot Scholarship Program Satisfies This Court's Criteria Of Neutrality And True Private Choice 15

A. The Ohio Pilot Scholarship Program Is Entirely Neutral Between Secular And Religious Schools, Leaving The Choice Of Schools To Individual Families 17

B. A Substantial Proportion Of Students Attending Religious Schools In One Component Of Ohio's Educational Choice Scheme Does Not Make It Unconstitutional 19

TABLE OF CONTENTS—Continued

Page

C. The Court Of Appeals Was Wrong In Concluding That The Ohio Program Was Designed To Discourage Nonreligious Schools From Participating 25

III. The Decision Below Creates Needless Conflict Between The Establishment Clause And The Rest Of The First Amendment 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Page**

Agostini v. *Felton*, 521 U.S. 203 (1997) ..... *passim*

Board of Educ. v. *Allen*, 392 U.S. 236 (1968) 10

Board of Education of Kiryas Joel v. *Grumet*, 512 U.S. 687 (1994) 4

Bowen v. *Kendrick*, 487 U.S. 589 (1988) 17

Bradfield v. *Roberts*, 175 U.S. 291 (1899) 7

Church of Lukumi Babalu Aye v. *City of Hialeah*, 508 U.S. 520 (1993) 29

Cochran v. *Board of Education*, 281 U.S. 370 (1930) ... 10

Committee for Public Education & Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973) ..... *passim*

Committee for Public Education & Religious Liberty v. *Regan*, 444 U.S. 646 (1980) 11

Corporation of Presiding Bishop v. *Amos*, 483 U.S. 327 (1987) 19

Employment Div. v. *Smith*, 494 U.S. 872 (1990) 29

Everson v. *Board of Educ.*, 330 U.S. 1 (1947) 5, 10

Good News Club v. *Milford Central School*, 121 S. Ct. 2093 (2001) 29

Hobbie v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) 29

Lamb's Chapel v. *Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) 29

TABLE OF AUTHORITIES—Continued

Page

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 11, 15, 16, 20

Meek v. *Pittenger*, 421 U.S. 349 (1975) 10, 12, 24

Mitchell v. *Helms*, 530 U.S. 793 (2000) ..... *passim*

Mueller v. *Allen*, 463 U.S. 388 (1983) 11, 14, 19

Reed v. *Rhodes*, 934 F. Supp. 1533 (N.D. Ohio 1996) 1

Rendell-Baker v. *Kohn*, 457 U.S. 830 (1982) 20

Rosenberger v. *Rector of Univ. of Virginia*, 515 U.S. 819 (1995) 4, 12, 15, 29

Sherbert v. *Verner*, 374 U.S. 398 (1963) 29

Thomas v. *Review Bd.*, 450 U.S. 707 (1981) 29

Wallace v. *Jaffree*, 472 U.S. 38 (1985) 6

Widmar v. *Vincent*, 454 U.S. 263 (1981) 14, 29

Witters v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986) ..... *passim*

Wolman v. *Walter*, 433 U.S. 229 (1977) 10, 12

Zobrest v. *Catalina Foothills School District*, 509 U.S. 1 (1993) 12, 14, 15, 25

Statutes:

Act of July 16, 1866, ch. 200, § 13, 14 Stat. 173, 176 8

Adolescent Family Life Act, 42 U.S.C. § 300z *et seq.* ... 17

TABLE OF AUTHORITIES—Continued

Page

Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 55 (1965), reauthorized as Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (20 U.S.C. § 7301 *et seq.*) (1994) 9

Ohio Rev. Code:

§ 3313.976(A)(8) 17

§ 3313.977(A) 17

§ 3314.04 21

§ 3317.03(I)(1) 17

Miscellaneous:

A Bill Establishing a Provision for Teachers of the Christian Religion, attached as Supplemental Appendix to dissenting opinion of Rutledge, J., *in Everson* v. *Board of Educ.*, 330 U.S. 1, 72 (1947) 5

Richard A. Baer, *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J.L. & POL. 449 (1990) 21

BERNARD BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY (1960) 7

Ronald E. Butchart, NORTHERN SCHOOLS, SOUTHERN BLACKS, AND RECONSTRUCTION: FREEDMEN'S EDUCATION, 1862-1875 (1980) 9

THOMAS J. CURRY, THE FIRST FREEDOMS (1986) 5

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Page

FUNK & WAGNALLS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (comp. ed. 1987) 20

RICHARD J. GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS (1937) 7, 8

CHARLES LESLIE GLENN, THE MYTH OF THE COMMON SCHOOL (1988) 8

Catherine Minter Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, National Bureau of Economic Research Working Paper No. 4979 (1994) 22

John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, __ MICH. L. REV. __ (forthcoming 2002) 8

LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (1987) 7, 8

CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860 (1983) 8

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) 14

Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) 6, 8

LEARNING FROM SCHOOL CHOICE (Paul E. Peterson & Bryan C. Hassel eds., 1998) 3

STEPHEN MACEDO, DIVERSITY AND DISTRUST (2000) 8

TABLE OF AUTHORITIES—Continued

Page

James Madison, *Memorial and Remonstrance Against Religious Assessments*, attached as Appendix to dissenting opinion of Rutledge, J., *in Everson* v. *Board of Educ.*, 330 U.S. 1, 63 (1947) 5

Ward M. McAfee, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOLS IN THE POLITICS OF THE 1870s (1998) 9

Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453 (2000) 8

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) 14

John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. AM. HIST. 97 (1997) 9

STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY (1996) 7

David Osborne, *Healthy Competition*, THE NEW REPUBLIC, Oct. 4, 1999, at 31 22

Marie Louise Points, *New Orleans*, in 11 THE CATHOLIC ENCYCLOPEDIA 5 (1911) 7

DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973 (1974) 8

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TABLE OF AUTHORITIES—Continued

Page

Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999) . 15

Wisconsin Legislative Audit Bureau, *An Evaluation—Milwaukee Parental Choice Program* (Feb. 2000) .. 22

John F. Witte et al., *Fifth Year Report: Milwaukee Parental Choice Program*, Table I, Department of Political Science and Robert M. La Follette Institute of Public Affairs, University of Wisconsin-Madison (Dec. 1995) 22

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Fannie Lewis is a Democratic City Councilwoman representing Cleveland's seventh ward ("Ward 7"), a position to which she was first elected more than 20 years ago.[1] Ward 7 comprises core inner-city neighborhoods and is populated by some of the poorest people in the United States. More than 40 percent of Cleveland's residents—and more than 70 percent of the residents of Ward 7—live in poverty. Seventy percent of the students in the City's schools are on Aid to Families with Dependent Children. For many of these children, the chance to attend a private school represents the only hope for breaking out of the poverty cycle in which they are trapped.

Indeed, it is hard to overstate the dire condition of the public schools in Cleveland. The school district meets none of the State's 27 minimum performance standards, and a federal court has ordered a state-level takeover of district schools because of "emergency" conditions resulting from local mismanagement. *Reed* v. *Rhodes*, 934 F. Supp. 1533, 1539 (N.D. Ohio 1996). Despite per-pupil outlays of roughly $7,000—twice the state average, and well above the national average—more than two-thirds of the district's students drop or flunk out before their graduation. Those who do graduate, moreover, read, write, and compute at levels well below their counterparts in other cities. Because they lack the finances to pay for any alternative, however, most inner-city Cleveland residents have no choice but to send their children to the City's troubled public schools.

Not surprisingly, Cleveland's school dropout rates are linked to high rates of unemployment, drug and alcohol abuse, teen pregnancy, welfare dependency, infant mortality, and crime. These problems are especially pronounced for racial minorities

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae* and her counsel made a monetary contribution to the brief's preparation or submission. The parties' written consents to the filing of this brief have been lodged with the Clerk.

living in Ward 7. For example, more than 55 percent of black men living in Cleveland are unemployed.

The condition of Cleveland's schools has long been a matter of concern to Councilwoman Lewis. She has been active in the Cleveland public schools since 1951, when her children first enrolled there. She has witnessed first hand the construction and demolition of more than one dozen city schools, and she has seen these schools continue to deteriorate despite billions of dollars spent to rescue them. The failure of repeated efforts to reform the system from within led her to become involved with the Ohio Pilot Scholarship Program (the "Program"). In January 1995, concerned that members of the legislature were not accurately representing the views of inner-city residents—and especially African Americans—on the subject of school choice, she led several busloads of inner-city residents to Columbus to make known their views. This group—including more than 300 people of various races, political persuasions, and faiths—testified at committee hearings and appealed to every member of the legislature. As a result of these efforts, the Program soon became law.

For these reasons, Councilwoman Lewis has a vital interest in ensuring that the Program is not struck down on the basis of an incorrect interpretation of the Establishment Clause. And to those who decry the Program on the ground that it enables private schools to "cream off" the best students in Cleveland's schools, she has a simple response: "There's nobody left to cream off. Nearly every family that could leave the system did so long ago."

ARGUMENT

By the mid-1990s, it was apparent that the public schools in Cleveland—like those in many American cities—were in crisis. The State spends roughly $7,000 on each student in Cleveland, yet more than two-thirds of them fail to graduate. J.A. 56a; C.A. App. 1620-1621. Thus, with the active support of *amicus*

curiae Fannie Lewis, the legislature embarked on an ambitious experimental program to improve Cleveland's schools by introducing competition and parental choice.

There are substantial reasons both in educational theory and in the experience of other areas to believe that school choice will improve the performance not only of students who choose alternative schools, but of those who choose public schools, which are forced to compete. See LEARNING FROM SCHOOL CHOICE (Paul E. Peterson & Bryan C. Hassel eds., 1998). The question here, however, is not whether that prediction is correct —and if it is not, Fannie Lewis will be among the first to push for new measures—but whether it can be put to the test.

Unfortunately, feeling itself bound by a 1973 decision of this Court, which itself was based on a highly dubious reading of the Establishment Clause, the court below called a halt to Ohio's experiment in educational reform—and with it, the only chance many thousands of children in Cleveland have to attend quality schools. That decision, we submit, is a human tragedy. But more to the point, it was a legal mistake. The decision was based on two fallacies. The first is that schools that fail to separate the religious and secular aspects of education are ineligible for public support even under a neutral program. The second is that the Cleveland program is not genuinely neutral.

I. Evenhanded School Choice Programs Comport With The History And Purposes Of The First Amendment.

This Court's understanding of the Establishment Clause has changed dramatically over the years. *Mitchell* v. *Helms*, 530 U.S. 793, 845 (2000) (O'Connor, J., concurring). But the court below remained mired in the jurisprudence of the 1970s. It relied almost exclusively on *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), despite the inconsistency between *Nyquist* and this Court's more recent decisions. It is possible to distinguish *Nyquist* from this case, as petitioners have shown. But the fundamental premise on which

Nyquist rested—that public assistance may not be provided to children who attend schools that do not separate the religious and secular aspects of education—was wrong from the start. It is inconsistent both with the fundamental principles of the First Amendment and with a long line of this Court's decisions.

The Religion Clauses of the First Amendment must be read in conjunction: the Establishment Clause precludes using state resources to favor or compel religious practice, while the Free Exercise Clause precludes using state authority to disfavor or prohibit it. As Justice Souter explained for the Court in *Board of Education of Kiryas Joel* v. *Grumet*, 512 U.S. 687, 696 (1994), "'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents" (citations omitted). The object of these constitutional provisions was not to create a more secular society, but to create a diverse and pluralistic society, where religious decisions are made by individuals, families, and private institutions. "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." *Id.* at 717 (O'Connor, J., concurring). Thus, "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger* v. *Rector of Univ. of Virginia*, 515 U.S. 819, 839 (1995).

We acknowledge that in our disestablishmentarian constitutional tradition, no one may be forced, through taxation or otherwise, to pay for religious activities. *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring). But that principle is not implicated here. Respondents are being taxed to fund scholarships that benefit all eligible schoolchildren. That has a secular purpose and an effect that is entirely neutral toward religion. Respondents have no legitimate objection to

subsidizing tuition for poor children attending both public and nonpublic elementary and middle schools—any more than taxpayers had a legitimate objection to paying for seminary education in *Witters*, sign-language interpreters in *Zobrest*, textbooks in *Allen*, bus rides in *Everson*, remedial instruction in *Agostini*, computers in *Mitchell*, or standardized tests in *Wolman* and *Regan*. Aiding *education*—while remaining neutral with respect to its religious or secular orientation—is not the same as aiding *religion*.

A. History Does Not Support Exclusion Of Religious Institutions From Neutral And Generally Applicable Programs Of Aid.

Opponents of educational choice programs frequently invoke the experience in Virginia and other States in rejecting religious assessments as a form of religious establishment. See *Everson* v. *Board of Educ.*, 330 U.S. 1, 28-63 (1947) (Rutledge, J., dissenting) (relying on James Madison's *Memorial and Remonstrance Against Religious Assessments* to argue that the state should not pay for bus transportation to religious schools). To treat the assessment controversy as a parallel to cases such as this, however, is to strain the history beyond recognition. The proposal against which Madison remonstrated was a tax for the specific purpose of subsidizing "teachers of the Christian religion"—*i.e.*, clergymen. The express aim of the proposal was to foster and promote religion in general, and Christianity in particular. See THOMAS J. CURRY, THE FIRST FREEDOMS 136-141 (1986). The funds were earmarked for religious purposes, and their distribution was decidedly non-neutral: churches were the only private institutions to which taxpayers could direct their assessments.[2]

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[2] Assessments paid by taxpayers who preferred not to contribute to any church were paid into the "public Treasury," to be "disposed of under the direction of the General Assembly," for "seminaries of learning." A Bill Establishing a Provision for Teachers of the Christian Religion, *reprinted in Everson*, 330 U.S. at 74 (Supplemental Appendix to dissenting opinion of

By contrast, school choice programs such as that in Cleveland have the secular purpose of enabling poor, mostly minority families to escape failing public schools, and the funds are distributed neutrally, without discrimination for or against religion. There is a profound constitutional difference between funding churches for the purpose of supporting religion, and funding all schools without regard to religion for the purpose of supporting education.

Indeed, there is no historical support for the notion that the Establishment Clause requires the state to discriminate against religious individuals or institutions with respect to generally available public benefits. In this litigation, respondents have not pointed to a single instance during the early days of the Republic in which the legitimacy of public grants to religious institutions for the performance of public functions was even challenged, let alone held to be unconstitutional. And despite careful historical research, we are not aware of one.[3]

Rutledge, J.). Taxpayers did not have the option of directing their assessments to other private institutions of their choice. Indeed, since there were no public schools in Virginia at that time, and education was provided almost exclusively under religious auspices, this meant—ironically—that those who objected to giving their money to churches would be forced to give it to church-related schools. As one scholar has pointed out, "[t]he essence of the general assessment was massive discrimination in favor of religious viewpoints." Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 49 (1997).

[3] Even Thomas Jefferson, as strong a separationist as one can find during the founding period, approved of granting public funds to religious groups for public functions including education. His support for education under religious auspices for Indian tribes is well known. See *Wallace* v. *Jaffree*, 472 U.S. 38, 103 (1985) (Rehnquist, J., dissenting). He took the same position within the States, as can be seen in a letter he wrote to the Ursuline Sisters regarding an orphanage and school they operated in New Orleans:

> Whatever diversity of shades may appear in the religious opinions of our fellow citizens, the charitable objects of your Institution cannot be of indifference to any and its furtherance of the wholesome purpose by training up its young members in the way they should go cannot fail to insure the patronage of the government it is under.

Marie Louise Points, *New Orleans*, in 11 THE CATHOLIC ENCYCLOPEDIA 5, 10 (1911).

When this Court first entertained a challenge to government subsidization of the health and welfare activities of religious organizations, it unanimously found it "wholly immaterial" that the recipient institution—a hospital—was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the [institution]." *Bradfield* v. *Roberts*, 175 U.S. 291, 298-299 (1899). Since then, church-related groups and institutions providing health, welfare, and educational services (other than elementary and secondary education) have routinely been recipients of governmental aid. See generally STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY (1996).

The historical record provides no reason to create a special exception for elementary and secondary education. At the time of the framing of the Bill of Rights, there were virtually no state schools.[4] In the early years of the Republic, public support for education generally took the form of grants to private schools, many of which were religious in nature. RICHARD J. GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS 173-262 (1937); BERNARD BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY (1960). In Washington, D.C., where the Establishment Clause then applied, education was provided entirely through private and semi-public institutions—including denominational schools—partially at public expense until 1848. GABEL, *supra*, at 179. Between 1800 and 1830, New York provided public funds to Presbyterian, Episcopalian, Methodist, Quaker, Dutch Reformed, Baptist, Lutheran, and Jewish schools, to an African Free School, and to the "Free School

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[4] The very term "public school" was frequently used in reference to private schools, including denominational schools. LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 6-7 (1987).

Society," a nonsectarian charitable school that was the forerunner of the public school system. JORGENSON, *supra*, at 14-16; DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 7, 20-21 (1974); GABEL, *supra*, at 211-213. These arrangements were not challenged, let alone invalidated, as "establishments" under state or federal law.

Only in the second quarter of the 19th Century did the States of the north and west begin to establish public schools with exclusive rights to public subvention. Even then, the defunding of private schools was not based on supposed Establishment Clause problems, but primarily on nativist and anti-Catholic opposition to alternatives to the Protestant public schools. See generally JORGENSON, *supra*; RAVITCH, *supra*. For example, when Catholics sought to participate in New York's pluralistic educational funding system, a bitter political battle broke out, featuring violent anti-Catholic riots. The end result was to confine funding to public schools. RAVITCH, *supra*, at 33-76.[5]

After the Civil War, Congress began appropriating large sums of money to provide schooling for the newly emancipated freedmen of the South. In the same year that it passed the Fourteenth Amendment, Congress enacted a statute instructing the Freedmen's Bureau to work through private benevolent associations whenever the latter provided suitable teachers. Act of July 16, 1866, ch. 200, § 13, 14 Stat. 173, 176. Most of these associations were missionary societies from the North, some nondenominational and some affiliated with particular religious

[5] For additional accounts of the early cooperation between governments and religious schools and the later struggles to defund Catholic schools, see, *e.g.*, CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860 (1983); CHARLES LESLIE GLENN, THE MYTH OF THE COMMON SCHOOL (1988); STEPHEN MACEDO, DIVERSITY AND DISTRUST 45-87 (2000); Laycock, *supra*, 46 EMORY L.J.at 50-53; Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 459-461 (2000). John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, __ MICH. L. REV. __ (forthcoming 2002).

denominations. Public funds went to Presbyterian, Methodist, Baptist, Congregationalist, and other religious educational societies. See RONALD E. BUTCHART, NORTHERN SCHOOLS, SOUTHERN BLACKS, AND RECONSTRUCTION: FREEDMEN'S EDUCATION, 1862-1875, at 4-9, 33-52 (1980); WARD M. MCAFEE, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOLS IN THE POLITICS OF THE 1870s (1998). Thus, at the time the Establishment Clause was applied to the States via the Fourteenth Amendment, it was not understood to bar aid to religious societies for the education of the young.

In the 1870s, Republicans in Congress attempted to amend the Constitution to prohibit aid to "sectarian" schools (while affirming the practice of Bible reading in the "public" schools), but they were unsuccessful. See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998). Nonetheless, many States adopted "little Blaine amendments," and hostility to Catholic education remained an effective bar to aid to private schooling in most States until after World War II. *Ibid.*; see also John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. AM. HIST. 97 (1997). This is the origin of what the *Mitchell* plurality called a doctrine "born of bigotry." 530 U.S. at 828-829.

More recently, Congress enacted the Elementary and Secondary Education Act of 1965 ("ESEA"),[6] which remains the cornerstone of federal education policy today. The ESEA provides for the "equitable participation" of all students, no matter what kind of school they choose to attend. In this way, the government fosters high quality education for all children—without creating any incentive to seek (or to avoid) religious

[6] Pub. L. No. 89-10, 79 Stat. 55 (1965), reauthorized as Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (20 U.S.C. § 7301 *et seq.*) (1994).

education, without interfering with the autonomy of the private institutions they attend, and without jeopardizing governmental neutrality toward religion. Such programs foster "pluralism and diversity among [the Nation's] public and nonpublic schools." *Nyquist*, 413 U.S. at 773. From the point of view of American families, genuinely neutral school choice programs unquestionably enhance—and in no way threaten— religious liberty.

In short, the lower court's interpretation of the Establishment Clause cannot be traced to the historical principles that inform it. The Establishment Clause bars coerced taxpayer support for religion as such, but it does not bar taxpayer support for the health, educational, and public welfare activities of religious organizations. Accordingly, when the government provides scholarship funds to individual citizens who are free to use those funds at the religious or secular schools of their choosing, it acts in conformity with this nation's longstanding policy of neutrality—not hostility—toward religion.

B. This Court's Recent Establishment Clause Cases Support The Constitutionality Of Evenhanded School Choice Programs.

In its first encounters with the issue, this Court upheld laws that provided aid on a neutral basis to children attending public and nonpublic schools. *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947); *Board of Educ.* v. *Allen*, 392 U.S. 236 (1968); see also *Cochran* v. *Board of Educ.*, 281 U.S. 370 (1930). For a little more than a decade, however, the Court embraced a reading of the Establishment Clause barring public assistance—even on a neutral basis—to schools in which the religious and secular aspects of education were not kept separate and the aid was not channeled solely to the latter. *Nyquist, supra; Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Wolman* v. *Walter*, 433 U.S.

229 (1977).[7] The court below treated these decisions as controlling.

This jurisprudential era did not last long. Beginning with *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), and *Mueller* v. *Allen*, 463 U.S. 388 (1983), this Court issued a line of decisions inconsistent with the fundamental assumptions upon which *Nyquist*, *Meek*, and *Wolman* rested.

Ultimately, in *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court made a decisive break with the *Nyquist* interpretation. The Court unanimously held that the Establishment Clause does not forbid a State to issue a tuition grant to an individual who uses that grant to attend a Bible college for training in the ministry, pursuant to a program of vocational assistance for the blind. Even though the recipient would use the grant to obtain religious education, the Court explained that the grants were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* at 487 (citation omitted). In a concurrence gaining the support of five members of the Court, Justice Powell explained that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test." *Id.* at

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[7] *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), rested on a different rationale. *Lemon* concerned state programs that conditioned public subsidies for the salaries of teachers in religious schools on their agreement not to include religious or moral elements in their teaching. The Court held that enforcing those conditions would constitute an excessive "entanglement" of church and state because they interfered with the schools' autonomy. *Id.* at 608-610. We believe that the Court was correct in ruling that programs structured in that way are unconstitutional—though the constitutional violation, we maintain, was of the free exercise rights of the schools and families, rather than of the Establishment Clause rights of the taxpayer plaintiffs.

490-491 (Powell, J., joined by Burger, C.J., and Rehnquist, J.); see also *id.* at 490 (White, J.); *id.* at 493 (O'Connor, J.).

Post-*Witters* decisions continued in that vein. In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court held that it is constitutional for the state to provide a sign-language interpreter, on a neutral basis, to a deaf student attending a religious school, even though this would obviously aid the "educational mission" of the school and would entail the communication of religious messages. In *Rosenberger*, the Court held that it is constitutional for a public university to pay the printing costs of a student magazine with religious content, pursuant to a neutral funding program for student publications and other student groups. Indeed, the Court in *Rosenberger* held that it is unconstitutional, under the Free Speech Clause, to deny support to an otherwise eligible group on account of its religious viewpoint. 515 U.S. at 828-837.

In *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997), the Court sustained Title I of the ESEA, a federal program in which public school teachers provide remedial instruction to students attending both public and private schools, overruling prior decisions holding the contrary. Significantly, the Court expressly repudiated the prohibition on "substantial aid to the educational function" of religious schools. See *id.* at 225 ("we have departed from the rule * * * that all government aid that directly aids the educational function of religious schools is invalid"). In place of the *Meek-Wolman* approach, *Agostini* substituted "three primary criteria" to evaluate whether aid-to-education programs unlawfully advance religion: whether the aid is distributed on the basis of "criteria that neither favor nor disfavor religion"; whether the aid is distributed in a form that leads to "government inculcation of religious beliefs"; and whether the aid would "create an excessive entanglement" between church and state. *Id.* at 232-234.

Finally, in *Mitchell* v. *Helms*, 530 U.S. 793 (2000), the Court overruled *Meek* and *Wolman*. *Id.* at 807-811, 829-835 (plurality

opinion); *id.* at 844-845 (O'Connor, J., concurring). There the Court sustained Chapter 2 of the ESEA, a federal program that provides computers, software, books, and other instructional materials for the use of students in public and private schools on a neutral basis. Applying the *Agostini* criteria, a four-Justice plurality held that an aid program is constitutional where it "determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content." *Id.* at 829. A concurring opinion by Justice O'Connor, joined by Justice Breyer, relied on a somewhat narrower view. According to them, neutral aid "provided directly to the individual student who, in turn, made the choice of where to put that aid to use" is constitutional without regard to whether it is put to use solely in secular educational settings. *Id.* at 841. Neutral aid provided directly to the religious institution—and not through the medium of a "true private-choice program"—is constitutional unless it is actually put to a religious use. *Id.* at 842.

The *Mitchell* Court did not have occasion to consider the continued vitality of *Nyquist*, but that decision—at least as interpreted by the Sixth Circuit—is plainly inconsistent with both the plurality and the concurrence in *Mitchell*.[8]

C. This Court's Focus On Neutrality And Private Choice Serves The Fundamental Purposes Of The First Amendment.

The two foundations of the Court's recent rulings governing programs of indirect aid to education are the neutral allocation of benefits and the exercise of individual choice. The Court's

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[8] Petitioners offer plausible grounds for distinguishing rather than overruling *Nyquist*, but we believe it would be clearer and more helpful simply to overrule that decision, and any other decisions inconsistent with the *Agostini* criteria. This would allow lower courts to decide cases in accordance with the Court's current doctrine, rather than looking for factual similarities to past cases based on repudiated logic.

focus on neutrality and individual choice serves a number of interrelated constitutional purposes. First, it maintains the distinction between *governmental* promotion of religion, which the Constitution forbids, and *private* religious decisionmaking, which the Constitution protects. State programs that are wholly neutral in offering educational aid to a class defined without reference to religion do not violate the Establishment Clause, because any aid to religion results from "genuinely independent and private choices" of individuals and cannot be attributed to the state. *Witters*, 474 U.S. at 487; see *Mueller*, 463 U.S. at 398-399; *Zobrest*, 509 U.S. at 10; *Agostini*, 521 U.S. at 226, 230-231; *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring).

Second, when aid is provided on an evenhanded basis to all parents, it avoids creating any "financial incentive" to choose religious schooling or to "modify their religious beliefs or practices in order to obtain those services." *Agostini*, 521 U.S. at 231-232; see *Mitchell*, 530 U.S. at 845 (O'Connor, J., concurring); *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 488. In this way, the Establishment Clause serves as a guarantor of the freedom of religious choice. The financial muscle of the state must not be used to encourage or discourage religious decisions. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-1002 (1990); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168-169 (1992). Families should be able to choose religious or secular education for their children on the basis of their conscience and convictions, not because the government is funding one and not the other alternative.

Third, when benefits are distributed among a wide array of beneficiaries on the basis of neutral and objective criteria, there is no implied "endorsement" of religion or "symbolic union" between religion and the state. *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981); *Witters*, 474 U.S. at 488-489. See *Mitchell*, 530 U.S. at 842-843 (O'Connor, J., concurring). Evenhanded

treatment conveys no message of preferred status. See Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 357 (1999) ("People know that the government doesn't necessarily endorse private choices that people make with government funds, any more than it endorses cabbage by letting people use food stamps to buy the food of their choice, which may include cabbage").

Contrary to the holding below, therefore, "true private-choice programs" that allocate aid to education on the basis of neutral criteria, leaving the choice of schools to families, are constitutional. It is of no constitutional significance that the program "contains no 'effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes,'" as the Sixth Circuit erroneously held. 234 F.3d at 958 (quoting *Nyquist*, 413 U.S. at 780). That is no longer a legal requirement, as the holdings of *Mueller*, *Witters*, *Zobrest*, and *Rosenberger*, and the plurality and concurring opinions in *Mitchell*, make clear. In the words of the five Justices in *Witters*, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate" the Establishment Clause. 474 U.S. at 490-491. Rejection of that principle would require affirmative discrimination *against* families who make religious choices—a result wholly at odds with this Court's decisions, and with the fundamental premises of the First Amendment.

II. The Ohio Pilot Scholarship Program Satisfies This Court's Criteria Of Neutrality And True Private Choice.

In this section, we address the second fallacy of the decision below: the panel's conclusion that the Program "is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria." 234 F.3d at 961. We recognize that, under *Lemon* and *Agostini*, there are several criteria that must be satisfied in addition to neutrality

and choice. The programs must serve some secular purpose; they must not foster excessive entanglement; and they must not entail governmental indoctrination. Neither the respondents nor the Sixth Circuit, however, questioned that the Ohio Program satisfies these requirements.[9] We will therefore confine our attention to the one alleged constitutional flaw identified by the Sixth Circuit: the supposed lack of neutrality.[10]

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[9] While the court below at one point asserted that the Program constituted an impermissible "entanglement" (see 234 F.3d at 960), this does not appear to have been intended to mean that the Program violated the entanglement "prong" of *Lemon* (see 403 U.S. at 612-613), as modified and incorporated into *Agostini*'s "primary effect" inquiry (see 521 U.S. at 234). Rather, the court was simply expressing its conclusion that the Program impermissibly promotes private religious schools.

Nor can it be argued that the Program at issue "result[s] in governmental indoctrination." *Agostini*, 521 U.S. at 234. As Justice O'Connor explained in her concurrence in *Mitchell*, "when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, '[n]o reasonable observer is likely to draw from the facts * * * an inference that the State itself is endorsing a religious practice or belief.' Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid." 530 U.S. at 843 (citation omitted).

[10] We note that the form of the aid provided by the Ohio Program is *indirect* —in Justice O'Connor's terminology, it is a "true private-choice program." *Mitchell*, 530 U.S. at 842 (concurring opinion). The Sixth Circuit described the Program as one in which "parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same." 234 F.3d at 958. Thus, this case does not raise the issue that divided the plurality and the concurrence in *Mitchell*: the rules applicable to per-capita aid programs that are "direct" in form. Compare 530 U.S. at 815-820 (plurality opinion) with *id.* at 842-844 (O'Connor, J., concurring). The funds here flow directly to parents, not schools.

A. The Ohio Pilot Scholarship Program Is Entirely Neutral Between Secular and Religious Schools, Leaving The Choice Of Schools To Individual Families.

The Sixth Circuit acknowledged that the Ohio Program is "facial[ly] neutral[]." 234 F.3d at 959. It distributes tuition vouchers according to strictly secular criteria and "does not * * * define its recipients by reference to religion." *Agostini*, 521 U.S. at 234. Scholarships are awarded solely on the basis of family income, without regard to the religious-nonreligious or public-nonpublic nature of the school each family chooses. 234 F.3d at 948. Parents may select any participating private school within the district—in addition to ordinary public schools, magnet schools, and public charter schools (known in Ohio as "community schools").[11] Any accredited private school willing to comply with the neutral terms of the Program is free to participate.[12] These are entirely neutral and objective bases for allocating resources, and public officials possess no discretion to favor or disfavor religion.[13] Consequently, the

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[11] The statute authorizes Pilot Scholarship students to attend public schools in neighboring districts; such schools would receive a total of $6,544 per student. Ohio Rev. Code § 3317.03(I)(1). Unfortunately, thus far no such districts have been willing to participate. Our defense of the Program does not depend upon the theoretical availability of these schools.

[12] Schools must agree not to charge scholarship students any more than the scholarship amount for tuition, and to select students randomly. If more children apply for the Program than there are spaces, the schools must select students by a lottery with a preference for economically disadvantaged children. Ohio Rev. Code §§ 3313.976(A)(8), 3313.977(A). In the first year, only grades K-3 were eligible, expanding by one grade each year. These are obviously neutral criteria.

[13] The Program must therefore be distinguished from programs such as the Adolescent Family Life Act, 42 U.S.C. § 300z *et seq.*, upheld in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), where government officials decide which recipients will receive benefits and how much. See *id.* at 596-597 (grants are

allocation of funds among schools is a product of independent private choice, not state decisionmaking.

With respect to this criterion, the Program is constitutionally indistinguishable from Title I, the federal provision that was upheld in *Agostini,* or Chapter 2, the companion provision that was upheld in *Mitchell*. Scholarships are "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion." *Mitchell*, 530 U.S. at 813 (quoting *Agostini*, 521 U.S. at 231). The benefits are "available to all children * * * , no matter what their religious beliefs or where they go to school." *Id.* at 814 (quoting *Agostini*, 521 U.S. at 232). In neither *Agostini* nor *Mitchell* was the Court troubled by the actual proportion of religious schools that participated, or by the fact that public schools in other districts were not involved. The state aid that is allocated for the benefit of each child eligible to participate in such programs is neither "greater [n]or broader" if students "apply their aid to religious education" than if they attend a public school or a private secular school. *Witters*, 474 U.S. at 488.[14] Such programs "do[] not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services." *Agostini*, 521 U.S. at 232. Under the Program, Ohio is subsidizing and promoting *education*; it is entirely neutral toward *religion*.

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awarded to applicant organizations based on the Secretary's assessment of their merits under statutory criteria). While discretionary programs are not necessarily unconstitutional as applied to religious grant recipients (see *Kendrick*), they are subject to more stringent controls against the use of funds for religious activities, since any use of the aid to inculcate religion could—unlike here—be attributed to the government.

[14] Although scholarship levels under the Program vary according to the tuition charged by the selected school (see 234 F.3d at 948), this is a neutral criterion that does not express any preference for (or disapproval of) religion, and does not involve the government in religious decisionmaking of any sort. The Program is indistinguishable from *Witters* in this respect.

B. A Substantial Proportion Of Students Attending Religious Schools In One Component Of Ohio's Educational Choice Scheme Does Not Make It Unconstitutional.

The court below erred in concluding that the Program here favors religion. Its view that the Program is "not neutral" because it creates "incentives" favoring religious schools was based primarily on statistical evidence revealing that the majority of schools involved in the Program were religious, and that the majority of students in the Program attended religious schools. 234 F.3d at 959. This is problematic on many levels.

To begin with, this Court has rejected the notion that a facially neutral aid program is unconstitutional because of apparently disproportionate effects. As the Court in *Mueller* explained, it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U.S. at 401. Accord *Mitchell*, 530 U.S. at 848 (O'Connor, J., concurring) ("We [are] not 'willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid'" (quoting *Agostini*, 521 U.S. at 229)). The relative numbers of students choosing religious and secular education under the Ohio Program are therefore constitutionally irrelevant.

The validity of neutral public aid to private schools must be measured in terms of neutrality of *opportunity*, not neutrality of *results*. Such an analysis goes beyond a mere statistical snapshot of the existing constellation of participating schools and students. Rather, it asks *what conditions have been created by the government program at issue*. This approach focuses the inquiry on the conduct of the *government*, while leaving private individuals and institutions free to make their own decisions as they see fit. Private citizens, after all, are incapable of violating the Establishment Clause. See *Corporation of Presiding Bishop*

v. *Amos*, 483 U.S. 327, 337 (1987) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."); cf. *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982).

Even in terms of results, moreover, it is clear that Ohio has not conferred any advantage on religious schools in Cleveland vis-a-vis their secular counterparts (whether public or private). If anything, religious schools are at a relative *disadvantage*. Families may choose between four types of publicly funded schools: ordinary public schools, "community schools" (more commonly known as charter schools), magnet schools (which, unlike Pilot Scholarship schools, can be selective), and Pilot Scholarship schools. Pupils attending public schools—including magnet schools—receive an average of $7,097 per year in direct aid to their school as well as a $500 subsidy to obtain tutoring from private sources. Students attending "community schools," all of which are secular, receive full tuition of at least $4,518 per year. Students attending Pilot Scholarship schools receive a maximum of $2,500, and the schools they attend may not charge them any additional tuition. It should be obvious that this scheme "creates no financial incentive for students to undertake sectarian education." *Witters*, 474 U.S. at 488; see *Agostini*, 521 U.S. at 232.

When the full range of alternatives is taken into account, the resulting array of schools looks quite different from the portrait painted by the court below. In the 1999-2000 school year, 3,761 students participated in the Program, attending 56 different schools. As the court below found, 46 of those schools, serving about 96 percent of the scholarship students, were religiously affiliated. 234 F.3d at 949.[15] In the same year, 2,087 students

[15] The court below used the adjective "sectarian." According to FUNK & WAGNALLS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1137 (comp. ed. 1987), "sectarian" means "[p]ertaining to a sect; bigoted," and "sectarianism" means "excessive devotion to or zeal for a particular sect." See generally Richard A. Baer, *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J.L. & POL. 449 (1990). We urge the Court to use the more neutral term, "religious" school, instead.

attended "community schools" at state expense. All of these are perforce secular. An additional 16,814 went to magnet schools. C.A. App. 428-429. The remainder attended ordinary public schools. That is an impressive array of choice.[16] Examining the system "as a whole," there is no way to say that educational opportunities in Cleveland are "skewed towards religion." *Witters*, 474 U.S. at 487-488.

It is particularly important to take account of the interplay between the "community school" and the Pilot Scholarship components of the Cleveland system. As the record shows, community schools "operate as direct competitors of the private schools participating in the Scholarship Program." J.A. 59a-60a. The basic concept of a community school is to allow teachers, parents, or community groups to form and control a school, free from the usual bureaucratic and programmatic controls imposed on public schools. See Ohio Rev. Code ch. 3314; *id.* § 3314.04 ("community school[s]" are "exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grant certain rights to parents"). From the perspective of a non-profit institution operating a school, these programs provide largely equivalent sources of support, except in two key respects: community schools must be secular, and community schools receive twice as much money per pupil. It is no wonder that most private secular schools that might otherwise participate in the Pilot Scholarship program have become community schools instead. See 234 F.3d at 959 (noting that "there is incentive for private nonsectarian schools to participate in the community

[16] The range would be even more impressive if the neighboring public school systems would agree to participate—but even without them, the system easily satisfies constitutional standards.

schools program rather than in the school voucher program"). As the court below observed (*id.* at 949), earlier in the history of the programs, before the creation of community schools, nonreligious private schools attracted 22 percent of the Pilot Scholarship students. It would be perverse to ignore the financial incentive favoring community schools when evaluating the neutrality of the Cleveland system.

Moreover, it would be short-sighted to base a constitutional conclusion on statistics that reflect only the *present* array of participating schools. School choice is experimental, and is in its infancy as a movement. For a variety of social, cultural, and historical reasons, the vast majority of low-cost private schools in America's inner cities—in the past—have been religious. These have been the only schools with the necessary resources and the dedication to commit those resources to needy children.

Once new funding sources are available, however, there is every reason to expect more schools with different approaches to open. The experience of the Milwaukee Parental Choice Program ("MPCP") is a case in point. Beginning in 1994, when the MPCP was expanded to include religious schools, the number of private *secular* schools participating in the MPCP more than tripled—from seven schools in 1990 to 23 schools in 1998, serving 30% of the choice students. See John F. Witte et al., *Fifth Year Report: Milwaukee Parental Choice Program*, Table I, Department of Political Science and Robert M. La Follette Institute of Public Affairs, University of Wisconsin-Madison (Dec. 1995); Wisconsin Legislative Audit Bureau, *An Evaluation—Milwaukee Parental Choice Program* 27 (Feb. 2000). Moreover, school choice has led to improvements in the traditional public school system. See Catherine Minter Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, National Bureau of Economic Research Working Paper No. 4979 (1994); David Osborne, *Healthy Competition*, THE NEW REPUBLIC, Oct. 4, 1999, at 31 (collecting studies showing that competition from charter schools has forced

regular public schools to reform). By fostering more diversity and more competition, school choice programs should thus invigorate nearly every aspect of the American educational status quo. It is particularly ironic to conclude, as did the Sixth Circuit, that a high percentage of religious schools participating in school voucher programs shows that such programs are somehow biased in favor of those schools. Just the opposite is likely to be true.

The court below failed to take account of the full array of choices available to—and used by—low-income families in Cleveland. The court explicitly confined its review to the Pilot Scholarship schools alone, disregarding the other available, government-funded choices. See 234 F.3d at 958 ("Defendants' argument concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant. Analyzing the scholarship program choices as compared to choices or schools outside the program is asking this Court to examine the entire context of Ohio education. Such a question is not before this Court"). In particular, the court refused to take account of the community school program because it is codified in a different part of the Ohio code:

> Defendants asserted repeatedly that the Community Schools program should be considered coterminous with the voucher program, arguing that the programs are merely separate sections in the statute. However, the statutory record does not support this argument, except for perhaps the literal meaning that the two programs do indeed occupy separate sections in the Ohio Code. The school voucher program is enacted as a complete program in the Ohio Revised Code. The program is enacted as a part of the chapter on Boards of Education. Furthermore, the school voucher program, and only the school voucher program, was challenged by Plaintiffs in this lawsuit.

Ibid. (citations omitted). Furthermore, the court observed that if it took programs like the community schools into account, it

"would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship programs available to children who qualify for the school voucher program: we would be considering and comparing every available option for Cleveland children." *Ibid.*

That approach is directly at odds with settled law. This Court has repeatedly held that so long as an aid program "includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two." *Meek*, 421 U.S. at 360 n.8; *Nyquist*, 413 U.S. at 782 n.38. As Justice Powell stated in *Witters*, the "appropriate perspective" when examining the effect of public aid to those attending religious institutions is to "look[] to the nature and consequences of the program viewed *as a whole*." 474 U.S. at 492.

To base a decision about the constitutionality of a program on whether it is codified in one place or two is utterly formalistic. The Ohio legislature could reenact the Program, integrating the Pilot Scholarship and Community Schools aspects of the choice program into a single statute, and this would not change a thing. From the point of view of participating families—*which is what matters for constitutional purposes*—the question is what choices are available, not what part of the statute books they are in. The underlying constitutional value is to ensure that decisions about education are a product of individual decisions. To evaluate the choices available to families, it is precisely the job of reviewing courts to conduct a "wide-reaching analysis" encompassing "every available option for Cleveland children." 234 F.3d at 958.

When one examines all available publicly funded options—magnet schools, community schools, Pilot Scholarship religious schools, Pilot Scholarship secular schools, and ordinary public schools—it is evident that Cleveland's low-income families have a broad range of options, and that the challenged statute merely expands their freedom to choose.

C. The Court Of Appeals Was Wrong In Concluding That The Ohio Program Was Designed To Discourage Nonreligious Schools From Participating.

Beyond its focus on results rather than opportunities and its inexplicable refusal to consider Cleveland's educational choices "as a whole," the court below offered several reasons for inferring that the Program "discourages the participation by schools not funded by religious institutions." 234 F.3d at 959; see also *id.* at 961 (stating that "the Ohio scholarship program is designed in a manner calculated to attract religious institutions"). These reasons do not withstand scrutiny.

First, the court stated that "[p]ractically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." 234 F.3d at 959. This is like saying that competitive bidding for construction contracts is biased because the firms with lower costs have an advantage. Precisely the same restrictions apply to religious as to secular schools. The government's obligation is to be neutral between religious and secular alternatives. Surely it would be unconstitutional to provide a lesser amount to a religious school on the basis of the generalization that religious schools are lower-cost providers. Private groups that give of their own resources to assist low-income students in obtaining a better education should be applauded, not criticized.

Not only is the panel's argument illogical; it is contrary to precedent. If it is unconstitutional to treat religious schools neutrally because of their alleged lower-cost structure, *Mueller*, *Zobrest*, *Agostini*, and *Mitchell*—as well as *Everson* and *Allen*—were all wrongly decided. It just as easily could have been said in those cases that religious schools had a cost-based advantage. Nor is it suspicious if the $2,500 maximum scholarship level approximates the tuition levels at Cleveland's religious schools. 234 F.3d at 959. At present, those schools

constitute the large majority of low-cost schools in Cleveland. If the maximum level had been higher, respondents would be complaining that religious schools were getting a bonus.

Second, the court stated that "there is incentive for private nonsectarian schools to participate in the community schools program rather than in the school voucher program." 234 F.3d at 959.[17] This is evidently a reference to the fact that community schools receive twice the per-pupil subsidy given to students at Pilot Scholarship schools. Since only secular schools can be community schools, however, the higher subsidy places religious schools at a *disadvantage* relative to their secular counterparts. The Sixth Circuit viewed this aspect of the Program as "discourag[ing] the participation by schools not funded by religious institutions." *Ibid.* That is like saying that the government discourages veterans from taking part in Medicare by offering them higher-quality care at veterans hospitals.

Third, the court pointed to the fact that the programs do not create a sufficient incentive for neighboring public school systems to participate. 234 F.3d at 959. We agree. The program would provide *even more* choices for Cleveland's low-income families if it did. But that does not make the existing range of choices unconstitutional.

Fourth, the court complained that the Program creates no incentives for attending "schools outside of the program":

> Students may not choose to attend community or magnet schools using a voucher, they may not apply a voucher to tuition at a private school outside the Cleveland School District, and they may not receive a voucher for a private school within the Cleveland School District which has not registered as part of the program. Rather, the program provides financial assistance for those parents who wish to

[17] The Sixth Circuit describes this as an "admission" by the Defendants, but it is a point in their favor.

> place their children in the particular private schools, mostly religious, which take part in the program. We find such a scheme directly akin to *Nyquist*'s offensive aid to only private school students.

234 F.3d at 959-960. Let us take this one point at a time.

"Students may not choose to attend community or magnet schools using a voucher." True. But they attend those schools with much *more* state money—$4,518 for community schools and $7,097 (plus $500 for private tutors) at magnet schools. J.A. 56a. Who could possibly say that such a program singles out parents attending religious schools for a "special benefit"?

"[Students] may not apply a voucher to tuition at a private school outside the Cleveland School District." True again. Perhaps it would be wise to expand the Program. But since the private schools outside the district would be subject to precisely the same constitutional objections as those within it, how could that possibly cure the alleged constitutional problem?

"[Students] may not receive a voucher for a private school within the Cleveland School District which has not registered as part of the program." True a third time. But the validity of a program does not turn on whether private schools *choose* to participate. The program in *Mitchell* was not invalid because some private schools in Jefferson Parish declined to participate, and no one would say that the government may *compel* private schools to take part in school choice programs. Are Pell Grants invalid because some private schools do not accept them?

These arguments fall considerably short of demonstrating that the Program was "designed" to favor religious schools.

Fifth, the court claimed that "[c]ontrary to the tax deduction generally available in *Mueller*, the Ohio voucher program is available to curtail only those expenses which students attending certain private schools accrue." 234 F.3d at 960. This is but a restatement of the court's refusal to view the school

choice system *as a whole*. Ohio's Program defrays all the costs of attending public schools (including an extra $500 for private tutoring), and it provides twice the level of scholarship funding to community schools as it does to Pilot Scholarship schools. Only by formalistically focusing on *one component* of the system can the court reach such a counterintuitive conclusion.[18]

Once these misleading arguments are discarded, it becomes clear that the Ohio Program easily satisfies the only disputed *Agostini* criterion: the aid is "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." 521 U.S. at 231.

III. The Decision Below Creates Needless Conflict Between The Establishment Clause And The Rest Of The First Amendment.

A final reason to reject the Sixth Circuit's construction of the Establishment Clause is that it would compel discrimination against students on the basis of the religious teaching at the school of their choice. According to the decision below, the state may not defray the cost of an education—however effective it may be in objective educational terms—absent an

[18] This part of the Sixth Circuit's decision is reminiscent of footnote 38 in *Nyquist*, 413 U.S. at 782 n.38:

> We do not agree with the suggestion * * * that tuition grants are an * * * endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools "totally at state expense."

It would have been more accurate to say that all parents were given exactly the same set of options: they could either enroll their children in public schools, in which case the government would pay the entire cost, or enroll them in private schools, in which case the government would provide a modest subvention. Neither group was given any rights "in addition" to those given the other. Of course, the subsidy provided for nonpublic schools was but a small fraction of that provided for public schools.

"effective means of guaranteeing that the state aid derived from public funds w[ould] be used exclusively for secular, neutral, and nonideological purposes." 234 F.3d at 958 (quoting *Nyquist*, 413 U.S. at 780). In practical terms, this means that the state must discriminate against otherwise eligible schools on the basis of the religious content of their teaching.

In addition to the difficulties discussed above, this view is at odds with the fundamental logic of the Free Exercise Clause, which prohibits discrimination on the basis of religion. *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"); *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990) (under the Free Exercise Clause, the state may not "impose special disabilities on the basis of religious views or religious status"); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (the Free Exercise Clause "protect[s] religious observers against unequal treatment"). To deny a generally available benefit to someone on the basis of her religious exercise is presumptively unconstitutional—the equivalent of imposing a fine for engaging in the religious practice. See *Thomas* v. *Review Bd.*, 450 U.S. 707, 720 (1981); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). Thus, the Sixth Circuit created serious constitutional problems where none need exist.

To make matters worse, the Sixth Circuit's approach also raises grave constitutional doubts under the Free Speech Clause. The religious activity that takes place in religious schools is, after all, speech. Teaching is quintessentially speech. And the state may not exclude individuals or groups from the benefits extended to similarly situated persons on the basis of the religious viewpoint of their speech. *Good News Club* v. *Milford Central School*, 121 S. Ct. 2093, 2099-2102 (2001); *Rosenberger*, 515 U.S. at 830; *Lamb's Chapel* v. *Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Widmar*, *supra*.

In short, the Sixth Circuit's decision puts the Establishment Clause on a collision course with both the Free Exercise Clause and the Free Speech Clause. The decision reflects an especially improbable reading of related provisions of the same Amendment. It makes far more sense to interpret cognate provisions harmoniously and consistently—to require governmental neutrality toward religious exercise and expression.

* * * * *

In the end, the decision below lacks support in the history of the First Amendment, is contrary to the principles of neutrality and independent choice on which this Court's recent Establishment Clause jurisprudence rests, and creates unneeded conflict with the rest of the First Amendment. It would be unfortunate if such a misguided understanding of the Religion Clauses were to stand in the way of a program that represents many children's only hope for escaping from the life of poverty in which they now find themselves.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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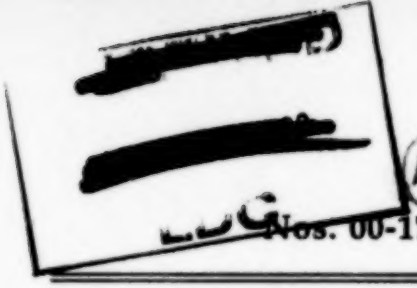

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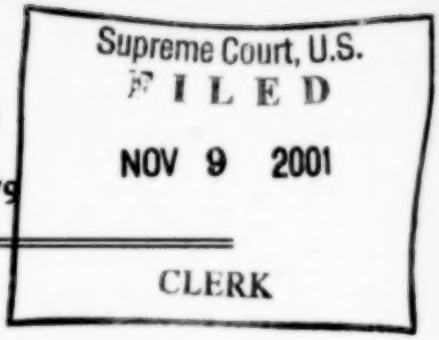

In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent of Public Instruction, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

And Related Cases

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL, INC., AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iii

Statements of Interest of *Amici Curiae* 1

Statement of the Case 1

Summary of Argument 1

Argument 2

I. The Pilot Scholarship Program Is Religiously Neutral 2

A. The Program Defines Its Beneficiaries Without Reference to Religion 3

B. A Range of Choices Are Available to Cleveland Parents 3

C. The Choices Made by Cleveland's Parents Do Not Prove Non-Neutrality 5

II. The No-Funding Doctrine Does Not Control the Outcome of This Case 7

A. The Conflicting Doctrines 7

B. Substantive Neutrality: Maximizing Religious Liberty by Minimizing Government Influence 9

C. The Historical Origins of the No-Funding Doctrine Do Not Warrant Invalidation of the Program 11

1. The Virginia General Assessment Bill Differs Fundamentally from the Ohio Scholarship Program 12

TABLE OF CONTENTS – Continued

Page

2. The Protestant-Catholic Conflict Was Not Grounded in an Establishment Clause Principle 14

3. As an Application of the Substantive Neutrality Principle, the No-Funding Doctrine Should Be Narrowly Construed 19

D. The Existence of Private Choice Also Resolves Any Conflict Between the Neutrality and No-Funding Doctrines in this Case 20

III. This Case Is Not Governed by *Nyquist* Since the Structure of the Program Is Distinguishable and *Nyquist* Cannot Be Squared With the Private Choice Line of Cases 24

A. The Ohio Scholarship Program Is Distinguishable From *Nyquist* Because It Includes Both Public and Nonpublic School Options..... 25

B. The Distinctions Upon Which *Nyquist* Relies Should Be Rejected 26

C. The Tuition Reimbursement Program in *Nyquist* Does Not Have the Primary Effect of Advancing Religion under This Court's Current Criteria 27

Conclusion 30

Appendix A .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Abington School Dist. v. Schempp, 374 U.S. 203 (1963) 7

Agostini v. Felton, 521 U.S. 203 (1997) ..6, 23, 27, 28, 29

Board of Education v. Allen, 382 U.S. 236 (1968) 29

Bowen v. Kendrick, 487 U.S. 589 (1988)..... 7

Bradfield v. Roberts, 175 U.S. 291 (1899)..... 7

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) ..... *passim*

Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646 (1980) 7

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 7

Everson v. Board of Education, 330 U.S. 1 (1947) 7, 12, 29

Lemon v. Kurtzman, 403 U.S. 602 (1971).....7, 22

Lynch v. Donnelly, 465 U.S. 668 (1984) 7

Mitchell v. Helms, 530 U.S. 793 (2000).....23, 28

Mueller v. Allen, 463 U.S. 388 (1983)..... *passim*

Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) 7

Rosenberger v. Rector of the Univ. of Virginia, 515 U.S. 819 (1995) 8, 11, 21

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).....4, 5

Wallace v. Jaffree, 472 U.S. 38 (1985) 7

TABLE OF AUTHORITIES – Continued

Page

Walz v. Tax Comm'n [of New York], 397 U.S. 664 (1970) 8, 23

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) ..... *passim*

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) 22, 23, 28, 29

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. I 15

Cal. Const. art. IX, § 8 14

N.Y. Const. art. XI, § 3 14

Tex. Const. art. 7, § 5(a) 14

STATUTES AND RULES

Ohio Rev. Code § 3313.975(C)(1) 3

Ohio Rev. Code § 3313.978(A) 3

Ohio Rev. Code § 3314.03(A)(11)(c) 4

Ohio Rev. Code § 3314.11 4

SECONDARY AUTHORITIES

David H. Bennett, *The Party of Fear* (1988) 16

Charles Glenn, *The Myth of the Common School* (1988) 14, 17

Ulysses S. Grant, Speech to the Army of the Tennessee (Sept. 29, 1875) (Library of Congress) 16

TABLE OF AUTHORITIES – Continued

Page

Ulysses S. Grant, Annual Message to Congress (Dec. 7, 1875) 16

James Hennesey, *American Catholics: A History of the Roman Catholic Community in the United States* (1981) 14

Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society 1780-1860* (1983) 14, 16, 17

Donald L. Kinzer, *An Episode in Anti-Catholicism: The American Protective Association* (1964) 16

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990) 10

Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43 (1997) 11

James Madison, *Memorial and Remonstrance Against Religious Assessments* 12

Martha Minnow, *Reforming School Reform*, 68 Fordham L. Rev. 257 (1999) 4

The President's Speech at Des Moines, 22 Catholic World 433 (1876) 17

Diane Ravitch, *The Great School Wars* (1974) .. 14, 16, 17

James D. Richardson, *7 Messages and Papers of the Presidents* (1898) 16

Jonathan D. Sarna, *American Jews and Church-State Relations* (1989) 18

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TABLE OF AUTHORITIES – Continued

Page

Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987)..... 11

Anson Phelps Stokes, 2 *Church and State in the United States* (1950).....14, 16, 17

Carl Zollman, *American Church Law* (West 2d ed. 1933).....14, 17

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Detailed statements of interest of *Amici* are set forth in the Appendix. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.[1]

STATEMENT OF THE CASE

Amici adopt the Statements of the Case in the Briefs of Petitioners.

SUMMARY OF ARGUMENT

Under existing precedent and underlying constitutional policy, the Ohio Pilot Scholarship Program does not violate the Establishment Clause. Contrary to the Court of Appeals' conclusion, the Program is neutral: it defines the class of beneficiaries without reference to religion, and those beneficiaries possess genuine choice about where to redeem their scholarships. The fact that a majority of beneficiaries decided to direct their scholarships to religious schools does not make the Program non-neutral.

The no-funding doctrine does not control the outcome of this case. To the extent that a particular case appears to pit the no-funding and neutrality doctrines against one another, the substantive neutrality principle is the key to resolving the apparent conflict. Under that

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[1] Pursuant to Rule 37.6, *Amici* disclose that: (1) no counsel for a party authored this brief, in whole or in part; and (2) no person or entity has made a monetary contribution to the preparation or submission of this brief.

principle, the purpose of the Religion Clauses is to minimize government influence on religious choices. Further, the history underlying the no-funding doctrine compels a relatively narrow application of the doctrine, and such narrow interpretation of the doctrine would reduce the number of conflicts between that doctrine and the neutrality doctrine. In any event, the existence of independent private choice in this case dictates the Program not be invalidated under the no-funding doctrine.

This Court's decision in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), does not require invalidation of the Program, for the Program is different than the aid mechanism invalidated in that case. To the extent that *Nyquist* controls, it should be overruled, given its inconsistency with other precedents.

ARGUMENT

I. The Pilot Scholarship Program is Religiously Neutral.

Of those parents who elected to place their children in the Pilot Scholarship Program, a substantial majority chose to redeem their scholarships at private religious schools. Drawing an unwarranted inference from this fact, the appeals court concluded that the Program is not neutral.

The Program is religiously neutral in a variety of ways. First, all Cleveland children are eligible for scholarships, without regard to their religious affiliations. Second, Cleveland parents eligible to participate in the Program have a range of educational options, including secular ones. Third, in the absence of improper government conduct, how parents ultimately exercise their freedom of choice is not relevant to the Establishment Clause analysis.

A. The Program Defines its Beneficiaries Without Reference to Religion.

In concluding that the Program is not neutral, the appeals court focused upon the identity of schools accepting vouchers rather than the identity of the families eligible to receive vouchers. That all Cleveland children – without regard to their religious affiliation – are eligible for scholarships should not be overlooked.

The Program provides scholarships to district children in kindergarten through eighth grade. Ohio Rev. Code § 3313.975(C)(1). The Program gives a preference to low-income children, offering scholarships to wealthier children only if all poor students have received consideration. *Id.* at § 3313.978(A). The religion of children or their families plays no role in determining eligibility for scholarships.

B. A Range of Choices are Available to Cleveland Parents.

In concluding that the Program was not neutral, the Sixth Circuit intimated that the legislature had cleverly "rigged" the Program so that parents would choose religious schools, despite the facial neutrality of the statutory provisions creating the Program. The legislature allegedly accomplished this nefarious objective by: (1) limiting the dollar amount of scholarships; and (2) requiring schools to "opt in" to the Program. The appeals court contended that these features of the Program skewed the Program towards participation by religious schools.

In reality, because the Program operates within the context of all public school options, parents of students in the Cleveland school district have a number of options. First, they can keep their children in the public schools to

which they normally would be assigned (and receive tutorial assistance under the Program). Second, parents can choose to send their children to community (charter) schools. Third, parents may redeem vouchers at private secular schools participating in the program. Fourth, parents may direct scholarships to neighboring public schools that elect to participate in the program. Fifth, parents may choose to send their children to private religious schools.

Program opponents have not provided any evidence to demonstrate that the participation level results not from the actual preferences of Cleveland families but from subtle government influence.[2] To the contrary, the

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[2] The Court of Appeals cited a law review article for the proposition that the Program tuition limits favor religious schools because such schools have lower overhead costs and receive supplemental income from private donations. *Simmons-Harris v. Zelman*, 234 F.3d 945, 959 (6th Cir. 2000) (citing Martha Minnow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999)). However, the cited article provides no factual support for its assertions that (i) voucher funding levels typically approximate tuition levels set by religious schools and (ii) secular private schools do not receive private donations. Likewise, the Court of Appeals' reference to an "incentive for private nonsectarian schools to participate in the community schools program rather than in the school voucher program," *id.*, is irrelevant. Parents can select such a school regardless of whether it chooses to be a community school or a private school participating in the Program. If anything, such an incentive would influence parents toward secular schools since community schools do not charge tuition and religious schools are not eligible to be community schools. Ohio Rev. Code § 3314.03(A)(11)(c). The court's comparison to the community schools program does acknowledge, though, that the Program must be evaluated in its context. *See also*, Ohio Rev. Code § 3314.11 (creating a state office of school options to provide advice and services for both the community schools program and the pilot project scholarship program).

record indicates that "not one [secular private school] has ever turned away a voucher applicant for any reason." *Simmons-Harris v. Zelman*, 234 F.3d 945, 969 (Ryan, J., dissenting). To conclude from the record that parents wishing to select a secular alternative school were unable to do so is mere speculation.

C. The Choices Made by Cleveland's Parents Do Not Prove Non-Neutrality.

The Establishment Clause is not violated where a substantial portion of individual beneficiaries under a neutral program allowing true private choice choose to direct their aid to religious organizations. When that happens, any effect of advancing religion is attributable solely to private citizens and not to the government.

In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court declined to consider the allocation of tax benefits arising under the tax deduction scheme, even though evidence indicated that private school tuition constituted the vast majority of deductible expenses and 96% of the private school students attended religiously affiliated institutions. *Mueller*, 463 U.S. at 401. This Court stated that:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

Id.

In *Witters v. Washington Department of Services*, the opinion of the Court discusses, as a factor supporting the program, the fact that "nothing in the record indicate[d] that . . . any significant portion of the aid expended under the . . . program as a whole will end up flowing to religious education." 474 U.S. 481, 488 (1986). However, a total of five justices in concurring opinions suggested directly or indirectly that this factor was irrelevant to their conclusion, because the program could be upheld under *Mueller*. *Id.* at 490 (White, J., concurring); *Id.* (Powell, J., concurring); *Id.* at 493 (O'Connor, J., concurring). As Justice Powell stated, "[c]ontrary to the Court's suggestion, . . . this conclusion does not depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training." *Id.* at 491 n.3; *see also, Agostini v. Felton*, 521 U.S. 203, 229 (1997) (refusing to "conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid.").

To suggest that the government must structure aid programs to deter beneficiaries from making religious choices contradicts the fundamental Establishment Clause principle of maximizing religious liberty. Such deterrence of religious choices would likely violate the specific Establishment Clause ban on government inhibition of religion, and manipulating an aid program to limit the number of individuals exercising religious choices might run afoul of the ban on excessive government entanglement with religion.

II. The No-Funding Doctrine Does Not Control the Outcome of this Case.

A. The Conflicting Doctrines.

This case lies at the intersection of two familiar doctrines from the American tradition of religious liberty. The neutrality doctrine directs that government be neutral toward religion, *see, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 745-47 (1976) (plurality opinion); *Abington School Dist. v. Schempp*, 374 U.S. 203, 215, 222, 225-26 (1963); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947), neither "advanc[ing] nor inhibit[ing]" religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Government may not endorse religion, but neither may it "disapprove" religion, *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985), quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), or endorse the view that religion is wrong-headed or irrelevant. A second doctrine, equally familiar, is the no-funding doctrine: government generally should not fund religious activities. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971); *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947). Government may sometimes fund secular activities performed by religious organizations,[3] but those cases are no precedent for funding religious activities.

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[3] *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 608-09 (1988) (sex education); *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 657-59 (1980) (administration of mandatory testing and monitoring of student attendance); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (cash grants to colleges and universities); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (medical care).

The neutrality and no-funding doctrines have generally seemed to be consistent, and the Court has only occasionally been forced to choose between them. When the Court has been forced to choose, such as in *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995), *Witters* and *Mueller*, the neutrality doctrine has prevailed. Somewhat analogously, the Court has held that property committed to religious uses may be exempted from taxation pursuant to a neutral scheme of tax exemption for a wide range of secular and religious organizations. *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970). And there has never been a successful Establishment Clause challenge to the income-tax deductibility of contributions to religious organizations. These deductions are not mere tax exemptions; they offset tax that would be due on the taxpayer's salary and investment income. They are therefore like a matching grant to the taxpayer for every contribution. The justification must be that religious contributions are neutrally included in a broad range of contributions to analogous organizations, and that the neutrality doctrine controls over the no-funding doctrine.

Here the two doctrines again conflict. The Ohio Scholarship Program enables parents to select religious schools. The neutrality doctrine forbids the discriminatory exclusion of religious schools. But opponents of the Program argue, and the Court of Appeals held, that including religious schools violates the no-funding doctrine.

The ultimate question presented is thus to define the relationship between these conflicting doctrines in the context of publicly funded education. Is the neutrality doctrine subordinate to the no-funding doctrine, as the Court of Appeals assumed? Or is it the other way around,

as this Court has held in other contexts? Or is there some underlying principle that unites these doctrines and makes their relationship clear?

B. Substantive Neutrality: Maximizing Religious Liberty by Minimizing Government Influence.

There is such an underlying principle. The ultimate goal of the Religion Clauses is religious liberty for all in a pluralistic society – for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people. The ultimate goal is that every American should be free to hold his or her own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence.

The neutrality doctrine serves this ultimate goal most directly. By forbidding government to take positions on religious questions, the neutrality doctrine minimizes government influence on religious choice, and thus leaves maximum room for private influence and private choice.

The no-funding doctrine serves this ultimate goal instrumentally. Government money is a powerful source of government influence; government expenditures on religion generally expand government influence in a field where that influence should be minimized. Describing the same point from the private perspective, voluntary funding of religious organizations generally maximizes individual liberty and the influence of private choice. Each individual can decide when, how, and how much to

contribute to whom, and whether to contribute at all. Voluntary funding of religious organizations protects individual conscience and keeps government out of religion.

These themes of liberty, neutrality, and private choice can be integrated into a single standard of substantive neutrality:

> [S]ubstantive neutrality [means] this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion should be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. . . .
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized. The same is true of religious practice and refusal to practice. The goal of maximum religious liberty can help identify the baseline from which to measure encouragement and discouragement.[4]

This elaboration of substantive neutrality synthesizes seemingly separate strands in the American tradition of religious liberty. It attempts to clarify this Court's traditional emphasis on neutrality, to defend that emphasis

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[4] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990).

against academic critics,[5] and to show how neutrality relates to liberty and to private choices. This synthesis points the way to a principled resolution here, where each side relies on a different strand from the religious liberty tradition.

The ultimate goal is to maximize religious liberty for believers and nonbelievers alike in a pluralistic society. The no-funding doctrine is instrumental – it serves religious liberty under a limited range of circumstances. But these circumstances do not encompass the Ohio Scholarship Program.

C. The Historical Origins of the No-Funding Principle Do Not Warrant Invalidation of the Program.

The no-funding doctrine looms large in the American tradition of religious liberty because of two historical controversies of great importance. These controversies are a source of understanding of the doctrine's scope and rationale.[6]

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[5] *See, e.g.*, Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987). Professor Smith urged the Court to abandon "the illusion that substantive answers can be deduced from the formal idea of neutrality." *Id.* at 331-32. Substantive neutrality moves beyond a mere "formal idea"; it defines "neutrality" in terms of the underlying substantive policies of the Religion Clauses.

[6] The following historical discussion initially appeared in the brief *amici curiae* of Christian Legal Society, *et al.*, filed with this Court in the *Rosenberger* case and authored by Douglas Laycock. Professor Laycock subsequently published this discussion in substantially the same form. *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 48-53 (1997).

1. The Virginia General Assessment Bill Differs Fundamentally from the Ohio Scholarship Program.

Financing of churches (as opposed to schools) was the central church-state issue of the 1780s, and the immediate background to the adoption of the Establishment Clause in 1791. The single most famous American statement on disestablishment, James Madison's *Memorial and Remonstrance Against Religious Assessments*, was written in opposition to the general assessment bill in the Virginia legislature, which would have provided tax support for teachers of the Christian religion.[7] If history settles anything in this area, it is that such a general assessment would be unconstitutional.

But this case is not about such a general assessment; indeed, nothing like the Virginia general assessment bill has been seriously proposed since repeal of the Massachusetts establishment in 1833. In the typical modern dispute about funding religious organizations, the state claims that it is funding some secular activity performed by a religious organization; those who object to funding claim that the activity to be funded is actually religious or that the secular activity is insufficiently insulated from religious activities. Notwithstanding the disputed characterization of the funded activity, modern funding programs are never limited to religious organizations.

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[7] Both the *Memorial and Remonstrance* and the general assessment bill are reprinted in *Everson v. Board of Education*, 330 U.S. 1, 63-74 (1947) (appendix to opinion of Rutledge, J., dissenting).

In sharp contrast, the Virginia general assessment bill was a tax solely for the support of clergy in the performance of their exclusively religious activities. The assessment was "general" only in the sense that all Christian faiths were included. There were no significant numbers of non-Christians in the polity, so the assessment was effectively neutral among religions then represented in Virginia.

However, it was not neutral as between religion and non-religion. The reason for supporting exclusively religious activities was not that they fell within the neutrally-drawn boundaries of some larger category of activities to be supported by the state. Rather, religion was to be singled out for special support because the state deemed it to be of special value. Put differently, the Virginia general assessment bill proposed to finance religious indoctrination because it was religious indoctrination. Under the Virginia general assessment, the religious content of the funded activity would have comprised the basis for qualifying for funding. The government would have been charged to fund exclusively religious activity with the intent that religious indoctrination be the outcome of such funding. In short, the government would have been directly engaged in influencing the religious choices of its citizens.

By contrast, the Ohio Scholarship Program is about financing accredited education regardless of its religious content. The State has determined to fund educational activity and intends for accredited education to be the outcome of the funding. Institutions may participate in the Program based on their accredited educational programs. The State is indifferent to the religious content of

the educational experience, and any religious content results solely from the private choices of the parents.

2. The Protestant-Catholic Conflict Was Not Grounded In An Establishment Clause Principle.

The other great controversy that gave prominence to the no-funding doctrine was the nineteenth-century dispute over common schools. Over a period of decades, and amidst great controversy, Americans built up the public schools and withdrew funding from religious schools.[8] Thirty-two states adopted constitutional provisions expressly prohibiting public funding of religious schools.[9]

This controversy, the details of which have been largely forgotten, is the source of the tradition that school funding is an especially important issue in the separation of church and state. And the continuing disputes over that issue are a principal source of the sense that direct monetary subsidization of religion is a different breed of

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[8] For accounts of these developments and the associated controversies, *see* Charles Glenn, *The Myth of the Common School* (Univ. of Mass. Press 1988); James Hennesey, *American Catholics: A History of the Roman Catholic Community in the United States* 182-83, 185-86 (Oxford Univ. Press 1981); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society 1780-1860* (Hill & Wang 1983); Diane Ravitch, *The Great School Wars* 3-76 (Basic Books 1974); Anson Phelps Stokes, 2 *Church and State in the United States* 47-72, 642-54, 681-86, 722-28 (Harper Bros. 1950).

[9] For a list, *see* Carl Zollman, *American Church Law* Secs. 65-66 at 78-80 (West 2d ed. 1933). For additional background, *see* Glenn, *supra* note 8, at 251-53. For examples, *see* Cal. Const. art. IX, § 8; N.Y. Const. art. XI, § 3; Tex. Const. art. 7, § 5(a).

problem, distinguishable from access to facilities and other rights subject to the neutrality doctrine.

The nineteenth-century resolution of the school-funding controversy arguably represents a political judgment on the constitutional questions raised by such funding. But this Court should not rely on that political judgment, even with respect to schools. It is especially dangerous to abstract from that judgment a bright-line rule that applies to all contexts and overrides more fundamental principles of religious neutrality. It is dangerous to apply doctrines derived from a political dispute without examining the dispute and the doctrines.

One difficulty with reasoning from nineteenth-century rejection of funding for religious schools is that that rejection was not part of the background to the First Amendment. And although the movement against funding religious schools amended many state constitutions, it conspicuously failed in its attempt to amend the federal Constitution (see below). The mere fact that the movement attempted to amend the federal constitution indicates that there was at least some doubt as to the extent to which the Establishment Clause prohibited funding of religious schools.

Perhaps more important, the nineteenth-century movement was based in part on premises that were utterly inconsistent with the First Amendment. Although there were good arguments to be made on both sides, the nineteenth-century opposition to funding religious schools drew heavily on anti-Catholicism. Nativist opposition to Catholic immigration fluctuated after 1825, but it never disappeared. Anti-Catholic secret societies, such as

the Know Nothings and the American Protective Association, occasionally grew large enough to influence elections,[10] and there was occasional mob violence and burnings of Catholic churches and convents.[11]

The movement for a federal constitutional amendment began with President Grant's 1875 warning against a potential national conflict "between patriotism and intelligence on the one side, and superstition, ambition and ignorance on the other."[12] In context, there is no doubt that the feared source of "superstition, ambition and ignorance" was the Roman Catholic Church, rapidly growing from immigration, with its alleged papal conspiracy to dominate the country. The preventive that the President proposed was to "[e]ncourage free schools and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school."[13] Catholics argued that Protestant religious practices in the public schools

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[10] *See, e.g.*, David H. Bennett, *The Party of Fear* 105-16, 159-82 (Univ. of N. Carolina Press 1988); Donald L. Kinzer, *An Episode in Anti-Catholicism: The American Protective Association* 140-80 (Univ. of Washington Press 1964); 1 Stokes, *supra* note 8, at 825-38.

[11] Kaestle, *supra* note 8, at 170; Ravitch, *supra* note 8, at 36, 66, 75; 1 Stokes, *supra* note 8, at 817-22, 824, 830-31.

[12] Speech to the Army of the Tennessee (Sept. 29, 1875) (manuscript and typescript in the Ulysses S. Grant Papers in the Library of Congress; reproduced on reel 5 of the microfilm edition).

[13] *Id.* The President requested a constitutional amendment to this effect in his Annual Message to Congress (Dec. 7, 1875), reprinted in James D. Richardson, 7 *Messages and Papers of the Presidents* 332, 334 (1898).

made those schools as sectarian as any private school. Public schools commonly read the King James Bible ("the Protestant Bible") "without note or comment."[14]

Catholics noted that "the reading of the Scriptures as a public ceremony is as distinctive to them [Protestants], as the celebration of Mass would be to Catholics."[15]

Senator James G. Blaine proposed a constitutional amendment to implement the President's proposal. The Blaine Amendment would have codified the Protestant position by expressly permitting Bible reading in the public schools but forbidding any use of state or federal funds to support religious schools.[16] This amendment was narrowly defeated by Democrats in the Senate; one of Blaine's supporters later denounced the Democrats as "the party of Rum, Romanism, and Rebellion."[17]

Whatever the merits of the tradition against state funding for church-affiliated schools, its origin was not a proud moment in our constitutional history. These nineteenth-century debates did not produce a principled resolution to a difficult problem. Badly tainted by anti-Catholicism, they produced instead a Nativist Protestant

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[14] For accounts of the Protestant Bible controversy, *see* Glenn, *supra* note 8, at 196-204; Kaestle, *supra* note 8, at 98-99, 166-71; Ravitch, *supra* note 8, at 3-76; 1 Stokes, *supra* note 8, at 825-32.

[15] *The President's Speech at Des Moines*, 22 Catholic World 433, 438 (1876).

[16] For the text of the amendment with discussion, *see* Glenn, *supra* note 8, at 252-53; 2 Stokes, *supra* note 8, at 68-69, 722-28; Zollman, *supra* note 9, Sec. 62 at 75-76.

[17] See Arthur Schlesinger, ed., *History of American Presidential Elections 1789-1968* at 1606 (Chelsea House 1971).

victory over Catholic immigrants. There was only a pretense of neutrality; the end result sustained a Protestant establishment in the public schools at public expense, with no relief for religious minorities. Major Jewish groups responded with their long effort to secularize the public schools;[18] Catholics continued their long effort to build and finance private schools.

The position of opponents of the Ohio Scholarship Program, regardless of their underlying motives, is analytically analogous to the position of the nineteenth-century Nativist Protestants. Of course, the opponents perceive their position to be far more inclusive, but they make the same analytical error with respect to the religious schools they seek to exclude. The opponents believe that excluding religious schools from the program would be neutral and fail to realize that such exclusion may in fact constitute discrimination against religious viewpoints in education and against the religious liberty interests of parents and their children. Such discrimination would violate the State's obligation of substantive neutrality toward religion. This Court should not unwittingly apply a doctrine rooted not in fundamental Establishment Clause principles but in nineteenth-century anti-Catholicism.

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[18] See Jonathan D. Sarna, *American Jews and Church-State Relations* 14-31 (American Jewish Committee 1989)

3. As an Application of the Substantive Neutrality Principle, the No-Funding Doctrine Should be Narrowly Construed.

Because government at all levels plays an active role in our society, there will arise many different issues concerning neutrality and funding, and different factual contexts will require different solutions. This Court must reason such issues out from first principles and we have tried to assist that process by articulating the fundamental principle of the Establishment Clause: to maximize religious liberty in a pluralistic society by minimizing the influence of government on the religious choices of private individuals. We have also discussed how the no-funding doctrine implements (or fails to implement) this principle in the two historical controversies from which the doctrine emerged.

Proponents of the Virginia general assessment sought to fund exclusively religious education because of its religious content. In other words, they wished to use the power of the State specifically to influence citizens in favor of the Christian religion. In an era of minimal government, religious indoctrination was to be singled out for a special subsidy. The no-funding doctrine as applied to the Virginia general assessment was fully consistent with the substantive neutrality principle.

In the Nativist Protestant movement, the State sought to exclude funding from any educational program that had Catholic religious backing (while advancing Protestant religion in the public schools). Put differently, the movement specifically sought to use the power of the State to influence citizens against the Catholic religion. In

this context, use of the no-funding doctrine actually contradicted the substantive neutrality principle and undermined pluralism.

In the Ohio Scholarship Program, the State is seeking to fund educational options selected by parents and students, regardless of any religious content to the options. The State is not seeking to influence citizens for or against any particular religion or denomination. Rather, the State is allowing citizens to choose an education that best fits with their particular religious preferences. Applying the no-funding doctrine to the Ohio Scholarship Program would be fundamentally inconsistent with the substantive neutrality principle.

These examples indicate that, to advance the principle of substantive neutrality, the strict no-funding doctrine must be narrowly construed to reach only those programs, like the Virginia general assessment, that fund exclusively religious activities because of their religious quality for the purpose of facilitating religious indoctrination. Likewise, neither rejection of the Virginia general assessment nor the denial of funding for Catholic schools by the Native Protestant movement provides any precedent for using the no-funding doctrine to strike down the Ohio Scholarship Program.

D. The Existence of Private Choice Also Resolves Any Conflict Between the Neutrality and No-Funding Doctrines in this Case.

Apart from any explicit reliance upon the substantive neutrality principle, this Court has consistently relied upon the existence of independent private choice to resolve apparent conflicts between the no-funding doctrine and the formal neutrality doctrine. Such reliance

reflects "the hard task of judging – sifting through the details and determining whether the challenged program offends the Establishment Clause." *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring).

One such case was *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). The neutrality doctrine pointed towards upholding state funding of a blind man's seminary education; the no-funding doctrine pointed in the opposite direction. The Court resolved the conflict in doctrines "not by permitting one to trump the other, but by relying on the elements of choice peculiar to the facts of that case." *Rosenberger*, 515 U.S. at 848 (O'Connor, J., concurring).

One critical fact enabled the *Witters* Court to resolve the conflict and decide the case: the fact that the aid to religion was "the result of petitioner's private choice." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in judgment). This Court emphasized that "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.* at 487.

Although the opinion of the Court discussed several additional factors supporting its conclusion, a majority of the justices stated in separate concurring opinions that the program was valid under *Mueller v. Allen*, 463 U.S. 388 (1983). *Witters*, 474 U.S. at 490 (White, J., concurring); *Id.* (Powell, J., concurring); *Id.* at 493 (O'Connor, J., concurring in part and concurring in judgment). In his *Witters* concurrence, Justice Powell summarized the rule in *Mueller* as follows:

> state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries.

Id. at 490-91 (Powell, J., concurring).

In *Mueller*, this Court upheld a state income tax deduction available for tuition, textbooks and transportation expenses incurred in sending children to private or public schools. This Court noted that where, as in the challenged tax deduction, "aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' . . . can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller*, 464 U.S. at 399 (citation omitted).

This principle was also applied in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). In *Zobrest*, this Court upheld an aid program that provided intepreters for deaf children, including children attending religious schools. The decision relied to a significant extent on the determination that "a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.* at 10.

The tuition assistance in the Ohio Scholarship Program is indistinguishable in structure from the vocational assistance in *Witters*. In both programs, aid reaches religious schools only if and when the individual beneficiaries choose to attend such schools. Also, the aid is paid directly to the beneficiaries, who then endorse it over to the school of their choice. Likewise, as the foregoing analysis of this Court's cases indicates, the private choice

aspect of the Ohio Scholarship Program is indistinguishable from the private choice aspect of the tax deductions allowed in *Mueller* and the government-paid interpreter upheld in *Zobrest*.[19]

Finally, this Court has stated that there are "special Establishment Clause dangers . . . when money is given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly." *Mitchell v. Helms*, 530 U.S. 793, 818-19 (2000) (plurality). It has been further stated that "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." *Id.* at 856 (O'Connor, J., concurring); *see also, Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 ("[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.") The "sponsorship, financial support and active involvement" that was rejected under the Virginia general assessment bill involved direct monetary grants

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[19] In *Agostini v. Felton*, 521 U.S. 203 (1997), this Court upheld the provision of remedial education services to disadvantaged children attending sectarian schools. Although the structure of the program did not involve direct individual application by the students for the services, this Court concluded that "providing [the] services directly to eligible students [does not] result[ ] in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application." 521 U.S. at 229. The private choice aspect of the Ohio Scholarship Program is more prominent than that under the program upheld in *Agostini* since the former program does involve direct application for benefits by the individual beneficiaries.

disbursed on religious criteria specifically to accomplish religious indoctrination. This is a far cry from the allocation of aid on secular criteria to accomplish secular objectives unrelated to religious indoctrination. Therefore, even if the Ohio Scholarship Program aid could in some sense be characterized as "direct funding" (notwithstanding the fact that the private choice of individual beneficiaries is essential to such aid reaching religious schools), the Program does not fall anywhere near "the original object of the Establishment Clause's prohibition."

III. This Case Is Not Governed By *Nyquist* Since The Structure Of The Program Is Distinguishable And *Nyquist* Cannot Be Squared With The Private Choice Line Of Cases.

In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court struck down a state tuition reimbursement program because it determined that the program had a "direct and immediate" effect of advancing religion. The Court's holding turned on the fact that the state only reimbursed parents for *nonpublic* school tuition and that approximately 85% of the nonpublic schools in the state were sectarian. *Id.* at 768.[20] Although the Court acknowledged that the aid reached religious schools only as a result of the private

[20] This Court also took notice of the possible sectarian characteristics of such schools, citing eight characteristics that could apply to some or all of the institutions. However, this Court gave no explanation of the significance of any of the characteristics, leaving the impression that such schools were simply too religious.

choices of individual parents, it stated that private choice alone was not sufficient to sustain the program. *Id.* at 781.

Nyquist does not justify affirming the lower courts' invalidation of the Program.

A. The Ohio Scholarship Program Is Distinguishable From *Nyquist* Because It Includes Both Public And Nonpublic School Options.

The *Nyquist* Court expressly distinguished the program at issue in that case from a program "involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted." *Id.* at 782 n.38. In *Mueller*, this Court held that the tax deductions at issue in the case fell within the exclusion set forth in *Nyquist* because the deductions were available for expenses incurred at both public and private schools. *Mueller*, 463 U.S. at 398. This Court observed that "state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Id.* at 399.

At the outset, it is important to recall that *all* Cleveland students are eligible for scholarships under the Program – not just those who are already attending nonpublic schools, as in *Nyquist*. Despite the availability of scholarships, Cleveland parents may choose to have their children remain in the Cleveland public schools. For such students, the Program makes tutorial assistance available. Further, the Program is open to public schools in neighboring school districts. Although in the initial years of the Program, a large percentage of children have redeemed their vouchers at private schools, this result is not appreciably different than the allocation of benefits in

Mueller, where private school tuition constituted the largest portion of the deductible expenses. *Id.* at 401.

B. The Distinctions Upon Which *Nyquist* Relies Should be Rejected.

In this Court's line of cases involving aid that reaches schools as a result of the private choices of individual beneficiaries, *Nyquist* stands alone as the only program struck down. Since the distinctions between *Nyquist* and the other cases are implausible or unprincipled, they should be expressly rejected.

One primary distinction, discussed above, is that the *Nyquist* program was only provided to parents sending their children to private schools. However, requiring the state to include public schools in a program where doing so would have no substantial impact, or where it would not further the legitimate secular objectives of the program, does not serve any Establishment Clause interest. This Court has recognized as much by refusing in *Mueller*, as discussed above, even to consider the fact that the vast majority of the tax deductions went to parents with children in private schools. Since the items for which expenses could be deducted (tuition, textbooks and transportation) were largely provided without cost to public school students, the inclusion of public schools in the program may have had no meaningful impact. In fact, this is precisely what the program opponents argued. *See Mueller*, 463 U.S. at 401. But the substance of the impact was not of concern to this Court, and properly so. Since Establishment Clause violations should not turn on the mere formality of a distinction without substance, this Court should expressly reject the proposition that all

school aid programs must be extended to public schools.[21]

The *Nyquist* decision also appears to suggest that the prevalence of sectarian schools selected by the program's beneficiaries has a bearing on the primary effect analysis. The opinion notes that the program sought to "assure that [parents] continue to have the option to send their children to religion-oriented schools," but then rejected the program because the choices made by parents were predominantly religious. *Nyquist*, 413 U.S. at 783. This proposition, which denies the right of individual beneficiaries to make their own religious choices, is clearly inconsistent with this Court's subsequent decisions in *Mueller* and *Witters*.

C. The Tuition Reimbursement Program in *Nyquist* Does Not Have the Primary Effect of Advancing Religion under This Court's Current Criteria.

In *Agostini*, this Court noted that the "criteria used to assess whether aid to religion has an impermissible effect" has changed in cases decided after 1985. *See*

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[21] The *Nyquist* court also incorrectly concluded that the program was skewed toward private schools because "[t]he grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools totally at state expense." *Nyquist*, 413 U.S. at 782, n.39. However, the converse could also be said: the right of parents of public schoolchildren to send their children to public school was given in addition to the right to receive tuition reimbursement for sending their children to private school. Put differently, all parents had the same options under state law: either send their children to public schools or select a private school and receive tuition reimbursement.

Agostini, 521 U.S. at 223. Three primary criteria are now used to "guide the determination of whether a government-aid program impermissibly advances religion: (1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion." *Mitchell v. Helms*, 530 U.S. 793, 845 (2000) (O'Connor, J., concurring) (citing *Agostini*, 521 U.S. at 234).

Under this new criteria, the program at issue in *Nyquist* does not have an impermissible effect. The aid does not define any recipients by reference to religion, nor does it create any additional entanglement between government and religion. The analysis of governmental indoctrination can be more complex. But *Agostini* makes clear that "the criteria by which an aid program identifies its beneficiaries [is relevant to assessing] whether any use of that aid to indoctrinate religion could be attributed to the State." *Agostini*, 521 U.S. at 230. In *Agostini*, this Court relied upon *Witters* and *Zobrest* to hold that the program at issue could not "as a matter of law, be deemed to have the effect of advancing religion through indoctrination." *Id.* at 226. Because the *Nyquist* program, like the aid programs in *Witters* and *Zobrest*, relies upon the genuine private choices of the individual beneficiaries to determine whether any aid reaches a religious institution, no religious indoctrination that may result can be attributed to the State.[22]

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[22] For the same reason, the program "cannot reasonably be viewed as an endorsement of religion." *Agostini*, 521 U.S. at 235. *See also, Witters*, 474 U.S. at 488-89 ("[T]he mere circumstance that an aid recipient has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion.").

Similarly, the program does not "create a financial incentive to undertake religious indoctrination." *Id.* at 231. This Court noted that such an incentive is not present where the aid "is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* The program clearly meets these conditions. As with the programs challenged in *Everson, Board of Education v. Allen*, 382 U.S. 236 (1968), *Mueller, Witters, Zobrest* and *Agostini*, the *Nyquist* program makes it incrementally easier for parents to select a religious school, but only to the same degree that it makes it incrementally easier to select any private school. The incentive, if any, is to attend a private school, and the extent of benefit for religious schools follows solely from the fact that many parents choose private religious schools. This is not a preference with which the Establishment Clause is concerned, and if the government sought to squelch these preferences by eliminating religious school options, it would violate a fundamental purpose of the Establishment Clause: to maximize religious liberty by minimizing government influence on the religious choices of private citizens.

CONCLUSION

The central command of the Religion Clauses is that government should minimize its influence on religious belief and practice. The Ohio Scholarship Program satisfies this command by permitting Cleveland families to choose the extent (if any) to which the education of their children may include a religious component. Because the Program promotes accredited education, selects its beneficiaries without reference to religion and does not substantially influence any religious choices, the judgment should be reversed and the case remanded for entry of an order granting the petitioners' motion for summary judgment.

Respectfully submitted,

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APPENDIX A

Statements of Interest of *Amici Curiae*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right

sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

The C an Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

The **Ethics & Religious Liberty Commission** is the ethics, moral concerns, and religious liberty agency for the Southern Baptist Convention, the Nation's largest Protestant denomination, with sixteen million members in over 41,000 autonomous local churches. The Commission is charged with addressing public policies affecting religious liberty domestically and abroad. We are profoundly concerned about the harmful effect that could result from government acts that discourage citizens from exercising educational choices for their children, whether those choices are secular or sectarian. We believe that the Establishment Clause should maximize religious liberty

by minimizing the influence of government on the religious choices of individuals.

Family Research Council, Inc. (FRC) is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family and religious liberty issues that affect the nation. FRC is committed to ensuring that the legacy of family, faith and freedom is not forgotten in America. FRC endorses parental involvement and parental choice in education and works to reduce the federal government's intrusion into local schools, including private and religious schools. FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts. Kenneth L. Connor is the President and Janet M. LaRue is the Senior Director of Legal Studies.

The **National Association of Evangelicals (NAE)** is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of American heritage.

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Nos. 00-1751, 00-1777, and 00-1779

IN THE

Supreme Court of the United States

October Term, 2001

Susan Tave Zelman, et al., *Petitioners*

v.

Doris Simmons-Harris, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE

on Behalf of The Association of Christian Schools International, California Catholic School Superintendents, The Connecticut Association of Independent Schools, The Connecticut Council on American Private Education, The Florida Association of Academic Nonpublic Schools, The Florida Council of Independent Schools, The Indiana Private Education Association, The Kentucky Non-Public Schools Commission, The Lutheran Education Association, The Michigan Association of Nonpublic Schools, The National Catholic Educational Association, The New Jersey Council for American Private Education, The New York Association of Independent Schools, The Oregon Federation of Independent Schools, The South Dakota Christian School Association, The Southern Baptist Association of Christian Schools, The Virginia Council for Private Education, and The Washington Federation of Independent Schools, in support of the Petitioners

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48 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. The Ohio Legislature Did not Single out Religious Schools in Cleveland for any Special Economic Benefit, but Included these Schools in a Major Effort to Improve the Quality of Education for all Children in Cleveland, Allocating Aid on the basis of Neutral, Secular Criteria that neither Favor nor Disfavor Religion, and Making it Available to both Religious and Secular Beneficiaries on a Nondiscriminatory Basis 3

II. Social Science Data Can Assist the Judicial Inquiry into the Purpose and Primary Effect of Public Funding of Education in Religious and Independent Schools 6

A. The Value of Empirical Research in Discerning Actual Effects of Legislation. 6

B. The Primary and Principal Effect of the Ohio Scholarship Program Has not Been to Advance Religion, but to Empower the Involvement of Economically Disadvantaged Parents in the Quality of their Children's Education, to Promote Actual not Notional Racial Integration in Religious and Independent Schools, and to Achieve Excellent Educational Outputs on a Religiously Neutral and Nondiscriminatory Basis. 11

C. Empirical Data on the Effects of Scholarship Program in Cleveland are Replicated in Major National Studies of the Quality of Education in Religious and Independent Schools throughout the United States, Which Serve the Public Good by Training Children to Undertake the Obligations of Citizenship, by Enabling them to Pursue a College Education, and by Saving Taxpayers Billions of Dollars in Educational Expenditures. 14

D. Empirical Data from other Countries Demonstrate that the Actual Effect of Evenhanded Educational Assistance Distributed on the Basis of "Criteria that neither Favor nor Disfavor Religion" Has not Led to "Government Inculcation of Religious Beliefs" or to "Excessive Entanglement of the Government with Religion," But has Led to a Greater Civic Sense of Responsibility for the Quality of the Education of All Children in a Variety of Settings Freely Chosen by Those Who Know Children Best, their Parents or Guardians. 24

CONCLUSION

Appendix A Statements of Interest of Amici Curiae 1a

Appendix B Tables 1b

TABLE OF AUTHORITIES

Pages

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I 1, 4

Ohio Constitution, § 15 (D) 4

Const. of Australia § 116 27

CASES:

Agostini v. Felton, 521 U.S. 203 (1997). 1,2,5,6,7,24,25,28,29,30

Aguilar v. Felton, 473 U.S. 402 (1985) 8,23

Attorney General for the State of Victoria v. The Commonwealth of Australia, 146 CLR 559, 33 ALR 321, 1981 WL 299232 (1981) 27

Board of Ed. v. Allen, 392 U.S. 236 (1968) 25

Committee for Public Education & Relig. Liberty v. Nyquist, 413 U.S. 756 (1973) 5,6,8,23,24

Everson v. Board of Ed., 330 U.S. 1 (1947) 25

Frothingham v. Mellon, 262 U.S. 447 (1923) 4

Grand Rapids School District v. Bell, 473 U.S. 373 (1985) 8

Jackson v. Benson, 578 N.W. 2d 602 (Wis. 1998), cert. den., 525 U.S. 997 (1998). 9

Lemon v. Kurtzman, 403 U.S. 602 (1971) 8,23

Mitchell v. Helms, 530 U.S. 793 (2000) 1,5,7,9,11

Mueller v. Allen, 463 U.S. 388 (1983) 6,7,8,11,25

Reed v. Rhodes, 422 F.Supp. 708 (N.D. Ohio 1976) 12

Reed v. Rhodes, 455 F.Supp. 546 (N.D. Ohio 1978) 12

Reed v. Rhodes, 869 F.Supp. 1274 (N.D.Ohio 1994) 4,12

Reed v. Rhodes, 934 F.Supp. 1533 (N.D.Ohio 1996) 3,12

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Statement of Interest of *Amici Curiae*

Amici curiae are national and state associations of religious and independent schools. These schools serve the public good by providing rigorous education to children of multiple religious and ethnic backgrounds. These schools produce excellent results measured in terms of educational outputs, including standard tests, grasp of the obligations of citizenship, and service to the community. Religious and independent schools represented in this brief typically deliver their services at a fraction of the cost of education in public schools.

Many of these *amici* filed an *amicus* brief in *Mitchell v. Helms*, 530 U.S. 793 (2000), highlighting factual information about the use of auxiliary aids, including computers, in contemporary American education. *Amici* now wish to call to the attention of the Court important empirical data about the role that religious and independent schools play in the education of economically and educationally disadvantaged children in inner-city schools, especially members of ethic minority groups, throughout the country.

The brief is filed with the consent of the parties. Counsel for the amici authored the brief, and no person other than the amici made a monetary contribution toward the preparation or submission of the brief. Particular statements of interest of the individual *amici curiae* are attached in Appendix A.

Summary of Argument

In *Agostini v. Felton*, 521 U.S. 203 (1997), this Court charted a new course in the application of the First Amendment Establishment Clause to federal and state programs providing financial aid to education that include children in religious schools among its recipients. The Court announced three primary criteria to evaluate whether government aid has the effect of advancing religion: (1) whether public assistance would probably lead to "government inculcation of religious beliefs," *id.* at 223, (2) whether the aid is distributed on the basis of "criteria that neither favor nor disfavor religion," *id.* at 231, and (3) whether the aid would probably lead to excessive entanglement of the government with religion, *id.* at 233.

Amici leave the development of the arguments about these three criteria to the parties. We focus here on a crucial portion of the record overlooked by the court of appeals, and on valuable empirical data relating to the actual effects of programs such as that challenged here.

In Part I *amici* call attention to the massive loan of state tax funds to the Cleveland City School District at the time of the economic failure of that school district in 1995. This uncontested fact was overlooked by the court of appeals, but is highly relevant to a determination of whether the Ohio Legislature singled out religious schools in Cleveland for any special economic benefit. The legislature also provided for tutorial assistance grants for public school children in a number equal to the alternate choice scholarship grants awarded to pupils selecting alternate schools. Ohio Revised Code [R.C.] §3313.978(B). Both of these aspects of the Cleveland program illustrate that the beneficiary class is broad, including parents of children in all forms of schools, public, religious, and independent. Under these circumstances it is constitutionally permissible to include religious schools in a major effort to improve the quality of education for all children in Cleveland, allocating aid "on the basis of neutral, secular criteria that neither favor nor disfavor religion," and making it "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231.

In Part II A *amici* show the connection between the requirement of a secular purpose and the determination of the primary effect of legislation that provides financial aid to education in a variety of settings, public, religious, and independent.

In Part II B we urge that the inquiry about the primary effect of a policy is an empirical question deserving an empirical answer. We provide research data concerning the actual effects of the Ohio Scholarship Program. The religious schools in these two cities where parental choice programs have been operational have the following characteristics. First, they are diverse economically in the sense that they offer excellent education to a significant percentage of economically disadvantaged children. Second, they are diverse in religious background, comprising many children who are not members of the sponsoring religious community. Third, they are racially

and ethnically diverse, offering the reality of integrated education in a city struggling to overcome the effects of a dual system violative of the Fourteenth Amendment. The primary or principal effect of the Cleveland programs is not to promote or advance religion, but to empower parental choice and to elevate the level of learning of the children in all schools, public, religious, and independent.

In Part II C we present reports of empirical data showing that the effects of the Scholarship and Tutorial Programs in Cleveland have been replicated in major national studies of the quality of education in religious and independent schools throughout the United States. In addition to the three effects noted above in Part II B, we show three positive effects that recur in religious and independent schools. First, children attending religious and independent schools are well prepared to undertake the obligations of citizenship. Second, they advance beyond secondary education to undertake higher education, with important ramifications for the economic well-being of these students and for the republic. Third, religious and independent schools contribute powerfully to the public good by saving taxpayers billions of dollars in educational expenses.

In Part II D we offer a succinct summary of comparative studies of educational financing in other constitutional democracies. We note that the recent reliance of this Court on the nondiscrimination principle in the funding of the education of all children brings this country's jurisprudence into line with that of all other constitutional democracies in the world. The data from other jurisdictions illustrate that the inclusion of religious schools within a broad range of educational options has the effect of increasing support for all forms of education.

Argument

I. The Ohio Legislature Did not Single out Religious Schools in Cleveland for any Special Economic Benefit, but Included these Schools in a Major Effort to Improve the Quality of Education for all Children in Cleveland, Allocating Aid on the basis of Neutral, Secular Criteria that neither Favor nor Disfavor Religion, and Making it Available to both Religious and Secular Beneficiaries on a Nondiscriminatory Basis.

In 1995 a severe financial crisis in the Cleveland City School District [CCSD] seriously affected the educational performance of children attending public schools in that city. No. 00-1751, State Pet. App. 62a. On March 3, 1995, a federal district court placed the CCSD under the control of the petitioner superintendent of public instruction. *Reed v. Rhodes*, 934 F.Supp. 1533, 1560 (N.D.Ohio, 1996). Prior to this order, the State of Ohio had advanced about $40 million to the CCSD in the form of a loan. Immediately following the takeover, the State Superintendent arranged for state controlling board approval of an additional $30 million dollars in loans from private lenders. As part of the 1994 Consent Decree entered in the school desegregation case, the State agreed to pay Cleveland $295 million over seven years, with the understanding that these funds were restricted to items related to desegregation. *Reed v. Rhodes*, 869 F.Supp. 1274 (N.D.Ohio 1994). In short, the State of Ohio did not abandon the CCSD, but worked overtime in both the legislative and executive branches to arrange for a massive infusion of cash to shore up the troubled school district. The Court need not turn a blind eye to plain facts of common knowledge.

Under *Frothingham v. Mellon*, 262 U.S. 447 (1923), no plaintiff has standing to challenge these financial arrangements between the State of Ohio and the local school district. Hence they were not featured in the record of this case. When situated within the context of the entire legislative response to the crisis in Cleveland, however, the massive transfer of resources from the state budget to the budget of the CCSD is a telltale indicator that the program under attack in this case was anything but an assault upon the troubled public schools of that city. Still less did the legislature attempt to confer an economic benefit upon a particular religious community or group of communities. The multi-million dollar state support of the CCSD is highly relevant to the determination of the breadth of the beneficiary class in this program. Viewed as a whole, the response of the state legislature to the crisis in Cleveland was clearly designed to assist children in all forms of schools, public, religious, and independent.

As part of its aid package the legislature also enacted a program that provides tuition assistance for children in kindergarten through the eighth grade. R.C. § 3313.975(B). The

scholarships may be used at adjacent suburban public schools or at religious and independent schools within Cleveland. The program mandates a preference for students from low-income families, defined statutorily as families with income below 200% of the federal poverty line. R.C. 3313.975(A). Scholarships may be awarded "to students who are not from low-income families only if all students from low-income families have been given first consideration for placement." No. 00-1751, Pet. App. 4a.

The Ohio Supreme Court found the scholarship and tutorial program challenged in this litigation permissible under this Court's jurisprudence on the First Amendment Establishment Clause. *Simmons-Harris v. Goff*, 711 N.E. 2d at 211. But the Ohio Supreme Court held that it offended the one-provision Clause of the Ohio Constitution, § 15 (D), art. II, because of its inclusion in an appropriations bill that included the massive assistance from the state to the CCSD. *Id.* at 214-15. The legislature immediately reenacted the legislation challenged here.

The state's support of the *public schools* of the CCSD is highly relevant to the federal question of the permissibility of the scholarship and tuition assistance program. This Court has repeatedly insisted that the breadth of the beneficiary class is a telling indicator of the permissibility of a program challenged under the Establishment Clause. For example, in *Mitchell v. Helms*, 530 U.S. 793 (2000) this Court sustained a federal program of assistance for auxiliary aids such as library books, maps, and computers because the recipients of this aid were children at all forms of schools, public and nonpublic. *See also Agostini v. Felton*, 521 U.S. 203 (1997) (remedial reading and mathematics teachers may provide assistance to educationally and economically disadvantaged children on the site of their schools, whether they are public schools or religious schools); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (same assistance for hearing impaired child attending religious school that he received while attending public school); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (openness of forum at a state university on a neutral basis "to a broad class of nonreligious as well as religious speakers ... is an important index of secular effect").

The court of appeals relied on *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), in which this Court invalidated a tax credit designed

in which this Court invalidated a tax credit designed exclusively for parents of children attending religious schools. *Simmons-Harris v. Zelman*, 234 F. 3d 945 (6th Cir. 2000), No. 00-1751, Pet. App. 13a-17a. *See also Sloan v. Lemon*, 413 U.S. 825, 832 (1973) (invalidating a Pennsylvania program of assistance because "the State [had] singled out a class of its citizens for a special economic benefit"). In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court sustained a Minnesota tax deduction for educational expenses on the ground that it was available to all parents on a neutral basis, whether the expenses were incurred in a public school or a religious or independent school. The court of appeals overlooked the crucial point on the breadth of the beneficiary class that this Court emphasized in both cases. *Compare Nyquist*, 413 U.S. at 783, n.38 (differentiating "significantly religious character of the statute's beneficiaries ... from ... public assistance made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited") with *Mueller*, 463 U.S. at 398 (citing note 38 in *Nyquist*) and 408-09. The program at issue here is thus permissible because the Ohio legislature did not single out any religious community to confer upon it an economic benefit, but included religious schools along with all other schools in a major effort to improve the quality of education for all children in Cleveland.

In making the critical determination of the scope of the beneficiary class in this program, the Court should situate the scholarship program within the entire legislative package responding to the problem of failing schools in Cleveland: massive direct aid to the CCSD, tutorial assistance for children attending the public schools operated by the CCSD, and scholarship assistance to parents whose children attend independent or religious schools, all of which agree to refrain from discrimination on the basis of race, color, or religion. In short, the Ohio Legislature allocated aid "on the basis of neutral, secular criteria that neither favor nor disfavor religion ... [and made it] available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231.

II. Social Science Data Can Assist the Judicial Inquiry into the Purpose and Primary Effect of Public Funding of Education in Religious and Independent Schools.

A. The Value of Empirical Research in Discerning Actual Effects of Legislation.

In reviewing challenges to public funding of education in religious schools under the Establishment Clause, this Court has insisted that the purpose of such programs must be secular. *Mitchell v. Helms*, 530 U.S. 793, 807-808 (2000); *Agostini v. Felton*, 521 U.S. 203, 211 (1997); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 5 (1993); and *Mueller v. Allen*, 463 U.S. 388, 394 (1983). The point of this inquiry is not to ask a vague question about the purpose of law in general, but a very specific and pointed question about the real purpose of the program under review. The demand of secularity is that the program have a legitimate public purpose, one that serves the common good of all. In the language of the Williamsburg Charter, a bicentennial document celebrating religious freedom, "'Secular purpose'... should not mean `non-religious purpose' but `general public purpose.' Otherwise, the impression is gained that `public is equivalent to secular; religion is equivalent to private.'" 8 *J. L. & Relig.* 5, 14 (1990).

This Court has routinely found that a wide variety of federal and state programs of financial support for education in religious schools have met the standard of secular purpose. *Mitchell*, 530 U.S. at 810, 813; *Agostini*, 521 U.S. at 211; *Zobrest*, 509 U.S. at 5, note 4. The *Mueller* Court articulated several purposes that fulfilled the requirement of secularity or neutrality:

> A state's decision to defray the cost of educational expenses incurred by parents – regardless of the type of schools their children attend – evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated. Similarly, Minnesota, like other states, could conclude that there

> is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden – to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies. *Mueller*, 463 U.S. at 395.

All of the purposes that the Court found to underlie the Minnesota statute sustained in *Mueller* are of equal application to the Ohio program challenged here.

Even where the Court has concluded that a particular program is constitutionally infirm, it has done so on another ground, not for want of a valid secular purpose. *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 409-11 (1985) and *Grand Rapids School District v. Bell*, 473 U.S. 373, 383 (1985) overruled in *Agostini v. Felton, supra*; *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 779-80 (1973), distinguished in *Mueller, supra*; *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

To inquire about the primary and principal effect effect of a program is, of course, to raise an empirical question. Does it actually advance religion? Does it actually inhibit or impede religion, for example, by entangling the government excessively in religious matters in which it has no business or competence? This Court has intuitively sensed that only empirical data suffice to answer empirical questions. For example, in *Nyquist, supra*, the Court rejected the idea that, in determining the effect of a statute, the Court should look exclusively to what the statute on its face purports to do and ignore the actual operation of the challenged provision. 413 U.S. at 410.

Earlier cases on the permissibility of aid to education in religious schools, such as *Lemon* and *Nyquist*, came before the Court on motions for summary judgment, without a fully developed record. *See, e.g.*, Charles H. Wilson, "The Facts Matter: The Case for Accurate Records in Constitutional Adjudication," in Edward McGlynn Gaffney, Jr., ed., *Private Schools and the Public Good* 189-91 (1980). But this case comes before the Court with a record reflecting several years of the actual operation of the program, in part because this Court

granted a stay pending appeal, 528 U.S. 983 (1999). Hence the Court may fashion an opinion grounded upon an inspection of known results, not on the shifting sands of lawyers' speculation about "imaginable but totally implausible evils." *Wolman v. Walter*, 433 U.S. 229, 260, note 6 (1977) (Marshall, J., concurring in part and dissenting in part); see *Mitchell v. Helms*, 530 U.S. at 823; *id.* at 855 (O'Connor, J., concurring in judgment).

The record in this case is replete with rich information about the actual effects of the Cleveland program in the lives of parents, teachers and administrators. No. 00-1777, Pet. App. 80a-188a. In addition, the Court may consider empirical studies that are highly relevant to the inquiry about the principal and primary effect of the Ohio Scholarship Program. [1]

The Court may also assess this program in the light of data about a similar program in Milwaukee sustained by the Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W. 2d 602 (Wis. 1998), cert. denied, 525 U.S. 997 (1998). Like the Cleveland program, the Milwaukee program has been functioning for several years. Hence its actual effects are accessible to the Court.[2]

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[1] For empirical research on the Cleveland programs conducted under the auspices of the Program in Education Policy and Governance [PEPG], Kennedy School of Gov., Harvard Univ., see Jay P. Greene, William G. Howell, and Paul E. Peterson, *Lessons from the Cleveland Scholarship Program* (1997), Peterson, Greene, and Howell, *New Findings from the Cleveland Scholarship Program: A Reanalysis of Data from the Indiana University School of Education Evaluation* (1998); Peterson, Howell, and Greene, *An Evaluation of the Cleveland Voucher Program After Two Years* (1999); Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland*, (1999) These papers are published on the Internet at http://www.ksg.harvard.edu/pepg

[2] For a generally positive assessment of the Milwaukee Parental Choice Program [MCPC], see John F. Witte, *The Market Approach to Education — An Analysis of America's First Voucher Program* (2000) ("Choice ... focuses attention on parents as critical actors in a system where they are often neglected or relegated to quite subservient support roles.... if packaged properly, it invokes deep value structures revolving around the twin poles of freedom of choice and the unjust denial of equal opportunity.") Witte provided annual assessments of the MCPC in its first five years; see Witte et al. *Fourth-Year Report, Milwaukee Parental Choice Program*, (Dept. of Polit. Sci., Univ of Wisc.-Madison,

The Court may probe the effects question by exploring what is known generally about the quality of education in religious and independent schools in urban areas throughout the United States. We discuss these data in section II C below. When attention is paid to research studies, hunches can yield to hard data. Canards can give way to reliable information. A priori speculation can be replaced by empirically grounded facts. The genius of the common law – attention to the facts of

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1994); Witte et al. *Fifth Year Report: Milwaukee Parental Choice Program* (1995); Witte , "The Milwaukee Voucher Experiment," *Educ. Research and Policy Analysis* (1998). For research studies of the MCPC conducted under the auspices of the PEPG, see Jay P. Greene and Paul E. Peterson, *Methodological Issues In Evaluation Research: The Milwaukee School Choice Plan* (1996); Greene, Peterson, & Jiangtao Du, *Effectiveness of School Choice: The Milwaukee Experiment* (1997); see also Greene, "Effectiveness of School Choice: The Milwaukee Experiment," *Educ. & Urban Society*, 190-213 (Feb. 1999); Greene, et al., "School Choice in Milwaukee: A Randomized Experiment" in Paul Peterson and Bryan Hassel, eds., *Learning from School Choice* (1998). For an economic analysis of the progress in the MCPC, see Caroline M. Hoxby, *School Choice and School Productivity (or Could School Choice be a Tide that Lifts All Boats?)* 28-40 (2001). http://www.schoolchoiceinfo.org/servlets/SendArticle/118/hoxby.pdf. Dr. Howard L. Fuller, Director of the Institute for the Transformation of Learning [ITL] at Marquette University and former Superintendent of Milwaukee Public Schools has independently confirmed the validity of these studies. Fuller and S. White, *Expanded School Choice in Milwaukee — A Profile of Eligible Students and Schools*, Wisc. Policy Research Institute Report, Vol. 8, No. 5 (1995); Fuller, *The Impact of School Choice on Racial and Ethnic Enrollment in Milwaukee*, ITL, Current Education Issues [CEI] No. 99-5 (1999); Fuller, *The Fiscal Impact of School Choice on the Milwaukee Public Schools*, ITL, CEI No. 99-2, March 1999; Fuller and George. Mitchell, *Selective Admission Practices? Comparing the Milwaukee Public Schools and the Milwaukee Parental Choice Program*, ITL, CEI No. 2000-01(2000);Fuller and Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools*, ITL, CEI No. 2000-02 (2000) Fuller has also situated the controversy over the MPCP within the context of a struggle of racial minorities to achieve for their children the same degree of choice about educational quality that middle-class Americans take for granted. Fuller, *The Continuing Struggle of African Americans for the Power to Make Real Educational Choices* (2000) Fuller, *The Saturation Campaign of Lies and Distortions about Educational Vouchers* (2000). Many of Fuller's papers are published on the Internet at http://www.schoolchoiceinfo.org

each case – can guide constitutional analysis.

As the Court becomes increasingly familiar with the jurisprudence of other jurisdictions, it can also take advantage of comparative studies on the actual effects of educational programs in other jurisdictions. We call special attention to countries with constitutional prohibitions of an established religion, such as Australia and the Netherlands. We discuss these data in section II D below.

B. The Primary and Principal Effect of the Ohio Scholarship Program Has not Been to Advance Religion, but to Empower the Involvement of Economically Disadvantaged Parents in the Quality of their Children's Education, to Promote Actual not Notional Racial Integration in Religious and Independent Schools, and to Achieve Excellent Educational Outputs on a Religiously Neutral and Nondiscriminatory Basis.

The court of appeals invalidated the Ohio Scholarship Program on the view that its primary effect was to "promot[e] sectarian schools." No. 00-1777, Pet. App. 28a. Laying aside the regrettable label "sectarian school," *Mitchell v. Helms*, 530 U.S. at 826, *amici* note that the court of appeals supported its conclusion merely by counting of the number of *religious schools* participating in the scholarship program, *id.* at 27a, without probing the religious identity of the *students themselves*. This is the very sort of mistaken and superficial analysis that this Court repudiated in *Mueller*, 463 U.S. at 401(rejecting relevance of statistic that 96% of the children in Minnesota private schools in 1978-1979 attended religiously affiliated institutions, or that the bulk of the deductions would be claimed by parents of children in religious schools).

When sharper focus is placed upon the characteristics of the students enrolled in the Cleveland scholarship program, we learn three things about these children.

1. Religious Schools Serve Economically Disadvantaged Children

A large percent of children from economically disadvantaged households would not be able to enroll in these schools without the scholarship program challenged in this case. As noted above, the statute mandates a preference for students from low-income families, defined as below 200% of the fed-

eral poverty index. R.C. 3313.975(A). According to the current Federal Poverty Guidelines, that means annual income of less than $35,300 for a family of four. See *Federal Register* Vol. 66, No. 33, Feb. 16, 2001, at 10695-97 (defining "poverty" for family of 4 as income of $17,650). Another measure of the economic need of these children is that the vast majority of them qualify for federally subsidized hot lunch programs.

2. Religious Schools Serve Children of Racial and Ethnic Minority Groups

The overwhelming majority of the children in the religious schools participating in the scholarship program are members of racial and ethnic minority groups. For over three decades the CCSD has been plagued with devastating consequences flowing from a dual public school system held to violate the Fourteenth Amendment. *Reed v. Rhodes*, 422 F.Supp. 708 (N.D. Ohio 1976); *Reed v. Rhodes*, 455 F.Supp. 546, 568 (N.D. Ohio 1978) (remedial order of "comprehensive, systemwide plan of actual desegregation"); *Reed v. Rhodes*, 869 F.Supp. 1274 (N.D. Ohio 1994) (enforceable consent decree); *Reed v. Rhodes*, 934 F.Supp. 1533, 1538-39 (N.D. Ohio 1996) ("total fiscal and administrative collapse" of CCSD), *id.* at 1560 (order directing State Board of Education and State Superintendent to "assume immediate supervision and operational, fiscal and personnel management of the District"), *id.* at 1558 (modifying Consent Decree and terminating judicial supervision of student-school assignments), aff'd, 179 F.3d 453, 473 (6th Cir.1999). The district court found that the district was unitary with respect to all its remaining obligations. *Reed v. Rhodes*, 1 F.Supp.2d 705 (N.D. Ohio 1998), aff'd, 215 F.3d 1327 (6th Cir. 2000). Finally, the consent decree obligations terminated on June 30, 2000.

Against the background of this unpretty picture, one important effect – if not the "primary and principal" effect – of the Cleveland scholarship program is the experience of voluntarily chosen racial integration occurring in the religious and independent schools participating in the scholarship program. A leading researcher at the Kennedy School of Government summarizes the findings of his study of this effect of the Cleveland program as follows:

> Despite the claims of critics, school choice in Cleveland contributes to racial integration by providing

> families with access to private schools that, on average, are better racially integrated than are the public schools in the Cleveland metropolitan area. Nearly a fifth (19%) of recipients of a voucher in Cleveland attend private schools that have a racial composition that resembles the average racial composition of the Cleveland area (defined as having a proportion of minority students in the school that is within 10% of the average proportion of minorities in metropolitan Cleveland). Only 5.2% of public schools students in the Cleveland metropolitan area are in comparably integrated schools. More than three-fifths (60.7%) of public school students in metropolitan Cleveland attend schools that are almost entirely white or almost entirely minority in their racial composition. Half of the students in the Cleveland Scholarship Program are in comparably segregated schools. This better integration in private schools participating in the choice program is achieved without sacrificing the economic and religious heterogeneity of those schools. Of all of the students who attend a publicly-financed school of choice in Cleveland, only 16.5% currently attend a religious school. Yet the evidence on racial integration suggests that access to a choice program that includes religious schools makes a significant contribution to promoting racial integration in Cleveland schools. Jay P. Greene, "The Racial, Economic, and Religious Context of Parental Choice in Cleveland," at 2 (Program on Educ. Policy & Gover-nance, Kennedy School of Government, Harvard Univ., 1999) http://www.ksg.harvard.edu/pepg/papers.html

3. Religious Schools Serve Children Who Are not Members of the Sponsoring Religious Community

The overwhelming majority of the children participating in the scholarship program are not of the same faith as the religious community that sponsors the schools in which they are enrolled. For example, the Hanna Perkins School petition notes that in Our Lady of Peace School, sponsored by the Catholic Church, "99% of our children are minority pupils. At least one-half of the families are at or below poverty level.

85% of the pupils are not of the Catholic faith." No. 00-1777, Pet. 5-6, citing R. 34 Hanna Perkins Opp. to TRO Exh. 1, pg. 1.

The same petition graphically illustrates the mistake of identifying the religion of the students benefiting from this program with the religious community sponsoring the schools they attend. No. 00-1777, Pet. 6. This sort of detail in this record should be unsurprising for two reasons. First, the Cleveland program prohibits admission restrictions based on religion. R.C. §3313.976(A)(4). Second, the scholarships are awarded by lottery and without regard to religion. R.C. §3313.977(A). What might be surprising is that these data are replicated in cities throughout the country, a point to which we now turn.

C. Empirical Data on the Effects of Scholarship Program in Cleveland are Replicated in Major National Studies of the Quality of Education in Religious and Independent Schools throughout the United States, Which Serve the Public Good by Training Children to Undertake the Obligations of Citizenship, by Enabling them to Pursue a College Education, and by Saving Taxpayers Billions of Dollars in Educational Expenditures.

Before analyzing national studies about the quality of religious and independent schools in America, we report the same data sets mentioned in Part II-B above about children attending religious schools in America.

First, religious and independent schools in inner-cities provide an important service to children from economically disadvantaged families, as measured by nearly open admissions, high retention, sliding scale tuition and outright grants, low socioeconomic status of students and ethnic minority status. Catholic schools in particular serve large number of low-income non-Catholics in the inner cities. Joseph M. O'Keefe & J. Murphy, "Ethnically Diverse Catholic Schools: School Structure, Students, Staffing and Financing," in J. Youniss & J. Convey, eds., *Catholic Schools at the Crossroads: Survival and Transformation* 117-36 (2000). See also NCEA, *Catholic High Schools: Their Impact on Low-Income Students* (1986). These schools are not public in the sense of being operated by the government, but they most emphatically are public in the sense of granting access to children of all economic and racial and ethnic backgrounds. These schools serve a valid purpose of providing an excellent education to children with multiple challenges to overcome: membership in a racial or ethnic minority, economic disadvantage, and educational disadvantage.

Second, religious schools serve a large number of children from racial and ethnic minorities. For example, the minority student enrollment in Catholic elementary and secondary schools in the current academic year throughout the nation is 680,042, which is 25.6% of the total enrollment of 2,647,301. Of these students, 103,200 (3.9%) are Asian; 212,845 (8%) are African American; 288,391 (10.9%) are Hispanic; 12,558 (.5%) are Pacific Islander,; 44,964 (1.7%) are multiracial; and 1,967,259 (74.4%) are white. Source: NCEA, *United States Catholic Elementary and Secondary School Statistics, 2000-2001*, Exhibit 20, http://www.ncea.org/PubPol/databank.html.

These data, moreover, reflect a considerable growth in the diversity of these schools. The percentage of minorities in Catholic schools has more than doubled in the past 30 years. In 1970, minorities accounted for 10.8% of the Catholic school population, in 1980 it had increased to 19.4% and in 2001 it is at 25.6%. In the same time period, the percentage of African American enrollment increased from 6.5% to 8.0%. The percentage of Asian Americans increased from 0.5% to 3.9%. The Hispanic enrollment rose from 5.2% to 10.9%.

The most recent data on minority enrollment from the most populous state in the nation corroborate the data reported by the intervenor schools in No. 00-1777. Pet. 6, *supra*. The percentage of children from ethnic minority groups in Catholic elementary schools in California (56.9%) is almost as high as the percentage of children from ethnic minority groups in the elementary and secondary schools (K-12) operated by the State (63.1%). Source: Calif. Dept. of Educ., *Factbook 2001*. Minority enrollment in Catholic schools is highest in the region with the largest number of Catholic schools; 70.51% of the children attending Catholic elementary schools in the Archdiocese of Los Angeles are minority students. In Oakland the minority figure in Catholic schools is 60.66%, and in San

Francisco it is 54.89%. Source: Calif. Catholic Conference, *California Catholic Education, Annual Report, 2001*

Third, religious schools provide educational services to a large number of children who are not members of the faith of the sponsoring religious community. In the current academic year 358,349 non-Catholic students attend Catholic schools nationwide. Non-Catholic student enrollment has risen from 2.7% in 1970 to 11.2% a decade later and today is 13.6%. For percentages of non-Catholic enrollment on a regional and national basis, see NCEA, *United States Catholic Elementary and Secondary School Statistics, 2000-2001*, Exhibit 21, http://www.ncea.org/PubPol/databank.shtml

Both religious and public schools serve the public good. Since programs such as the one challenged here include children attending religious schools within a broad beneficiary class, they are not likely to have the impermissible effect of advancing religion. On the contrary, the more problematic governmental classification would be to set up an elaborate scheme of benefits from which only the parents of children attending religious schools would be excluded on an a priori basis.

We turn now to the empirical studies of the quality of education in religious schools. Beginning in the early 1980s many researchers have analyzed large federal data on academic achievement known as "High School and Beyond" [HSB]. The focus of this research was principally upon the largest group of nonpublic schools, those operated by the Catholic church, where they found very positive educational effects that could not be accounted for by extrinsic causes.[3]

Major research studies indicated that Catholic schools

[3] Although empirical studies of other schools has not yet been undertaken with the same rigor, it is reasonable to expect that studies of other religious and independent schools with a similar educational mission would yield conclusions at least as positive as those disclosed in the studies of Catholic schools. For example, a very high percent of children in Hebrew-day schools in southern California associated with Agudath Israel come from economically disadvantaged families, but perform well in educational outputs. It is more problematic to conclude that mechanisms that produce positive results in religious schools are replicable in public schools. *See, e.g.*, Stephen S. Sugarman and Frank Kemmerer, eds. *School Choice and School Controversy* 91 (2000).

were particularly effective for members of racial and ethnic minority groups. For example, Dr. Andrew M. Greeley of the National Opinion Research Center at the University of Chicago undertook a study of minority students based on the High School and Beyond [HSB] data set maintained by the National Center for Education Statistics [NCES]. Greeley found that Catholic high schools are not "rich men's segregated enclaves," as they were mislabeled during the debate in the 1970s over tuition tax credits. *Catholic High Schools and Minority Students* 10 (1982). Half of the black students in this study were non-Catholics; 95% of these schools admitted non-Catholic students. *Id.* at 11, note 3.

The principal purpose of this study was to determine why black and Hispanic students in Catholic secondary schools display much higher levels of academic effort and achievement than their counterparts in public schools. *Id.* at 3. Since the cost of tuition in a Catholic high school represents a high percent of income of minority families, Greeley proceeded on the assumption that families who laid out this expenditure out of very scarce resources believed that their children would receive a better education in these schools than in the "free" schools; and he analyzed carefully the expectations of parents under these circumstances. *Id.* at 13-27.

Greeley concluded, however, that family input alone could not explain the outcomes achieved by these students, measured in terms of academic performance, homework, grade point average, and college aspiration. For example, Greeley found that in all three racial and ethics groups (white, black and Hispanic), students in Catholic schools were twice as likely to do more than five hours of homework a week than their public school counterparts, *id.* at 44. Greeley described a genuine "school effect" above and beyond the input or expectations of the family. He attributed the Catholic school effect to ownership of the schools by religious orders in most of these schools, to more regular discipline, and to a higher quality of teaching in these schools. *Id.* at 107. According to Greeley, the "effect of Catholic schools seems to be especially powerful on the multiply disadvantaged – minority students whose parents did not attend college, who themselves have not qualified for academic programs." *Id.* at 108; *see also* 91.

Dr. James Coleman and his associates at the University of

Chicago reached similar conclusions from the HSB data. James S. Coleman, Thomas Hofer, and Sally B. Kilgore, *High School Achievement: Public, Catholic, and Private Schools Compared* (1982); James S. Coleman and Thomas Hofer, *Public and Private High Schools: The Impact of Communities* (1987). After adjusting for self-selection, a recent analysis of the HSB data found that sophomores in Catholic schools are more likely to graduate with their class. W. Sander & A.C. Krautmann, "Catholic Schools, Dropout Rates and Educational Attainment," 33 *Econ. Inquiry* 217 (1995).

The research by Greeley and Coleman and his associates was ground-breaking and preliminary. The solidity of their central conclusions over time was confirmed in a major study a decade later. Anthony Bryk, Valerie E. Lee, and Peter B. Holland, *Catholic Schools and the Common Good* (1993). These researchers concluded that Catholic high schools "achieve relatively high levels of student learning, distribute this learning more equitably with regard to race and class than in the public sector, and sustain high levels of teacher commitment and student engagement." *Id.* at 297. Their research was both analytic and normative, on the view that "a study of the moral premises of the Catholic school can constructively contribute to a debate about the kinds of schools we seek for all our children." *Id.* at 345, note 4.

Other researchers have also found a positive "school effect" for children in Catholic schools J. Convey, *Catholic Schools Make a Difference: Twenty-five Years of Research* (1992); Youniss & Convey, *Catholic Schools at the Crossroads:* (2000).

Further positive results have emerged from analysis of the National Educational Longitudinal Study [NELS] data set. One study discovered a positive Catholic school effect in the analysis of tests of academic achievement in the NELS data. A. Garnoran, "Student Achievement in Public Magnet, Public Comprehensive, and Private City High Schools" 18 *Educ. Evaluation & Policy Analysis* 1 (1996). Another analysis of the NELS data discovered a low drop-out rate in Catholic high schools. J.D. Teachman, K. Paasch, & K. Carver, "Social Capital and the Generation of Human Capital," 75 *Social Forces* 1343 (1997).

An analysis of the National Assessment of Educational

Progress [NAEP] data on math achievement of fourth graders found that students from less supportive family environments achieved higher scores when they attended Catholic schools. A.M. Jones, *Differential Effectiveness: Catholic and Public School Fourth Graders' Performance on the 1992 NAEP Mathematics Assessment,* Unpublished doctoral dissertation, Boston College (1997).

A study using census data and the annual survey from the NCEA shows higher graduation rates for Catholic school students. D. Neal, "The Effects of Catholic Secondary Schooling on Educational Achievement," 15 *J. Labor Economics* 98 (1997); *see also* NCEA, *The Catholic High School: A National Portrait* (1985).

A psychological study recently found a high degree of achievement and self-esteem among students of color who attend Catholic schools. J. Bempechat, *Against the Odds: How "At-Risk" Students Exceed Expectations* (1998).

When evaluated in the context of nondiscriminatory programs such as the scholarship and tutorial programs in Cleveland, these research findings reinforce the conclusion that the primary and principal effect of such programs is not to advance religion, but to advance the public good by serving the educational needs of all children. They do a particularly good job of training children to undertake the obligations of citizenship and of motivating them to complete secondary education well and to pursue a college education. And it is uncontroverted that religious and independent schools save taxpayers billions of dollars in educational expenditures each year. We highlight each of these three beneficial effects of religious and independent schools in America.

1. Training children for the obligations of citizenship

First, religious and independent schools do a good job of training children for the obligations of citizenship. Far from being "antidemocratic," these schools produce impressive achievements in civics that are higher that those in public schools. For example, a federal study in 1997 found that students in religious and independent schools discussed current events more regularly than students in public schools. K. Chandler & C. Chapman, *Student Interest in National News and Its Relation to School Courses* (U.S. Dept. of Educ. NCES publication no. 97-970),

In a national sample of tests given at grades 4, 8 and 12, students in religious and independent schools had higher average scores than their peers in public schools. Students in Catholic schools had higher average scale scores than students in public schools at all three grades, and they were comparable to students in public schools in studying the Constitution, Congress, the executive branch, how laws are made, the court system, political parties, state and local government, other countries and international relations. C. Chapman, K. Chandler, & R.G. Niemi, *The Civic Development of 9th through 12th Grade Students in the United States* (U.S. Dept of Educ. NCES 1998). The report concludes:

> After controlling for a host of other factors described above, private school students tend to have higher political knowledge scores, are more likely to have confidence in their ability to speak at public meetings, are more likely to accept the presence of controversial books in public libraries than are public school students. *Id.* at v.

Empirical research indicates that private schools are not "parochial" in the sense of narrow self-interest or lack of breadth. As Table 1 in Appendix B illustrates, religious and independent schools train men and women who are well informed and are more likely to be active citizens than their public school cohorts.

The data maintained by the government about religious and independent schools supports the conclusion that these schools are concerned with civic virtue and the common good. For students in religious and independent schools, moreover, civic engagement goes beyond knowledge and self-described attitudes; they perform community service at higher levels than their colleagues in public schools. Table 2, Appendix B.

This trend continued through the 1990s, with welcome improvement in students attending public schools. For both 1996 and 1999, students in public schools (47 percent in 1996 and 50 percent in 1999) were less likely to report participation in community service than students in religious schools (69 percent in 1996 and 72 percent in 1999). In 1999, students attending public schools were less likely to participate in community service than were students in independent schools (50

percent compared to 68 percent). In addition, students from religious schools were more likely than those from public schools to report service-learning experiences for both 1996 and 1999. C. Chapman, & B. Kleiner, *Statistics in Brief, November 1999, Youth Service Learning and Community Service among 6th and 12th Grade Students in the United States: 1996 and 1999* p. 5 (U.S. Dept. of Educ. NCES publication no. 2000-028). In short, data gathered and analyzed by the federal government, refute the claim that religious schools are anti-democratic. In fact, students in these schools are more knowledgeable and more engaged in the political process than their colleagues in public schools.

2. Rigorous standards of academic achievement

Second, by demanding a high level of academic rigor, religious and independent schools contribute to the intellectual resources of the nation. At the most basic level, students are present for instruction in religious and independent schools, which have far less absenteeism and fewer cut classes than in public schools. T.D. Snyder & C.M. Hoffman, *Digest of Education Statistics 2000* 184 (U.S. Dept. of Educ., Nat. Center for Education Statistics No. 2001-034).

As noted above, religious and independent schools have more stringent requirements. This translates into a higher success rate for completion of secondary education. For example, 44.8% of religious and independent schools and 19.8% of public schools met the high school graduation recommendations of the National Commission on Excellence in Education. Nearly 88% of students in religious and independent high schools apply to college, compared to 57.4% of public high school students. Though students at religious and independent high school students comprise only 7.5% of that population nationally, they account for 20% of the nation's twelfth graders who took AP examinations in 1998. Students at religious and independent high schools scored higher on the SAT than public school counterparts, as indicated in Table 3 in Appendix B.

Along with greater preparedness for college, students in religious and independent schools have higher occupational aspirations. Data in the NELS set disclose that when asked about expected occupations in grades 8, 10, and 12, two-thirds of Catholic-school students chose "professional, business or managerial" as opposed to 59% of those in other private

schools and only 49% of those in public school. Snyder & Hoffman, *Digest of Education Statistics 2000* 157. Students at religious and independent schools also perform better on the National Assessment of Educational Progress in a range of subject areas, including reading, *id.* at 129; math, *id.* at 140; science, *id.* at 145-46; and geography and U.S. history, *id.* at 138.

Most recently, students at religious and independent schools scored significantly above the national average on the International Math and Science Study, which measured math and science performance in 38 countries around the world. The scores from religious and independent schools were so impressive that, had they been the norm for the nation, they would have propelled the U.S. position in international rankings from 19th to 12th place in math and from 18th to 6th place in science Source: Council on American Private Education, 2001.

3. Religious and Independent Schools As a Subsidization of Public Schools

Third, far from posing a threat to the well-being of the nation's public schools, religious and independent schools actually subsidize their operation. The median parish school tuition at Catholic elementary schools throughout the nation in the current academic year is $1,787, and the average per pupil cost is $2,823. The median freshman tuition at Catholic secondary schools in the current academic year is $4,300 and the average per pupil cost is $5,700. Based on the average public school per pupil cost of $6,512, Catholic schools provide more than $17.2 billion dollars a year savings for the nation. NCEA, *United States Catholic Elementary and Secondary School Statistics, 2000-2001*, Exhibit 19, http://www.ncea.org/PubPol/databank.shtml

When the cost of education at other religious and independent schools is added to this figure, the sum that these schools save American taxpayers mounts to nearly $39 billion each year in educational expenditures. In 2000, Catholic schools educated 49.5% of all private school children and 5.5% of all school-aged children. But the percentage of students taught in major metropolitan centers, where Catholic schools constitute the vast majority of private schools, is much higher. In Philadelphia, private schools educate 31% of all

children; in New York, 23%; in Chicago, 22%. With a per pupil cost of $7,428, private schools in New York save the city $2.2 billion; in Chicago $924 million (1990 data), in Philadelphia $379.6 million, in New Orleans $109 million, in Cleveland $100 million and in Boston nearly $80 million. Joseph M. O'Keefe, "What Research Tells Us about the Contributions of Sectarian Schools," 78 *U. Det. Mercy L. Rev.* 425, 428 (2001).

Religious and independent schools are a precious national resource that is worth preserving. In 1965, 13,500 Catholic schools served 5.6 million students. In 2000 the number had dropped to 8,146 schools serving 2,575,815 students. The nation cannot afford to risk a new loss of the schools that have been found upon serious empirical investigation to have the beneficial effects described above.

In the leading case that invalidated state aid to religious elementary and secondary schools, this Court acknowledged the enormous contribution of these schools to the nation. Chief Justice Burger wrote: "Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents. The merit and benefits of these schools, however, are not the issue before us in these cases." *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971); *see also Aguilar v. Felton*, 473 U.S. 402, 415 (1985) (Powell, J., concurring). Whatever the Court was thinking of in 1971, the merit of religious schools as effective partners in American education is most emphatically before the Court in this case. In identifying the primary and principal effect of the program challenged here, the Court should take into account decades of studies of the actual effects of education in religious schools.

This Court need not reconsider whether or not *Lemon* and *Nyquist* were rightly decided decades ago. Those decisions are irrelevant to the decision of this case because the program now before this Court does not remotely resemble the Rhode Island program that sought to address the issue of imbalance of compensation between teachers at public schools and religious schools by offering a salary supplement to of secular subjects in religious schools. *Id.* at 616-20. Neither is it like the Pennsylvania program that sought to reimburse religious schools for the service of offering instruction to citizens of the Commonwealth on secular subjects. *Id.* at 620-24. Nor is it like the tax benefit invalidated by the Court in *Nyquist, supra*.

tax benefit invalidated by the Court in *Nyquist, supra*. The constitutional vice that the Court found in all of those programs was that they would tend to advance religion by offering an exclusive benefit only to parents of children attending religious schools. By contrast, the scholarship program offers financial assistance to offset some of the cost of educating children in religious schools; and tutorial assistance grants are awarded to public school children in a number equal to the scholarship grants awarded to pupils selecting alternate schools. R.C. §3313.975(A).

When viewed as complementary aspects of state concern for the education of all children, these two aspects of the Cleveland program illustrate that the beneficiary class is broad, including parents of children in all forms of schools, public, religious, and independent. Under these circumstances it is constitutionally permissible to include religious schools in a major effort to improve the quality of education for all children in Cleveland, allocating aid "on the basis of neutral, secular criteria that neither favor nor disfavor religion," and making it "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231.

D. Empirical Data from other Countries Demonstrate that the Actual Effect of Evenhanded Educational Assistance Distributed on the Basis of "Criteria that neither Favor nor Disfavor Religion" Has not Led to "Government Inculcation of Religious Beliefs" or to "Excessive Entanglement of the Government with Religion," But has Led to a Greater Civic Sense of Responsibility for the Quality of the Education of All Children in a Variety of Settings Freely Chosen by Those Who Know Children Best, their Parents or Guardians.

As recently as two decades ago, a prominent United States Senator could observe that the United States stands out as "the only industrial nation in the world that does not routinely provide aid to nonpublic schools as part of its education system." Daniel Patrick Moynihan, "What the Congress Can Do When the Court is Wrong," in Gaffney, ed., *Private Schools and the Public Good* 79 (1980).

Our country must, of course, be faithful to our own constitution; but comparative constitutional analysis suggests that

there is not a significant difference in the textual commitment of other constitutional democracies to religious freedom. The principal difference between the United States and other constitutional democracies lies within the judicial construction placed upon the constitutional text. *Amici* do not suggest that it would be constitutionally permissible in this country for the federal government or the states to advance religion. This Court, however, has "sustained programs that provided aid to all eligible children regardless of where they attended school." *Agostini*, 521 U.S. at 231, citing *Everson v. Board of Ed.*, 330 U.S. 1, 16-18 (1947) (sustaining ordinance authorizing all parents to deduct from their state tax returns the costs of transporting their children to school on public buses). *See also Board of Ed. v. Allen*, 392 U.S. 236, 243-244 (1968) (sustaining law loaning secular textbooks to all children); *Mueller v. Allen*, supra, at 398-399 (sustaining statute allowing all parents to deduct actual costs of tuition, textbooks, and transportation from state tax returns); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 487-88 (1986) (sustaining law granting all eligible blind persons vocational assistance); *Zobrest*, 509 U.S. at 10, (sustaining section of IDEA providing all "disabled" children with necessary aid). As noted above, the Court concluded in *Agostini* that "aid is less likely to have the effect of advancing religion ... by creating a financial incentive to undertake religious indoctrination ... where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." 521 U.S. at 231.

After *Agostini*, the time is ripe for a serene review of the actual effects in other constitutional democracies when all children are included in programs of public assistance to education. Such programs need not be analyzed as a zero-sum game in which one kind of school wins only at great cost to other schools. In fact, an opposite effect occurs. When all children are included within programs of public aid, parents have a greater incentive to take a direct interest in the political arrangements that allocate funds, and they tend to support greater funding for all schools. Empowering parental involvement in the education of their own children is a win-win for all children, whether they attend schools operated by the govern-

ment or those operated by religious communities or independent educators.

Solid comparative studies can now inform the Court on the principal effect of evenhandedness in governmental subsidy of education. *See, e.g.*, Stephen V. Monsma and J. Christopher Soper, *The Challenge of Pluralism: Church and State in Five Western Democracies*, 68 (1997); Charles L. Glenn, *Choice of Schools in Six Nations* (1989); and J.D. Sherman, "Public Finance of Private Schools: Observations from Abroad," in T. James and H.M. Levin, eds, *Public Dollars for Private Schools* (1983). Countries such as the Netherlands, England, and Australia approach the issue of governmental funding of religious schools in terms of neutrality or evenhandedness towards all faiths and their competing secular counterparts. On the basis of this concept of neutrality, each of these countries provides public funds for religious schools without demanding they give up their religious distinctiveness or segregate their religious and nonreligious activities. Fairness and equal treatment are the issues in these countries, not a strict wall of separation. In each of these three countries government aid to religious schools is substantively neutral; it refrains from attempting to influence religious belief by making aid available evenhandedly to any religious or secular group that wants to form a school. These governments do not give special preference to religion, but give equal opportunity to all religious and competing secularly based belief systems in education.

In the Netherlands, for example, funding for religious schools is seen as being compatible with church-state separation because public funds are available for all types of religious and secular schools. There is strong popular support for equal treatment of a variety of schools, and this policy has resulted in a wide choice of schools. As of 1993, on the primary level there were 2900 public schools, 2400 Roman Catholic schools, 2260 Protestant schools, 320 private secular schools, 76 Rudolph Steiner schools, 30 Islamic schools, 3 Hindu schools, and 2 Jewish schools. Monsma and Soper, *Challenge of Pluralism* 68. A recent study by the Organization for Economic Cooperation and Development (OECD) concluded: "the central value of freedom of choice was an aspect of Dutch education beyond debate at the present time." OECD, *Schools:*

A Matter of Choice 68 (1994); Sophie C van Bijsterveld, *The Constitutional Status of Religion in the Kingdom of the Netherlands* (1994).

England similarly provides public funding for nongovernmental religious schools. The current Labour Party government has in recent years increased the number and variety of schools within the state system that are operated by churches or other faith groups. In addition to schools operated by the Church of England and the Roman Catholic Church, the government also funds, on the same basis, Muslim, Sikh, Jewish, and Greek Orthodox schools. As in the Netherlands, the English policy of full funding for private and government schools has resulted in a wider choice of schools for parents. A recent government Green Paper on education concluded: "we welcome more schools provided by churches and other major faith groups and by other voluntary and community groups, where there is clear local demand from parents and the community." U.K. Dept. of Educ. & Employment, *Schools: Building on Success* 48 (2001); David McClean, "State and Church in the United Kingdom," in Gerhard Robbers, ed., *State and Church in the European Union* (1996).

The experience in Australia is probably most instructive of all since that country has a constitutional prohibition of an establishment of religion: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." Const. of Australia § 116. The High Court of Australia ruled that the payment of federal funds money to religious schools for educational purposes does not violate this provision. In *Attorney General for the State of Victoria ex rel. Black v. Commonwealth of Australia*, 146 CLR 559, 33 ALR 321, 1981 WL 299232 (1981), the High Court rejected the claim that a law "for providing the funds for the forwarding of the education of Australians by non-governmental schools" is a law "for establishing Christian religion.," 146 CLR at 582, 33 ALR at 330. Both Chief Justice Barwick's opinion for the High Court and Justice Murphy's dissent, 146 CLR at 619, manifested deep familiarity with the jurisprudence of this Court, which the Australian High Court engaged with subtlety and nuance.

The majority of the justices in 1981 expressed views that coalesce around the nondiscrimination principle later adopted by this Court in *Agostini*, 521 U.S. at 231.

Under this decision of the High Court of Australia, Commonwealth (federal) funds go to a wide variety of religious schools in Australia including Roman Catholic (1686 schools), Anglican (120), Lutheran (72), Seventh-day Adventist (71), Baptist (42), Pentecostal (21), Jewish (19), Assemblies of God (17), Muslim (16). In addition, the state provides aid to nonreligious private schools such as Montessori (19 schools) and Rudolph Steiner (34). Monsma and Soper, *Challenge of Pluralism* 105; William L. Boyd, "Balancing Public and Private Schools: The Australian Experience and American Implications," in William L. Boyd and J.G. Cibulka, eds., *Private Schools and Public Policy: International Perspectives* 149-70 (1989).

Private schools in each of these countries are fully accountable to the government for the use of public funds. In order to receive funding, religious and independent schools in all three countries must be licensed by the government, and these schools must include instruction in a national curriculum (England) or a satisfactory curriculum (the Netherlands and Australia). *See* Australia Dept. of Educ., Employment and Training, *Commonwealth Guidelines for Schools* (1995); Monsma and Soper, *Challenge of Pluralism* 72; Richard Gold, *The School Standards and Framework Act of 1998 Explained* (1999). There is no evidence in the comparative literature that religious communities in these countries have ever perceived this degree of governmental regulation of their schools as the sort of entanglement of the government with religion that this Court has deemed "excessive." *Agostini*, 521 U.S. at 233.

Religious and independent schools thrive in these countries. The percentage of students enrolled in religious schools has increased in recent decades in the Netherlands, England, and Australia, where these schools frequently have waiting lists, which reflect a desire on the part of parents to place their children in these schools.

The data analyzed in Parts II B and C above concerning educational outputs in religious and independent schools in the United States are replicated in the Netherlands, England, and Australia, where children attending religious schools score as

high or higher than government schools on standardized tests. *See* Australia Dept. of Educ., Employment, Training, *National Report on Schooling in Australia* 186-90 (1993). The positive educational effects that have flowed from the Cleveland programs have a close and longstanding parallel in the countries whose public policy has allowed evenhanded financing of education for decades.

These positive results have been achieved without the zero-sum mentality that success in one sector of education can only come at the expense of other sectors of education. In short, religious schools in the Netherlands, England, and Australia do not threaten the well-being of schools operated by the government. On the contrary, involvement of parents in the choice of the kind of education they want for their own children has had the positive effect of improving the percent of funds allocated to education generally. *See* Dennis P. Doyle, "Family Choice in Education: The Case of Denmark, Holland, and Australia," in William L. Boyd, *Private Schools and Public Policy: International Perspectives* (1989).

These countries do not provide any empirical evidence to support the claim that funding of the education of children in religious schools leads to political divisiveness among parents or educators. On the contrary, a regime of evenhanded funding of all sorts of educational efforts has led to a broad and thick consensus about the importance of education to the future of democracy. William L. Boyd, "Balancing Public and Private Schools: The Australian Experience and American Implications", in Boyd, *Private Schools and Public Policy* U.K. Dept. of Educ. & Employment, *Schools Building on Success* (2001). The acrimony that frequently surrounds the debate in this country on funding of education in religious schools is simply not present in democracies that have lived for decades with a policy of allocating aid "on the basis of neutral, secular criteria that neither favor nor disfavor religion," and of making it "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231.

Public funding for religious schools is not only consistent with the norm of substantive neutrality, but also promotes two key values often associated with liberal democracy: choice and social pluralism. Government funds make private education more affordable for low- and middle-income parents who

choose to exercise that option. Parents who want a religious education for their children, or a secular education with certain special teaching techniques or philosophies such as Montessori, are empowered to exercise this parental liberty systematically in the Netherlands, England, and Australia. *See* OECD, *Schools: A Matter of Choice* 71 (1994); U.K. Dept. of Educ. & Employment, *Review of the New Schools Policy* 15 (1995).

State funding for religious schools in the Netherlands, England, and Australia has had the effect of strengthening social pluralism by preserving cultural identity. Public aid to religious schools in these countries recognizes the fact that religious and ethnic life is lived out through community organizations like the schools, and it empowers individuals and groups at local levels to participate in the decisions that are most important to them. Other democracies have long recognized that "genuinely independent and private choices of aid recipients," *Witters*, 474 U.S. at 487, do not pose a realistic threat that *the government* would inculcate religious beliefs, favor religion, or become excessively entangled in religion.

The fundamental undergirding of the constitutional arrangements in each of these countries is an acknowledgement of the parental liberty interest that this Court secured over seventy-five years ago in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), see Edward McGlynn Gaffney, Jr., "*Pierce* and Parental Liberty as a Core Value in Educational Policy," 78 *U. Det. Mercy L. Rev.* 491 (2001). What the experience of democracies all over the world, such as the three surveyed here, adds to *Pierce* is that it is possible to move in the direction of empowering parental liberty through funding schemes that make education in alternative schools affordable in a manner that has not in fact led over time to "government inculcation of religious beliefs," *Agostini*, 521 U.S. at 223, has in fact been distributed on the basis of "criteria that neither favor nor disfavor religion," *id.* at 231, and has not in fact led to "excessive entanglement of the government with religion," *id.* at 233. In short, comparative constitutional analysis can shed considerable light on the important question presented in this case.

Conclusion

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Appendix A
Statements of Interest of Amici Curiae

The Association of Christian Schools International [ACSI] is a nonprofit, non-denominational, religious education association providing support services to more than 4,000 Christian preschools, elementary, and secondary schools in the United States. More than 160 postsecondary institutions are also members of ACSI. ACSI's international office is located in Colorado Springs, Colorado. ACSI member schools located in the Ohio River Valley are served by a regional office in Canton, Ohio.

California Catholic School Superintendents is an association of the Superintendents of Catholic elementary and secondary schools in the twelve dioceses of California: Fresno, Los Angeles, Monterey, Oakland, Orange, Sacramento, San Bernardino, San Diego, San Francisco, San Jose, Santa Rosa, and Stockton. These dioceses support 597 elementary schools serving 182,595 children, and 113 secondary schools serving 71,983 children. All of these schools are nondiscriminatory on the basis of race and ethnicity. They are "majority minority" schools; 56.39% of the students in the elementary grades (1-8) are minority students; and 50.46% of the students in the secondary grades are minority students. Statewide, 97.2% of the 12th grade graduates of Catholic high schools in California matriculated into college.

The Connecticut Association of Independent Schools [CAIS] is a voluntary association of 90 religious and independent nursery, elementary and secondary schools in Connecticut, with a broad range of types of schools, including Jewish day schools, Catholic schools (diocesan, religious order, and lay-governed), and an Islamic school. It includes one of America's oldest schools, Hopkins in New Havem founded in 1660. CAIS is affiliated with the National Association of Independent Schools, and with the Connecticut Council on American Private Education.

The Connecticut Council on American Private Education [ConnCAPE] is affiliated with the Council on American Private Education. ConnCAPE's membership reflects a wide diversity of religious and independent schools, including: Hartford Archdiocesan School System, Norwich Diocesan School System, Connecticut Catholic Conference, Immanuel Lutheran School System, Bridgeport Diocesan School System, Connecticut Federation of Catholic School Parents, Montessori School of Greater Hartford, and the Connecticut Association of Independent Schools.

The Florida Association of Academic Nonpublic Schools [FAANS] is an association of 28 associations of educators who serve the educational needs about 85% of the children attending nonpublic schools in Florida. These schools include Catholic schools, Baptist schools, Seventh-day Adventist schools, and independent schools in Florida. FAANS is the State affiliate of the Council on American Private Education. FAANS works regularly with the Florida Department of Education to meet the needs of over 380,000 children in nonpublic schools in Florida.

The Florida Council of Independent Schools [FCIS] is a founding member of FAANS and is the Florida affiliate of the National Association of Independent Schools. It serves 157 independently governed schools throughout Florida, with an enrollment of over 70,000 children. Founded in 1954, FCIS remains one of oldest and largest associations of independent schools in the United States.

The Indiana Private Education Association (INPEA) provides a framework for communication and cooperation among non-public schools in Indiana. In addition, it maintains productive relationships with state and federal government and other agencies that influence quality education. INPEA serves more than 400 schools, 6000 teachers and 95,000 students pre-kindergarten to twelfth grade. The governing body of INPEA is composed of representatives from schools throughout Indiana and representatives from the following member organizations: Association of Christian

Schools International, Christian Schools International, Indiana Association of Independent Schools, Lutheran Church Missouri Synod, Lutheran Association for Elementary Education, Indiana Conference of Seventh Day Adventists, Archdiocese of Indianapolis, Diocese of Evansville, Diocese of Fort Wayne- South Bend, Diocese of Gary, and Diocese of Lafayette.

The Kentucky Non-Public Schools Commission [KNPSC], as an incorporated agency, represents over 300 private and religious schools, as well as home schooling associations in the state of Kentucky. The Kentucky State Department of Education and State Board of Education recognize the KNPSC as the accrediting agency for the private and religious schools of the state. The KNPSC also represents the interests of private school parents and faculty members in lobbying efforts before the General Assembly in Frankfort.

The Lutheran Education Association [LEA] is a professional organization linking, equipping and affirming educators in Lutheran ministries. The LEA is a member-based organization currently comprised of over 4,500 Lutheran educators in the U.S. and several other countries worldwide.

The Michigan Association of Nonpublic Schools [M-A-N-S] is an association serving Catholic Schools of the seven diocese of Michigan, Michigan District of the Christian Schools International and Michigan District of the Lutheran Church - Missouri Synod Schools. M-A-N-S operates with the voluntary support of its 540+ schools with more than 7,000 teachers educating over 137,000 students in this state.

The National Catholic Educational Association [NCEA] is the largest professional education association in the world. Its membership includes over 200,000 Catholic educators who serve 7.6 million students at all levels of Catholic education. It issues an annual statistical report on Catholic elementary and secondary schools and regular re-

search reports on the performance of Catholic schools.

The New Jersey Council for American Private Education [NJ CAPE] represents the interests of nonpublic school children in New Jersey. NJ CAPE currently consists of the following organizations: Agudath Israel of New Jersey, Archdiocese of Newark, Association of Schools and Agencies for the Handicapped Christian Schools International, Diocese of Camden, Diocese of Metuchen, Diocese of Paterson Diocese of Trenton, Independent Child Study Team, New Jersey Association of Independent Schools, New Jersey Association of Lutheran Schools, New Jersey Catholic Conference, New Jersey Conference of Seventh-day Adventist Schools, New Jersey Christian School Association, Association of Christian Schools International, Christian Schools International and New Jersey Association of Jewish Day Schools.

The New York Association of Independent Schools [NSAIS] was founded in 1947, and is incorporated under New York State Education Law. NYSAIS is a voluntary association of 152 independent nursery, elementary and secondary schools in New York enrolling some 59,000 students. It is affiliated with the National Association of Independent Schools, the New York State Coalition for Nonpublic Education and the Council for American Private Education. NSAIS is a nonprofit organization offering services to administrators, teachers, trustees and parents involved in private schools from pre-K through 12th grade. The activities of NSAIS include: advocacy for independent education, evaluation and accreditation of member schools, professional development for faculty, administrators, and trustees, legal and institutional counsel, information on legislation, regulations, statistics, educational developments, and administrative practice.

The Oregon Federation of Independent Schools [OFIS] is an Oregon non- profit corporation. The members of OFIS are religious and independent schools ranging from Kindergarten through 12th Grade. Oregon remembers that "the

child is not the mere creature of the State," *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and that parents are free to choose the kind of education they deem best suited to the needs of their children.

The South Dakota Christian School Association is comprised of religious schools from all denominations, with 54 member schools throughout the State of South Dakota. The association is a member of the South Dakota Council on American Private Education.

The Southern Baptist Association of Christian Schools is a nationwide professional organization whose members are primarily sponsored by Southern Baptist churches and organizations or schools that share a common mission and vision. Our vision is to advance a system of Christian schools of excellence, uniting home, church and school in Jesus Christ through Kingdom Education so that the generations to come will know the Truth of God's Word and not forget His works, nor be taken captive by the vain philosophies of their day. Our mission is to impact the education of school-aged children toward a biblical worldview by providing information, training, fellowship and avenues for influence for pastors and educational leaders of Southern Baptist schools and churches.

The Virginia Council for Private Education [VCPE] oversees accreditation of nonpublic preschool, elementary and secondary schools in the Commonwealth. VCPE was organized in 1974 as the Virginia affiliate of the Council on American Private Education. Fourteen different associations currently comprise the VCPE membership representing over 380 academic institutions.

The Washington Federation of Independent Schools is the umbrella organization for private education in Washington State. With seventy percent of the independent student population enrolled in member schools, WFIS serves as the only statewide vehicle for regular communication and strategic development between the many diverse religious and

independent sponsoring boards. WFIS schools are affiliates of the Catholic dioceses in the state; the Association of Christian Schools International (ACSI); the Christian Schools International (CSI); Lutheran Schools; Montessori schools; the Pacific Northwest Association of Independent Schools (PNAIS); the Seventh Day Adventist Schools (SDA); and numerous other religious and independent institutions, including the Waldorf Schools, Hutterian Brethren, and those institutions with sponsorship within the Hebrew or Islamic communities. The WFIS Board of Directors consists of eighteen school heads representing the largest member constituencies elected regionally by their respective bodies. WFIS is networked with similar organizations in the other states through the Council for American Private Education (CAPE).

Appendix B
Tables

POLITICAL KNOWLEDGE OF STUDENTS IN GRADES 9-12

Students who gave correct answers to political items

School type	1	2 to 3	4 to 5
Public	50.7	30.8	18.6
Religious & Independent.	33.4	37.2	29.4

Self-described indicators of political involvement

	I could write a letter to a government office		I could make a statement at a public meeting	
School type	**Yes**	**No**	**Yes**	**No**
Public	93.1	6.9	81.7	18.3
Relig. & Indep	96.4	3.6	89.6	10.4

	I understand politics or government		My family has a say in what government does	
School type	**Yes**	**No**	**Yes**	**No**
Public	53.8	46.2	63.3	36.7
Relig. & Indep	67.0	33.0	73.3	26.7

	People should be allowed to speak against religion		Controversial books can be can be kept in public library	
School type	**Yes**	**No**	**Yes**	**No**
Public	88.0	12.0	56.0	44.0
Relig. & Indep	90.9	9.1	65.4	34.7

Source: Chapman, Chandler, & Niemi, *The Civic Development of 9th through 12th Grade Students in the United States* (1998).

Community Service Participation

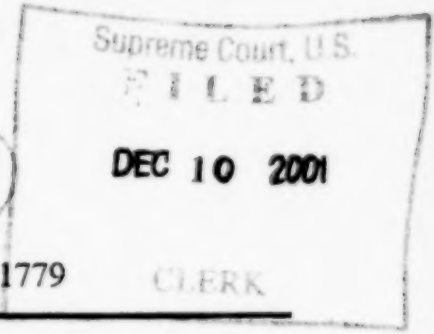
School Type	Total	Voluntary	Total	For Class	Court-Ordered	Other
Public	42.0	36.3	13.2	5.9	1.5	7.7
Catholic	66.7	49.6	45.1	33.7	1.8	17.4
Private,other	56.7	49.6	21.1	10.0	1.1	12.9

Source: U.S. Dept. of Education, *Condition of Education* (1997)

Comparative SAT Scores

	Verbal	Math
National	505	514
Public	501	510
Religious	529	523
Independent	547	566

Source: U.S. Dept. of Education, *Condition of Education* (1998)



Nos. 00-1751, 00-1777 & 00-1779

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

SUSAN TAVE ZELMAN, SUPERINTENDENT OF OHIO, ET AL., *Petitioners,*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

HANNA PERKINS SCHOOL, ET AL., *Petitioners,*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

SENEL TAYLOR, ET AL., *Petitioners,*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, ET AL., IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. The American Commitment to Public Education 3

A. The People's Commitment to Public Education 3

B. The Courts' Commitment to Public Education. 7

II. Vouchers Conflict with the Values of American Public Education. 9

A. Vouchers Conflict with the Obligations of the States to Support Public Education. 9

B. Vouchers Conflict with State Obligations to Meet the Educational Needs of All Students. 12

C. Vouchers Conflict with the Accountable Use of Taxpayer Funds. 15

D. Vouchers Conflict with Education for a Democratic, Pluralistic Society. 17

III. The Alleged Benefits of Voucher Programs are Illusory 20

A. Vouchers Do Not Offer Meaningful Choice 20

Page

B. Vouchers Do Not Help Their Recipients 23

C. Vouchers Do Not Help the Public Schools 24

IV. The Cleveland Voucher Program Violates the Establishment Clause 26

A. The Cleveland Program is Not Neutral 26

B. The Cleveland Program Does Not Involve "Genuinely Independent Private Choice." 29

C. The Cleveland Program Directly Funds Sectarian Instruction 30

D. The Cleveland Program Creates an Incentive for Religious Instruction 32

CONCLUSION 32

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Page

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Page

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INTEREST OF THE *AMICI*[1]

The *amici* are a broad group of associations and individuals dedicated to the improvement of public education in America. The *amici* also have a longstanding interest in implementing effective public school policies in accordance with constitutional requirements, including the Establishment Clause. Collectively, the *amici* represent hundred of thousands of parents, educators, and advocates for children concerned about the impact of vouchers on American education.

The National School Boards Association ("NSBA"), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States, together with the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members, who govern the 14,722 local school districts that educate forty-seven million public school students. The school board associations in California, Florida, Maine, Michigan, Vermont and Washington represent all or most of the public school boards in their respective states. Each of these states has experienced either a voucher program, proposal, or case.

The National Parent Teachers Association, National Association of Secondary School Principals, American Association of University Women, American Association of School Administrators, National Association of Elementary School Principals, National Association of Federally Impacted Schools, National Association for Bilingual Education, Horace Mann League, the National Alliance of Black School Educators and the Public Education Network are all national associations committed to American education. Together, they represent citizens from every segment of American society who share a common concern for public education.

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[1] The Amici file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the Amici, their members or their counsel made a monetary contribution for the preparation or submission of this brief.

James J. Blanchard is the past Governor of the state of Michigan. Thomas D. Watkins, Jr., is the Michigan Department of Education Superintendent for Public Instruction. Kathleen N. Straus is the President of the State of Michigan Board of Education. Lawrence J. O'Neill is the President of the Board of Directors of Milwaukee Public Schools. Jennifer Morales and Peter Blewett are individual school board directors for Milwaukee Public Schools. All have personal experience with voucher programs or proposals and a commitment to quality education.

SUMMARY OF THE ARGUMENT

The Cleveland voucher program is inconsistent with the fundamental role of public education in American life. Since the development of widespread public education, the American people and our courts have always recognized that public education is a primary responsibility of the states and is essential to preparing children to be successful citizens in a pluralistic democracy.

Voucher programs are incompatible with these principles of public education. Vouchers purport to benefit the few, but at the expense of the many; they represent an abdication by the states of their responsibility to provide for all students and to make accountable use of taxpayer funds; and they withdraw children from the democratic, diverse environment of the public schools.

Nor do vouchers provide any benefits to counterbalance these costs. Vouchers, particularly the Cleveland program, fail to offer meaningful choice, fail to improve student achievement for participating students, and fail to improve public education for non-participating students.

The Cleveland voucher program also violates the Establishment Clause. The structure of the program overwhelmingly favors sectarian private schools, does not depend on independent, private choices, directly funds parochial instruction, and creates a financial incentive for religious education.

ARGUMENT

The debate over school vouchers is as much about the role of public education in America as it is about the Establishment Clause. As the Court has always recognized, the country's universal system of public education plays an essential role in our society by educating citizens for democracy, inculcating societal values, and socializing children for life in a pluralistic world. Voucher programs that divert public tax dollars to private schools undermine the ability of the public schools to fulfill these functions and are as objectionable for this reason as they are under the Establishment Clause for their direct state support of religious instruction.

I. The American Commitment to Public Education.

A. The People's Commitment to Public Education.

The "common" or public school emerged as the hallmark of American education in the nineteenth century. Horace Mann, who championed the public school as Massachusetts' first state superintendent, envisioned a system of schools that would be "common" to all people. Mann's conception took root. Supported by public funds, controlled by state authorities, and open to every child, the common school is the heart of American public education. *See generally* 1 James A. Rapp, *Education Law* § 1.01[3][c] (2001); Lawrence A. Cremin, *The American Common School: An Historic Conception* 219-20 (1951). *See also Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 214-217 (1948) (Frankfurter, J., dissenting) (discussing history of public education).

By the 1820s, most states had constitutional provisions addressing public education. By the 1850s, almost every state had a public education system in place. Compulsory education laws soon followed. By the start of the twentieth century a free public education was available to and, in most states, required for all. *See*

Rapp, *supra*, § 1.01[3][c]. Today, the American common school is part of the birthright of every American child.

America's common schools were developed to provide the education necessary for a healthy democracy. As the nation's founders recognized, education and effective self-government go hand in hand. In his Farewell Address, George Washington exhorted the country to "Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion be enlightened." *George Washington: Writings* 972 (John Rhodehamel ed., 1997).

Thomas Jefferson, likewise, recognized the importance of public and publicly funded education: "I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness." 10 *The Papers of Thomas Jefferson* 244-45 (Julian P. Boyd, ed., 1954).

In addition to providing students with the intellectual tools necessary to a participatory democracy, public education also provides students with the social awareness necessary for a healthy society. The values inculcated through public education "include tolerance of divergent political and religious views...while tak[ing] into account consideration of the sensibilities of others." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). In the common school, children of all creeds, classes and backgrounds come together to share a common experience. Not only are children exposed to wide-ranging political and religious views, but they are taught tolerance and respect for those different from themselves. Through the common school, America's children learn the values of our diverse society.

Admittedly, not every public school accomplishes all of these purposes for every student. Nor does all public education today live up to the ideals of Jefferson and Mann. Serious problems confront many public schools. The *amici*, however, are committed to reforms that work, such as reduced class size, parent

involvement, professional development, and afterschool and preschool programs. Vouchers, which would inevitably harm the system of public education that has evolved over the past two centuries, are not such a reform.

The American public shares the commitment of the *amici* to public education and their concerns about vouchers. Forty-seven million students now attend public schools—roughly nine out of ten American children. *See* National Center for Education Statistics, *Projections of Education Statistics to 2011* <http://nces.ed.gov/pubs2001/proj01/chapter1.asp>.[2] Public education remains among the top concerns of the American people. One survey found that public education is the single most important issue in America today, above Social Security, health care and the economy. *See* Greenberg Quinlan Research and the Tarrance Group, *Education Top Priority Nationally and In States* (poll conducted February 4-7, 2001); *see also* The Gallup Organization, *Education Reform: The Public's Opinion* (January 24, 2001) <http://gallup.com/poll/releases/pr010124b.asp>.

This same public has rejected vouchers. Opinion polls indicate that the public disapproves of vouchers by a 15 to 28 percent margin. *See* Phi Delta Kappa/The Gallup Organization, *The 33rd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools* (September 2001); ABC News.com, *No Big Issue: Public Isn't Clamoring for School Vouchers* (October 17, 2000) <http://abcnews.go.com/sections/politics/DailyNews/schoolvoucherspoll001017.html>. In the last decade, the Senate, House, and legislatures in at least 37 states have rejected voucher programs. *See* Nina Shokraii Rees, *School Choice 2000: What's Happening in the States* (2000); 145 Cong. Rec. S9896 (daily ed. July 30, 1999) (recording Senate vote rejecting national voucher program by margin of eighty-seven to thirteen); Juliet Eilperin, *House Advances Education Overhaul*, Washington Post, May 24, 2001, at A1.

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[2] All Internet sources cited herein were visited on December 5, 2001, and citations were valid as of that date.

The public has also rejected vouchers at the ballot box. Voters in California and Michigan overwhelmingly defeated voucher initiatives in November, 2000. Seventy-one percent of voters in California rejected a plan for statewide vouchers, and sixty-nine percent of voters in Michigan rejected a limited proposal to give vouchers to students in seven school districts. In both states, the voting was consistent across demographic groups: Democrats, Republicans, Independents, Catholics, Protestants, Whites, Hispanics and African-Americans all voted against the plans. So did voters in Detroit, where the Michigan program would have begun. *See* Associated Press, *No Voter Support for Vouchers,* Milwaukee Journal Sentinel Online, November 9, 2000; CNN.com, *Exit Polls for California* (Nov. 7, 2000) <http://www.cnn.com/ELECTION/2000/epolls>; Michigan Department of State, *Michigan Election Results 2000* (last updated Jan. 9, 2000) <http://www.sos.state.mi.us/election/results/00gen/>; *The Voucher Vote,* The Palm Beach Post, November 13, 2000, at 22A.

Prior elections have produced similar results. Voucher proposals were rejected in 1996 by sixty-five percent of voters in Washington state; in 1993 by seventy percent of voters in California; in 1992 by sixty-seven percent of voters in Colorado; in 1978 by seventy-four percent of voters in Michigan; and in 1972 by fifty-five percent of voters in Maryland. *See* Michael A. Resnick, *Why Vouchers Won't Work* 47 (1998). In fact, voters have never approved a single voucher program anywhere.

B. The Courts' Commitment to Public Education.

Like the American people, this Court has always recognized the critical role that public education plays in American society. The Court's commitment to public education as expressed in *Brown v. Board* has resonated through the last fifty years of education law:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the

> importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954). The Court's emphasis in *Brown* was not on education in general, regardless of source, but on education as a *function of state and local government, i.e.* as a public responsibility serving the public good.

The Court has echoed the same themes throughout its education law jurisprudence. Thus, the Court has concluded that "public school teachers may be regarded as performing a task 'that [goes] to the heart of representative government'" and that public schools "are an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground." *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 n.6 (1973)). *See also, e.g., Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) ("[Public] education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.") (internal citations omitted)); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("In sum, education has a fundamental role in maintaining the fabric of our society."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) ("Nothing this Court holds today in any way detracts from our historic dedication to public education.").

Thus, this Court's decisions consistently recognize that education is a public function necessary to preserve a democratic society. The states, too, have recognized the crucial role played by public education. Today, every state constitution contains an education clause that recognizes the provision of a public education

as a state function. *See, e.g.*, William Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 Educ. L. Rep. (West) 19 (1993); Molly McCusic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 Harv. J. Legis. 307 (1991).

Appellate courts in the majority of the states have now confirmed the states' constitutional obligations to provide an adequate public education on an equal basis to all children. *See, e.g.*, Douglas S. Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* (2001) (addressing the current status of education finance litigation). Time and again the courts have insisted that the states provide for the needs of students in *all* of the public schools and eliminate disparities in educational opportunity. *See, e.g., Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (holding that state must "provide a substantially equal educational opportunity to its youth in its free public elementary and secondary schools"); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1376 (N.H. 1993) (finding that constitution "imposes a duty on the State to provide a constitutionally adequate education to every educable child and to guarantee adequate funding"); *Leandro v. State*, 488 S.E.2d 249, 257 (N.C. 1997) (declaring that constitution "requires that all children have the opportunity for a sound basic education"); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 91 (Wash. 1978) (concluding that "the constitution has created a 'duty' that is supreme, preeminent or dominant" to provide an adequate education with "sufficient funds").[3]

II. Vouchers Conflict with the Values of American Public Education.

Every facet of American society has recognized the crucial role that public education plays in furthering our common values and democratic processes. The importance of public education is

[3] This is only a small sampling of state decisions affirming the duty of the states to provide for public education. The Advocacy Center for Children's Educational Success With Standards maintains a current and historical database of all state education litigation at http://www.accessednetwork.org/litigationmain.html.

embedded in our history, the holdings of this Court, state courts, and the public consciousness. Voucher programs such as the Cleveland program at issue here, however, undermine the essential attributes of American public education and run counter to its entire history.

A. Vouchers Conflict with the Obligations of the States to Support Public Education.

The essence of the American public school system is a publicly funded, publicly accountable education that is open to all. In recent years, state courts have confirmed, time and again, that the states cannot evade their responsibility to provide equal and adequate schools for all students. *See supra*, part I.B. Voucher programs, particularly programs like the Cleveland plan that apply to only a handful of students, ignore the obligations of the states to *all* students.

The Cleveland School District enrolls about 76,000 students. *See* United States General Accounting Office, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee* 5 (Aug. 2001) [hereinafter "GAO Report"]. In the 2001-2002 school year, 4,266 Cleveland students received vouchers, or less than six percent of the student population. *See* People for the American Way, *Five Years and Counting: A Closer Look at the Cleveland Voucher Program* 2 (September 25, 2001). Funding for the Cleveland voucher program comes from Ohio's Disadvantaged Pupil Impact Aid ("DPIA") program. DPIA monies are normally intended to help disadvantaged public school students by funding pre-schools, all-day kindergartens, smaller class sizes, and reading improvement programs. *See* Ohio Rev. Code Ann. § 3317.029 (West Supp. 2001).

To date, the Cleveland voucher program has had a direct cost of more than $28 million, and a total cost of more than $33 million when administrative expenses are included. *See Five Years and Counting, supra*, at 1-2. This year, the program is expected to drain more than $8 million from Cleveland's public schools in DPIA funds, plus another $2 million in transportation costs. *See id.*

at 2. When all program expenses are taken into account, including state administration expenses and the state's already substantial aid to private schools, at least one analysis has concluded that Ohio spends more tax money per voucher student than it does for nearly 90 percent of the state's public school children. *See* Doug Oplinger and Dennis J. Willard, *Vouchers Costing Ohio,* Akron Beacon Journal, March 27, 1999; *Five Years and Counting*, *supra*, at 2.

All of this money *could* be going to the Cleveland public schools to improve education for the 94% of its students *not* served by vouchers. Instead of fulfilling its obligation to provide a sound public education for all students, however, Ohio has abandoned this responsibility in favor of an expensive program designed for only a chosen few.

Nor have the Cleveland schools recognized any cost savings from the withdrawal of voucher students. A 1999 study by consulting firm KPMG found that the Cleveland School District's operating costs have continued to increase despite the withdrawal of voucher students because voucher students are drawn from throughout the large district. Consequently, the Cleveland public schools are "losing [state aid] without a change in their overall operating cost:." *See* KPMG LLP, *Cleveland Scholarship and Tutoring Program: Final Management Study* 9-5 (September 9, 1999).

Results from Wisconsin's Milwaukee voucher program are similar. The Milwaukee program—the nation's largest voucher program—enrolled just under 10,000 students last year, or about 10% of the students in Milwaukee Public Schools. The Milwaukee program cost $49 million in state aid, half of which was diverted from Milwaukee Public Schools and half of which was diverted from all other Wisconsin public school districts. As a result, in an unsuccessful attempt to benefit 10% of the Milwaukee student population, 238 other public school districts in Wisconsin lost funds, prompting property tax increases. *See* Wisconsin Legislative Fiscal Bureau, *Funding for the Milwaukee Parental Choice Program* 5 (May 8, 2001); The Heritage Foundation, *School Choice 2001: What's Happening in the States* 248 (2001). Meanwhile,

Milwaukee Public Schools has had to cut programs in the face of budget shortfalls of up to $32 million. *See* Sam Schulhofer-Wohl, *Protesters Slash at MPS Budget Plans,* Milwaukee Journal Sentinel, March 28, 2001, at 1B; Robert C. Johnson, *Union-Backed Candidates Win Milwaukee Board Seats,* Education Week, April 11, 2001, at 3.

American public education should serve to prepare all children for active participation in our society. That goal cannot be achieved through programs that drain resources from the public schools serving more than ninety percent of children in a misguided attempt to benefit a select few.

B. Vouchers Conflict with State Obligations to Meet the Educational Needs of All Students.

In addition to withdrawing resources from public education, voucher programs do not benefit the students most in need of help. In a society that strives for equality, education means maximizing opportunity for each child, regardless of educational need. Yet students with physical, mental and emotional challenges and limited English proficiency are the least likely to be served in voucher programs. *See, e.g.*, Scott S. Greenberger, *Voucher Lessons Learned,* The Boston Globe, February 26, 2001, at A1; Julie Mead, *Publicly Funded School Choice Options in Milwaukee*, Public Policy Forum, June 2000.

The evidence of exclusion comes from voucher advocates, parents of former voucher students, and participating private schools. As David Brennan, the one-time leader of the voucher push in Ohio, explained to the governor: "Numerous scholarship [voucher] recipients were discouraged from taking their scholarships to private schools with the full knowledge that none of the existing private schools will be able to handle a seriously handicapped child." Memorandum from Brennan to Tom Needles, Ohio Governor's Office (Sept. 27, 1996) <http://www.ohio.com/bj/projects/whose_choice/pages/96_0927_3Brennanp3.JPEG>. A state education official confirmed such exclusionary practices, noting that special education students "were actively counseled out

of the program." Dennis J. Willard and Doug Oplinger, *Voucher Plan Leaves Long List of Broken Vows,* Akron Beacon Journal, Dec. 14, 1999 <http://www.ohio.com/bj/projects/whose_choice/docs/029046.htm>.

Likewise, many parents whose children have withdrawn from the Cleveland voucher program have informed state officials through exit interviews of the shortcomings inherent in the program. Several have noted that the program "does not provide for special needs students." Wrote one: "My son receives half day regular classes, half day special classes, and I couldn't find a school that would take him in...." Office of Cleveland Scholarship and Tutoring Program, *Collected Exit Interviews* (2000-2001). For these parents and children, the "choice" promised by their vouchers rings hollow.

The Milwaukee program contains similar deficiencies. Numerous voucher schools in Milwaukee have acknowledged their inability to serve special needs students. For example, the Mount Calvary Lutheran School candidly indicates it "is unable to serve students who are unable to climb stairs, have severe emotional problems, are mentally disabled, or have other severe learning problems." Empowering Parents for Informed Choices in Education, *Mt. Calvary Lutheran School* <http://epic.cuir.uwm.edu/EPIC/English/data/mtcalv.html>; *see also* Empowering Parents for Informed Choices in Education, *St. Bernadette School* <http://epic.cuir.uwm.edu/EPIC/English/data/stbern.html> (unable to serve educationally or emotionally disabled students or those more than one year below grade level); Empowering Parents for Informed Choices in Education, *Our Lady Queen of Peace*, <http://epic.cuir.uwm.edu/EPIC/English/data/queeno.html> (unable to serve emotionally or educationally disabled students and lacking access for the physically disabled).

Private voucher schools can maintain these positions because they are exempt from most anti-discrimination laws. The Americans with Disabilities Act does not apply to private schools with religious affiliations. *See* 42 U.S.C. § 12113. Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination

against the handicapped in education, applies only to programs that accept federal funds. *See* 19 U.S.C. § 794. The Individuals with Disabilities Education Act imposes the principal burden for assuring an adequate education to students with disabilities on a child's local *public* school district, not on private schools. *See* 20 U.S.C. § 1414.

Nor are these problems limited to Cleveland and Milwaukee. A 1998 survey by the United States Department of Education of private schools in the inner cities of large metropolitan areas found that sixty-eight percent of the schools would "definitely or probably" *not* be willing to participate in a voucher program if they had to accept "special needs" students, such as those who are limited English proficient, learning disabled, or low achieving. *See* Lana Muraskin, *Barriers, Benefits, and Costs of Using Private Schools to Alleviate Overcrowding in Public Schools* 49-51 (1998).

Finally, one of the few points on which all educational researchers agree is that student achievement is directly and highly correlated with parental involvement. *See, e.g.*, Laura Desminone, *Linking Parental Involvement with Student Achievement: Do Race and Income Matter?*, J. Educ. Res., Sept./Oct. 1999 at 11; *Parental Involvement Supports Academic Improvement Among Middle Schoolers*, Middle Sch. J., May 2001 at 56.

The children of involved parents are far more likely to participate in voucher programs. A parent must take the initiative to apply for the program, select a private school, and follow through. Not surprisingly, Wisconsin's official evaluator found that parents of voucher students were considerably more involved in their children's education than public school parents. *See* John F. Witte, *The Milwaukee Voucher Experiment: The Good, the Bad, and the Ugly,* Phi Delta Kappan, Sept. 1999, at 61.

On the other hand, few if any children of uninvolved parents, *i.e.* those children most at risk of failure, are likely to participate in the program. Thus, the very nature of voucher programs, and particularly the Cleveland program, largely precludes participation by those students most in need of assistance.

Instead, they will be relegated to the increasingly resource-deprived public school systems that legislators have chosen to ignore in favor of voucher programs that apply only to the well-behaved, non-disabled children of actively involved parents.

C. Vouchers Conflict with the Accountable Use of Taxpayer Funds.

Governments have an obligation to make responsible use of taxpayer funds. Because public schools are entrusted with fundamental responsibilities, states must use particular care to ensure that funds appropriated for public education further the public interest. Yet voucher programs contain virtually no protections for taxpayers.

Voucher schools need not comply with open meeting and records laws, adhere to state academic standards, or report on academic achievements. Nor are they subject to state accountability measures to address educational deficiencies. In Ohio, the state's Superintendent of Public Instruction is authorized to exempt participating voucher schools from even the few educational requirements that do exist. *See* Ohio Rev. Code Ann. § 3313.976(A)(3) (West Supp. 2001); Scott Stephens and Mark Vosburgh, *Murderer on Staff of State-Funded Private School,* The Plain Dealer, July 1, 1999, at 1A.

Nor are voucher schools subject to Ohio's "performance accountability" system, which grades the academic performance of school districts and establishes escalating state interventions designed to raise educational results to acceptable levels. *See* Ohio Rev. Code Ann. § 3302.01 *et seq.* (West Supp. 2001). Voucher schools are likewise exempt from Ohio's proficiency testing requirements, including minimum standards set for the award of high school diplomas. *See id.* § 3313.976(A)(3) (requiring voucher schools to satisfy only those state educational standards in place as of July 1992); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 416, 421 (6th Cir. 1996) (explaining that, prior to 1993, state educational standards did not require private schools to comply with state proficiency testing requirements).

Moreover, Ohio prepares annual publicly available reports on all aspects of each public school district's operations – from test scores, to school safety and discipline, to teacher qualifications and library resources. *See id.* § 3302.03 (West Supp. 2001). Schools participating in the voucher program, however, must provide only the most minimal information, namely "the grade levels offered, the numbers of students, tuition amounts, achievement test results, and any sectarian or other organizational affiliations." *Id.* § 3313.978(D)(2) (West Supp. 2001).[4]

Similarly, voucher schools in Milwaukee and Florida are largely free from state oversight and public scrutiny. *See* Julie Mead, *Publicly Funded School Choice Options in Milwaukee*, Public Policy Forum, June 2000, at 11; John F. Witte, *The Market Approach to Education: An Analysis of America's First Voucher Program* 46 (2000); Associated Press, *State Refuses to Release School Voucher Test Scores* (June 8, 2000); *Program Needs Oversight,* Sun-Sentinel, October 23, 2001, at 18A; *McKay's 'Bad Apple'?,* St. Petersburg Times, October 29, 2001, at 10A.[5]

Despite this nearly complete lack of oversight, voucher programs funnel millions of dollars in taxpayer funds to private institutions with no assurance that the state or its citizens will get any return on their investment. In contrast, states regulate every

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[4] Although a state statute provides for annual reports by parochial and private schools, *see* § 3301.14, no such reports are currently required by the state.

[5] As a consequence of this lack of oversight, evidence of public waste abounds. In Ohio, the state was forced to conduct its own audit of the voucher program after accounting giant DeLoitte & Touche was unable to complete an audit due to lax record-keeping. The state's audit showed, among other things, that the state had paid out $3.5 million to transport voucher students by taxicab, a sum that included more than $419,000 in overpayments to cab companies; paid one voucher school more than $70,000 for students who were not even enrolled; and paid more than $150,000 to a "video school" that had no immunization requirements or emergency procedures and in which students watched video-taped lessons in an unsafe building with no fire safety or health certificates. *See* Jim Petro, *Cleveland Scholarship and Tutoring Program Special Audit Report,* (Jan. 5, 1999); *see also* Jeff Archer, *More Oversight Sought for Ohio School Choice,* Education Week, January 19, 2000, at 5; Scott Stephens and Mark Vosburgh, *Voucher School Relies on Videos as Teachers,* The Plain Dealer, July 10, 1999, at 1A.

aspect of traditional public schools, from curriculum to procurement to assessment, to assure the responsible use of public money and the adequate education of the young. Voucher programs abandon these safeguards and, in so doing, abandon any sincere effort to assure that the publicly funded education provided by voucher schools actually meets public needs.

D. Vouchers Conflict with Education for a Democratic, Pluralistic Society.

Among the many shared values taught in public schools is an appreciation of the importance of each individual's civil rights. Public schools do not just teach about these rights; they expose students to their application on a personal level. Public schools are subject to all of the restrictions and restraints placed on the state through federal and state constitutions, statutes, and regulations. Because public schools extend these protections to students, the students learn to exercise, respect, and value them responsibly.

This Court has declared that children should not be forced to "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). In public schools, students have the right to free exercise of religion, freedom of expression, freedom of association, freedom against unreasonable search and seizure, equal protection under the law, and due process. *See West Virginia v. Barnette*, 319 US. 624 (1943) (religion); *Tinker*, 393 U.S. 503 (speech); *Healy v. James*, 408 U.S. 169 (1972) (association); *New Jersey v. T.L.O.*, 469 U.S. 325 (1984) (search and seizure); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (equal protection); *Goss v. Lopez*, 419 U.S. 565 (1975) (due process.) Thus, these liberties are a guaranteed part of the public school experience. Yet none of these freedoms apply inside private voucher schools. *See, e.g., Logiodice v. Trustees of Me. Cent. Inst.*, No. 00-CV-246-B-S, 2001 U.S. Dist. LEXIS 18269 (Nov. 8, 2001) (holding that private high school that contracted to educate publicly funded students was not a state actor and not subject to the due process clause).

Just to teach about the responsible exercise and protection of constitutional rights is not enough. Students need the opportunity to participate in the application of those rights in institutions that offer democratic opportunities. Certainly, according constitutional rights to students may sometimes be inconvenient or uncomfortable. The benefit, however, is that students have an opportunity to learn to exercise these constitutional rights responsibly and to appreciate and respect democratic institutions. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.")

Voucher programs, in contrast, take the curious position that the best way to further the values behind public education is to send students to institutions where they enjoy none of the rights associated with those values. Voucher programs divert public funds to enroll children in private schools where they can be disciplined or even expelled without due process for exercising such fundamental rights as freedom of speech. This approach is incompatible with the mission of public schools to infuse students with an understanding of democratic values.

While not every school succeeds, public schools continue to have the capacity to provide a hands-on understanding of what it means to live in a pluralistic society. Public schools were created as places where a diverse nation of immigrants could come together to learn how to be citizens in a democracy. During earlier waves of immigration, the public school was the institution responsible for building a common culture—it was the "melting pot." More recently, public schools have helped to promote progress in civil rights by bringing together children of different races during their formative years, before prejudices have taken hold.

Voucher options, however, permit families to select for insular and homogenous educational environments. This is not an idle concern. The latest study of the Cleveland program concludes that it has the potential to significantly contribute to racially isolated education. *See* Kim Metcalf, *Cleveland Scholarship*

Program Evaluation, 1998-2000 (Sept. 2001).[6] Metcalf found that voucher participants are disproportionately White compared to their public school peers and the gap widens as the students become older. For example, in the spring of 2000, while Whites represented just fourteen percent of Cleveland public school students who did not apply for vouchers, they represented thirty-two percent of the voucher recipients. In contrast, African-Americans constituted seventy-four percent of the public school students who did not apply for vouchers, but just fifty-five percent of actual voucher students. *See id.*, Technical Report at 29, Summary Report at 4.

The GAO Report points to a similar development in Milwaukee, where more than ninety-six percent of voucher students were from a minority group in the 1994-95 school year, but just seventy-nine percent of voucher students were minorities by 1998-99, after religious schools were included in the program. *See* GAO Report at 19. The GAO Report also questions the validity of three earlier studies in Cleveland and Milwaukee that claimed the voucher programs promoted integration. *See* GAO Report at 21-22. Recognizing these developments, Dr. John Witte, official state evaluator of the Milwaukee program, has written: "Thus a program originally intended to aid poor, minority families in Milwaukee's inner city seems to be subsidizing what we may infer to be primarily white families." John F. Witte, *The Market Approach to Education: An Analysis of America's First Voucher Program* 188-89 (2000). The Cleveland and Milwaukee data therefore suggest that voucher programs contribute to the resegregation of schools. Again, this is antithetical to the mission of public schools and an inappropriate use of public monies.

III. The Alleged Benefits of Voucher Programs are Illusory.

Voucher proponents ignore the conflicts between voucher programs and the values underlying American public education and

[6] The State of Ohio commissioned a multi-year evaluation of the Cleveland program by researchers at Indiana University. The team, led by Dr. Kim Metcalf, recently released the latest installment in the multi-year study.

instead claim that vouchers are justified by their supposed benefits for students and their enhancement of public schools through "competition." The facts, however, do not support the claimed benefits.

A. Vouchers Do Not Offer Meaningful Choice.

Much of the rhetoric of vouchers revolves around a mantra of "choice" as the panacea for all that ails American public education. Vouchers are held out as a tool for granting freedom to families that would otherwise be "stuck" in dysfunctional public school systems. Leaving aside for the moment that the real solution ought to be to fix those systems rather than flee from them, the Cleveland program demonstrates that the "choices" offered by vouchers are largely illusory.

As discussed above, vouchers offer little or no choice to many of the students most in need of educational assistance. Students with disabilities—physical, mental or behavioral—are largely unwelcome in the voucher schools. *See supra*, part II.B.

In addition, vouchers provide little real choice of non-religious alternative schools and inherently favor religious schools. Ninety-six percent of Cleveland voucher students attend religiously-affiliated private schools, and eighty-two percent of participating schools are sectarian. Other private schools do not participate because they cannot limit their tuition to $2,500 without the financial support provided through affiliation with a church. That is not surprising, because actual educational costs greatly exceed voucher values. The statewide costs of educating public students in Ohio in fiscal year 2000 was $7,057 per pupil—more than three times the maximum voucher value—and the Cleveland City School District spent $7,833 per student. Ohio Department of Education, *2001 Ohio Department of Education Local Report Card* <http://www.ode.state.oh.us/reportcard>.

Nationally, tuition at nonsectarian private schools averages $6,822 per student. *See* National Center for Education Statistics, *Private Schools in the United States, 1993-1994*, at Table 1.5 (June

1997) <http://www.nces.ed.gov/pubsearch/pubsinfo.asp?pubid=97459>. Public school expenditures average $6,508 per student. *See* National Center for Education Statistics, *Statistics in Brief: Revenues and Expenditures for Public Elementary and Secondary Education: School Year 1998-99*, at Table 5 (March 2001) <http://www.nces.ed.gov/pubsearch/pubsinfo.asp?pubid=20011321>. Both far exceed the Cleveland voucher value and the average tuition at religious schools. Nationwide, tuition at Catholic schools averages $1,934, and tuition at other parochial schools averages $2,293. *See Private Schools in the United States*, *supra*, at Table 1.5. . These cost disparities explain why school "choice" through vouchers is predominantly restricted to religious schools. Participants have a clear incentive to choose religious schools for the simple reason that few other schools accept vouchers.

In Cleveland, the same economic factors prevent suburban school districts from accepting voucher students from the Cleveland public schools. The surrounding suburban school districts spend an average of more than $9000 per student, and receive an average of just over $2500 per student from the state. Adding the $2500 voucher amount to the $2500 in state funding would still leave an average shortfall of $4000 per student for the suburban districts if they chose to participate in the voucher programs. *See* Ohio Department of Education, *2001 Ohio Department of Education Local Report Card* <http://www.ode.state.oh.us/reportcard> (reporting financial data). Understandably, none of the surrounding districts is interested in absorbing this cost.

Consequently, for all practical purposes, the "choice" offered by the Cleveland voucher program is between the Cleveland Public Schools or one of a limited number of sectarian private schools. Moreover, the real choice lies with the private schools themselves, not the students. The private schools effectively limit the number and type of students whom they are willing to accept. *See supra*, part II.B.

Finally, to the extent the Cleveland program does offer any choice, it largely misses its target population. The Cleveland program is ostensibly aimed at poor students in the Cleveland

Public Schools. *See* Ohio Rev. Code Ann. § 3313.978(A) (West Supp. 2001) ("criteria shall give preference to students from low-income families"). However, the program contains no cap on income eligibility, and students from families with household incomes ranging from $50,000 to $90,000 have received vouchers. *See* Jim Petro, *Cleveland Scholarship and Tutoring Program Special Audit Report* (January 5, 1999). Nor does the program contain a blanket admission priority or preference for low-income students. Instead, it merely requires voucher schools to extend an admission priority for twenty percent of available seats. *See* Ohio Rev. Code Ann. § 3313.978(A).

Consequently, almost twenty-five percent of the costs of the Cleveland program in its first year went toward tuition for students who were *already enrolled* in private schools rather than for the disadvantaged public school students for whom DPIA funds are intended. American Federation of Teachers, *The Cleveland Voucher Program: Who Chooses? Who Gets Chosen? Who Pays?* iii (1997). A more recent study found that one in three students participating in the voucher program was already enrolled in a private school before receiving a voucher. *See* Zach Schiller, *Cleveland School Vouchers: Where the Students Come From* (2001). For these students, the voucher program did not create any choice that was not already available to them.[7]

A similar situation occurred in Milwaukee after the addition of religious schools to the program in the 1998-99 school year, when the voucher program experienced its largest ever enrollment growth. That year, forty-six percent of the new voucher students were already enrolled in a Milwaukee private school before receiving a voucher. On the other hand, just twenty-nine

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[7] Problems in program administration likely compounded these trends. The state audit of the Cleveland program revealed that the selection process permitted students from high-income families to be selected for the program before the low-income students who were supposed to receive preference. The same report found that the lack of record-keeping by voucher schools could permit the award of vouchers to students who did not qualify at all under the program. *See* Jim Petro, *Cleveland Scholarship and Tutoring Program Special Audit Report*, (January 5, 1999).

percent of new voucher students that year were public school transfers. *See* Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program Facts and Figures for 1998-99, Breakdown of Choice Enrollment by Where Enrolled in Prior School Year.* Even some voucher school administrators have acknowledged this wrinkle. "The make-up of our student body has stayed the same. Many of our current choice kids were our students before choice." Public Policy Forum, *School Choice In Its Tenth Year* 5 (April 5, 2000).

In short, to the extent the Cleveland program offers any new choice to any students, it is the choice of a parochial education that is made available to a handful of well-behaved, non-disabled students who are acceptable to the parochial schools. This is hardly the panacea that would warrant foresaking the values behind public education or stretching an analysis under the Establishment Clause.

B. Vouchers Do Not Help Their Recipients.

Overall, researchers paid by the state in both Ohio and Wisconsin have "found little or no difference in voucher and public school students' performance." GAO Report at 4; *see also* John F. Witte, *The Milwaukee Voucher Experiment: The Good, the Bad, and the Ugly,* Phi Delta Kappan, September 1999, at 62. One of the most striking findings in these official evaluations, however, was the discovery by Kim Metcalf that voucher students enrolled in schools established in response to the Cleveland program actually scored lower in all five subject areas than their public school peers. *See* Kim Metcalf, *A Comparative Evaluation of the Cleveland Scholarship and Tutoring Grant Program* (1998); *see also* GAO Report at 27-28.

A handful of other researchers (Jay P. Greene, William G. Howell and Paul E. Peterson) examining the Cleveland and Milwaukee programs found isolated gains among voucher students in specific subject areas. The GAO, however, concluded that all of these studies suffered from significant limitations and did not include their findings in its recent report to Congress. *See* GAO Report at 28, 30 and 33. In contrast, Metcalf's most recent review

of the Cleveland program found that students in public schools actually showed greater gains in core areas than students in voucher schools. *See* Kim Metcalf, *Cleveland Scholarship Program Evaluation, 1998-2000* (Sept. 2001). Meanwhile, there have been no reviews of the academic performance of Florida's voucher students, and the state refuses to publicly release their test scores. *See* Associated Press, *State Refuses to Release School Voucher Test Scores* (June 8, 2000).

C. Vouchers Do Not Help the Public Schools.

Unable to establish that vouchers help their recipients, voucher advocates assert that voucher programs enhance the public schools as a whole by providing competition. This argument is equally unsupported.

The notion that voucher programs actually improve public school districts defies common sense. The Cleveland voucher program diverts millions of dollars from the Cleveland school system while leaving behind tens of thousands of students, including those with the greatest needs. The Milwaukee program does the same, but also diverts funds from more than two hundred other public school districts in the state. And there is no evidence that either Cleveland's or Milwaukee's schools have improved as a result.

The only alleged "evidence" cited to support the "improvement through competition" argument comes from Florida. Beginning in the 1999-2000 school year, Florida made vouchers available to students in school districts that had received failing grades on state assessments during two of the previous four years. During the 1999-2000 school year, the program affected 900 students from two schools, although only fifty-eight utilized a voucher to attend a private school. *See* GAO Report at 39. No new students qualified for vouchers in 2000-2001 because, at the start of that school year, no school in the state had received an "F" rating for two of the preceding four years. *See* GAO Report at 38.

Voucher advocates point to the absence of failing schools in 2000-2001 as proof that the voucher program served as an incentive to the public schools to improve. *See, e.g.*, Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (2001). However, the conclusions of Greene (one of the Cleveland and Milwaukee program researchers whose findings were questioned in the GAO Report), have been sharply criticized by other researchers. *See, e.g.*, Michael A Fletcher, *Milwaukee Will Vouch for Vouchers*, Washington Post, March 20, 2001, at A1; Jessica L. Sandham, *Study Finds 'Voucher Effect' in Florida Test Gains,* Education Week, February 21, 2001, at 12, 15; *Debating Florida's Voucher Effect*, Education Week, March 14, 2001, at 48; *A Flunking Effect?*, Education Week, March 14, 2001, at 48; *Choice Words,* Education Week, March 21, 2001, at 21; Jessica L. Sandham, *Second Study Questions Research Linking Voucher Threat to Gains*, Education Week, March 28, 2001, at 22.

Greene's critics note that he did not consider the impact of state assistance that provided extra teachers and additional resources for struggling schools, nor attempt to isolate the effect of the stigma of being labeled a "failing school." *See* Fletcher, *supra*; Sandham, *Study Finds Voucher Effect*, *supra*. They also note that the lowest-performing public schools in other states that grade or label their schools in a manner similar to Florida but that do *not* offer vouchers have also improved. *See Debating Florida's Voucher Effect*, *supra*. Others have criticized the methodological structure of Greene's study. *See A Flunking Effect?*, *supra*; *Choice Words*, *supra*. Another researcher has theorized that the "F" schools simply followed a strategy of focusing heavily on raising the scores on the state's writing test, deemed by many to be the easiest of Florida's three state tests in which to make sizable gains. *See* Sandham, *Second Study Questions Research*, *supra*.

Further, the Institute for Policy Research at Northwestern University conducted a comprehensive review of the available research and data on "school competition" and found no consistent effect on student achievement. *See* Christopher Jepsen, *The Effects of Private School Competition on Student Achievement* (Nov. 2000)

<http://www.northwestern.edu/IPR/publications/papers/jepsenwp99.pdf>. In short, there is no evidence, from Florida or elsewhere, that voucher programs improve public schooling for anyone.

IV. The Cleveland Voucher Program Violates the Establishment Clause.

While vouchers are flawed in many ways, the greatest problem with the Cleveland program is its violation of the Establishment Clause. In determining whether a government program of educational assistance violates the Establishment Clause, the Court considers whether the program "'result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement.'" *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (quoting *Agostini v. Felton*, 521 U.S. 203, 234 (1997)).

In the context of government aid to religious schools, the indoctrination analysis asks "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809 (citing *Agostini*, 521 U.S. at 226). The answer depends, in part, on whether the government aid program is truly neutral, and on whether government aid reaches the religious school only as the result of private choices. *See id.* at 809-810.

Mitchell and *Agostini* also require the Court to examine "whether an aid program 'defines its recipients by reference to religion.'" *Mitchell*, 530 U.S. at 813 (quoting *Agostini*, 521 U.S. at 234). While this inquiry overlaps with the examination of neutrality, it seeks "to answer a somewhat different question—whether the criteria for allocating the aid 'create a financial incentive to undertake religious indoctrination.'" *Id.* (quoting *Agostini*, 521 U.S. at 231). All of these factors indicate that the Cleveland program violates the Establishment Clause.

A. The Cleveland Program is Not Neutral.

The structure of the Cleveland voucher program directly benefits religiously-affiliated private schools. Aid under the Cleveland program flows only to those private schools that agree to limit their tuition to $2500 per year. Overwhelmingly—ninety percent in the 1999-2000 school year—the participating schools are sectarian. These schools enroll ninety-six percent of voucher recipients under the Cleveland program. *See* GAO Report at 25.

This is no accident. Sectarian private schools traditionally have lower tuitions than secular private schools, in large part because sectarian schools are subsidized by their churches. *Id.* The General Accounting Office specifically concluded that the structure of the Cleveland program "appears to have limited the program primarily to low-tuition religious schools." Secular schools, on the other hand, have explained that "they could afford to accommodate just a few voucher students because they must find corporate or other sponsors to subsidize the difference" between the voucher amount and their usual tuition. *Id. See also supra*, Part III.A; *Simmons-Harris v. Zelman*, 234 F.3d 945, 959 (6th Cir. 2000) ("Practically speaking, the tuition restrictions mandated by the statute limit the ability of non-sectarian schools to participate in the program. . . ."), *cert. granted*, 70 U.S.L.W. 3232 (2001).

The Ohio legislature could have crafted a more neutral program. The legislature could have raised the voucher amount, eliminated the tuition cap, or permitted voucher students to use their $2500 toward tuition at *any* school, but it did not. Although it may be seeking to promote quality education, Ohio cannot claim that it "offers aid on the same terms, without regard to religion, to all who adequately further that purpose." *Mitchell*, 530 U.S. at 810. Instead, Ohio created a non-neutral program that directly favors sectarian institutions.

Thus, the Cleveland program differs from other government-aid programs previously upheld by the Court. *Compare Mitchell*, 530 U.S. 793 (Chapter 2 federal funding available equally to all schools, public and private); *Agostini*, 521

U.S. 203 (Title I federal assistance available equally to all private schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (IDEA assistance available to all students regardless of school attended); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) (state assistance available to all students based on disability regardless of school attended); *Mueller v. Allen*, 463 U.S. 388 (1983) (tax credit available to all families for all educational expenses, regardless of school attended). This lack of neutrality in the Cleveland program is sufficient in itself to establish a violation of the Establishment Clause.

B. The Cleveland Program Does Not Involve "Genuinely Independent Private Choice."

The religious indoctrination that occurs in Cleveland's sectarian schools can also reasonably be attributed to governmental action because no genuinely independent private choice separates the government aid from the sectarian schools. *See Mitchell*, 530 U.S. at 810; *Witters*, 474 U.S. at 488. In the Cleveland program, only one real private choice is involved: the initial choice to participate in the program. Once a family makes that choice, the flow of aid directly to a sectarian institution is virtually assured because of the program's structural preference for religiously-affiliated private schools.

The funding mechanism in the Cleveland program appears to have been created to give the illusion of private choice. However, while voucher checks are nominally made out to the family of the voucher students, the families never acquire any control of the checks. *Compare Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (noting that aid was provided directly to individual students). Checks are sent to the participating schools and deposited by the participating schools. Any refund is paid back to the state, not the family. The family cannot spend a cent at any institution other than the participating school (which, for more than nineteen students out of twenty, will be sectarian). The only contact between the family and the money is a visit to the school office to endorse the check over to the school. *See* GAO Report at 5-6; *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 836 (N.D.

Ohio 1999), *aff'd*, 234 F.3d 945 (2000), *cert. granted*, 70 U.S.L.W. 3232 (2001). For all practical purposes, the program is one of direct aid to the private schools in a per-capita amount for each voucher student.

Thus, the Cleveland program leaves no room for "independent decisions made by numerous individuals to guide their secular aid" to a particular school. *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring). The aid does not "pass[] through the hands, (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere." *Id.* at 816. Nor do voucher checks bear any relationship to "a public servant contributing her government paycheck to the church." *See Rosenberger v. Rector and Visitors*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (citing *Witters*, 474 U.S. at 487). Rather, the voucher checks are functionally checks to the sectarian institutions. Again, this element of the Cleveland program distinguishes it from other types of government aid to sectarian schools that the Court has previously approved. *Compare, e.g., Zobrest*, 509 U.S. 1 (IDEA assistance follows student to *any* school the student chooses to attend), *and Witters*, 474 U.S. 481 (same as to state vocational aid). In *Witters*, for example, the vast majority of state aid went to secular schools. *See Witters*, 474 U.S. at 487.

C. The Cleveland Program Directly Funds Sectarian Instruction.

The Court has "long been concerned that secular government aid not be diverted to the advancement of religion." *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring) (citing also *Bowen v. Kendrick*, 487 U.S. 589 (1988) for proposition that "actual diversion is constitutionally impermissible"). Thus, "[t]o establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes." *Id.* at 857 (O'Connor, J., concurring); *see also Rosenberger*, 515 U.S. at 847 (1995) (O'Connor, J., concurring) ("[Prior] decisions, however, provide no precedent for the use of public funds to finance religious activities.).

The Cleveland program unquestionably provides for the direct funding of religious instruction. The Cleveland vouchers cover all tuition at the participating schools; that is, they pay for all portions of the instructional program. The instructional programs at the religious schools include religious instruction as a central component. *See Simmons-Harris v. Zelman*, 72 F. Supp. 2d at 837-838 (discussing religious emphasis of parochial private schools in the Cleveland program).

The Cleveland program thus differs substantially from many of the programs of state aid to religious institutions that have come before the Court. Instead, the Cleveland program closely resembles the grant program rejected by the Court in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Just as in *Nyquist*, "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Nyquist*, 413 U.S. at 780.

While the Court's jurisprudence under the Establishment Clause has evolved since *Nyquist*, the Court has never upheld a program that directly funds religious instruction. In *Mitchell*, the federal aid program prohibited aid for religious purposes and contained safeguards against religious use. *Mitchell*, 530 U.S. at 831-832. In *Agostini*, the aid program provided "supplemental, remedial instruction to disadvantaged children on a neutral basis" and was "carefully constrained." *Agostini*, 521 U.S. at 234. In *Witters*, the Court observed that "aid to a religious institution unrestricted in its potential uses" would violate the Establishment Clause if attributable to the State, although the Court found no violation "[o]n the facts present here." *Witters*, 474 U.S. at 489. And in *Zobrest*, the Court found the presence of a state-financed interpreter on a parochial school campus acceptable in part because "no funds traceable to the government ever find their way into sectarian schools' coffers." *Zobrest*, 509 U.S. at 10.

The Court has previously drawn a line between the mandates of the Free Exercise and Establishment Clauses by

prohibiting direct government aid for sectarian instruction. The Court should not blur that line, which prevents both the reality and the appearance of government endorsement of religion. *See Mitchell*, 530 U.S. at 842-43 (O'Connor, J., concurring) (discussing impact of direct aid on endorsement).

D. The Cleveland Program Creates an Incentive for Religious Instruction.

The last substantial question in the Establishment Clause analysis under *Mitchell* and *Agostini* is "whether the criteria for allocating the aid 'create a financial incentive to undertake religious indoctrination.'" *Mitchell*, 530 U.S. at 813 (quoting *Agostini*, 521 U.S. at 231). The Cleveland program creates a clear incentive for religious instruction.

A central mission of most of the sectarian schools in the Cleveland program is religious instruction. *Simmons-Harris*, 72 F. Supp. 2d at 837. The entire design of the Cleveland program creates a financial incentive for students to attend participating private schools, which are overwhelmingly sectarian. Put simply, for those students who want out of the Cleveland Public Schools, the state will pay them to attend a participating sectarian school, but will not pay them to attend a non-sectarian school that does not participate in the program. Thus, despite the Ohio legislature's attempt to create a facially neutral program, the reality in Cleveland is that vouchers create both a financial incentive and a direct subsidy for religious instruction. *See, e.g., Mitchell*, 530 U.S. at 845-46 (O'Connor, J., concurring) (discussing danger that financial incentive will have the effect of advancing religion when aid is not neutral).

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

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In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
Of Public Instruction, et al.,
Petitioners,

v.

DORIS SIMMONS-HARRIS, et al.,
Respondents.

**On Writ of Certiorari to the
Untied States Court of Appeals for the Sixth Circuit**

AMICUS BRIEF OF OHIO ASSOCIATION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY IN SUPPORT OF AFFIRMANCE FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Authorities.....	i
Interest of Amicus Curiae.....	1
Summary Of Argument.....	3
Argument.....	4
Conclusion.....	20

TABLE OF AUTHORITIES

Cases:

Agostini v. Felton, 521 U.S. 203 (1997).....	9
Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940).....	2
Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).....	5, 7
DeRolph v. State (1997), 78 Ohio St.3d 193, 677 N.E.2d 733.....	4
DeRolph v. State (2000), 89 Ohio St.3d 1, 728 N.E.2d 993.....	4
Lemon v. Kurtzman, 403 U.S. 756 (1971)....	3, 5, 10
Mitchell v. Helms, 530 U.S. 793, 120 S.Ct. 2530 (2000).....	3, 12

Cases (continued):

Rosenberger v. Rector and Visiitors of Univ. of Va., 515 U.SW. 819 (1995)..... 12

Simmons-Harris v. Goff (1999), 86 Ohio St.3d 1, 711 N.E.2d 203..... 19

Simmons-Harris v. Zelman, 234 F.3d 945 (6thCir. 2000)..... 6

Supreme Court Rules:

Supreme Court Rule 37.1 (1999)..... 3

Supreme Court Rule 37.6 (1999)..... 1

Constitution:

U. S. Const. Amend. I..... passim

U. S. Const. Amend. XIV..... 2

Other Authorities:

"The Buckeye Institute's Proposed School Voucher Plan: Who Wins? Who Loses?" by The Ohio Coalition for Equity & Adequacy of School Funding, Columbus, Ohio, December 1997 4

INTEREST OF AMICUS CURIAE

A group of Ohio citizens organized in 1958, dedicated to the public support of public education. During 1979, this group became affiliated with the National Association for Public Education and Religious Liberty and became the Ohio Association for Public Education and Religious Liberty (OPEARL).[1]

OPEARL is committed to the maintenance and support of a system of free, public education throughout the United States of America, extending from the kindergarten through the university. Public education was established and provided for all American children, OPEARL submits, primarily to create an enlightened United States electorate to rule itself democratically. The success of the American democratic system rests on completely supporting and maintaining the unique principle of its free kindergarten through twelfth grade (K-12) public education system.

Because its is profoundly dedicated to the United States K-12 free public school education system, OPEARL resists any attempt to expend public funds for the support of nonpublic sectarian and nonsectarian K-12 schools. This Association believes that any child will benefit just as much in a publicly supported, publicly controlled school system as she/he will in a nonpublic school. However, the essential difference is that the former is controlled by the public and responsive to public policies while the latter is controlled and responsive to a limited private group. Therefore, OPEARL

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[1]Counsel of Record of OPEARL is the author of this amicus brief. No monetary contributions were made for the preparation or submission of this amicus brief, except for the payment of the agreed legal fee and related expenses to the author by his client, OPEARL. Supreme Court Rule 37.6. Consent letters for OPEARL's amicus brief, signed by each of the five parties, is on file with the Clerk of this Court.

ardently contends that the sharing of public funds with nonpublic sectarian and nonsectarian schools results in a dilution of the strength of the vital American K-12 public school system.

OPEARL believes that each parent also has the freedom of choice to decide whether or not she/he wishes to have her/his child participate in America's free K-12, public school education. If a parent chooses a nonpublic school education for her/his child, then the parent must assume full responsibility, including the monetary resources, for providing the alternative K-12 education for her/his child. Public funds used for the support of nonpublic education results in taxation without representation.

Further, OPEARL adheres to the Establishment Clause, contained in the First Amendment to the United States Constitution,[2] in connection with public monies expended or received by nonpublic sectarian K-12 schools. For that reason, OPEARL has an interest in supporting the instant Respondents and for advocating the United States Supreme Court to affirm the judgment of the two lower courts that held and ruled that the statutory Ohio Pilot Project Scholarship Program, also known as the "school voucher program," is unconstitutional because it violates the Establishment Clause in the First Amendment.[3] The Ohio Legislature enacted the school voucher program in question on June 29, 1999.

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[2] The First Amendment, which address freedom of religion, states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

[3] The Establishment Clause to the First Amendment was made applicable to the states through the Fourteenth Amendment to the United States Constitution. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900 (1940).

In accordance with Supreme Court Rule 37.1, OPEARL, by its amicus brief and public records in its filed Lodging, wishes to bring to the Supreme Court's attention what it submits is "...relevant matter not already brought to its attention by the parties (that) may be of considerable help to the Court[,]"[4] on the important issue of whether or not the public aid provided through the Scholarship Program Ohio statutes in question creates an excessive entanglement between the State of Ohio's government and religion, primarily Roman Catholic religion in the instant cases. See *Mitchell v. Helms*, 530 U.S. 793, at 845, 120 S.Ct. 2530, at 2560 (2000) (O'Connor, J., concurring).

SUMMARY OF ARGUMENT

The statutory Ohio Pilot Project Scholarship Program, also known as the "school voucher program," enacted on June 29, 1999 by the Ohio Legislature, does not pass "...constitutional muster under this Court's Establishment Clause jurisprudence[,]"[5] because the result of the school voucher program has the effect of an endorsement of religion, thereby failing the second prong in the *Lemon* Test. *Lemon v. Kurtzman*, 403 U.S. 602, at 612-13, 91. S.Ct. 2125 at 2131 (1971).

OPEARL contends that this Ohio school voucher program also fails the third prong of the *Lemon* Test for the reason that the process involved in the enactment of the statutory Ohio Pilot Project Scholarship Program created an excessive entanglement between government and religion. The Ohio public records, such as filed in the Lodging of OPEARL, compellingly demonstrate that the state executive and legislative branches of Ohio's government were

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[4] Supreme Court Rule 37. 1.

[5] Page 13 of BRIEF OF STATE PETITIONERS, filed on November 9, 2001, in the instant cases.

excessively entangled with the Roman Catholic Church in the legislative process before, during and after the legislative and executive enactment into law of this Ohio school voucher program under review by this Court.

Therefore, both the important institutions of religion and democratic government will be weakened and become susceptible to corruption in this country if the Ohio school voucher program is not declared unconstitutional by this Court for the reason that the voucher program is in violation of the Establishment Clause in the First Amendment to the United States Constitution, which is applicable herein through the Fourteenth Amendment to the Constitution.

ARGUMENT

The "scholarships" are commonly referred to as "school vouchers" that are awarded pursuant to the statutory Ohio Pilot Project Scholarship Program (Scholarship Program). School "choice" through the use of vouchers is not a novel idea. In fact, economist Milton Friedman proposed the idea in the 1950s as a way to create a free market in the education system. The idea did not take hold at that time; however, some elected state executives and legislatures have resurrected Friedman's idea, even as legislatures, like Ohio,[6] have failed to constitutionally fund state constitutional public school systems. To assist this Court, OPEARL has included as part of its Lodging a copy of an article, published in 1997 by the Ohio Coalition for Equity and Adequacy of School Funding, that briefly discusses the history of school vouchers through 1997.[7]

[6] See, *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733; *DeRolph v. State* (2000), 89 Ohio St.3d. 1, 728 N.E.2d 993.

[7] "The Buckeye Institute's Proposed School Voucher Plan: Who Wins? Who Loses?" published in December 1997 by the Ohio Coalition for Equity & Adequacy of School Funding.

The leading case interpreting the Establishment Clause to the First Amendment of the United States Constitution in the context of public funds and sectarian schools is *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The resultant constitutional standard is embodied in what is commonly known as the "*Lemon* Test." The *Lemon* Test has three prongs, and if a statute fails to pass the bar under any of the three, it is unconstitutional. The first prong requires that a law reflect a secular legislative purpose and the third prong requires that a law avoid excessive government entanglement with religions. The second prong of the *Lemon* Test requires that a law's primary effect neither advances nor inhibits religion. *Lemon*, Id. at 612-613.

The second prong is implicated by the facts in the instant cases. Recognizing the congressional intent that is ostensibly unobjectionable can mask a law with unconstitutional effect, this Court has held that it may be necessary to probe the text to the effect of an enactment. In *Committee for Public Education v. Nyquist*, 413 U.S. 756, at 774 (1973), this Court held that "the propriety of a legislature's purposes may not immunize from further scrutiny a law which [has] a primary effect that advances religion ..." This principle is particularly well suited for application to the facts of the present cases. On its face, this Scholarship Program appears to survive under the second prong of the *Lemon* Test by neither advancing nor inhibiting religion. Reading the Ohio statutes in question, it appears that the Scholarship Program participants are able to choose from a wide variety of schools, including public, private sectarian and private nonsectarian. However, in effect, only private, primarily private sectarian, schools have chosen to participate.[8] This effect is plain in hindsight. Moreover, the

[8] Page 7 of BRIEF OF STATE PETITIONERS, filed on November 9, 2001, in the instant cases, states in pertinent part: "For the 1999-2000

facts indicate that the drafters' intent was not so pure as the text of the Ohio statutes in question seem to indicate. Notwithstanding drafting clearly intended to evoke a perception of constitutional compliance, the result, i. e., the effect, of these statutes was surely both apparent to and intended by the Ohio lawmakers.

The Ohio statutes that govern the Scholarship Program appear to allow the participants, i. e., the students, and their parents to choose among a variety of public, private sectarian and private nonsectarian schools when deciding where to spend the public scholarship money provided by the State of Ohio. Yet the record establishes for the instant cases that none of the statutorily eligible sixteen Ohio public school districts adjacent to the Cleveland City School District has chosen to participate in the Scholarship Program.[9]

Although the Ohio statutes governing the creation and operation of the Scholarship Program appear to provide the neutrality demanded by the Federal Establishment Clause, it is apparent that more than a mere cold reading is required when applying the *Nyquist* principle. Sectarian schools comprise 82 percent of the total schools participating in the Scholarship Program, but 96 percent of all the participating students are enrolled in the registered religious schools. Further, the State of Ohio provides this public tuition for these 96 percent sectarian scholarship recipients without any restrictions whatsoever that these particular public funds be used for only secular instruction. Such an unrestricted flow of public money into the coffers of the religious schools can

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school year (on which the District Court record was based), parents from among 56 participating schools, 46 of which (82 percent) were religiously affiliated. *Simmons-Harris*, 234 F.3d at 949 (State Pet. App. At 5a). In that same year, 96 percent of all scholarship students attended one of these 46 religiously affiliated schools, which included Catholic,..."

[9] Page 6 of BRIEF OF STATE PETITIONERS, filed on November 9, 2001, in the instant cases.

certainly be said to advance religion by the Ohio government. Because of this, the *Nyquist* Court has afforded us the opportunity to look behind the face of the Ohio statutes and discern what has really transpired.

The Scholarship Program does not simply direct public monetary funds to nonpublic sectarian schools, but it does so in a manner contrary to the policy of the Establishment Clause. In the operation of the Scholarship Program, the public funds are nakedly commingled with the private funds of the participating religious schools. There is absolutely no statutory regulation of the uses to which these public funds can be expended; they are simply injected, **carte blanche**, into the coffers of the religious schools. The inevitable result of this commingling is that public funds are being used to advance religion. It is clear that this practice manifests a blatant disregard for the fundamental policy underlying the Establishment Clause, viz., that the government must remain unquestionably impartial on matters of religion.

When a Scholarship Program recipient attends a registered private school, the State of Ohio delivers its check, payable to the recipient's parents, directly to the private school. The parents then must endorse the State's check to the registered private school without the State's check ever leaving the custody of the private school. Of course, the record supports that most of these public checks are delivered to private religious schools by the State of Ohio.

In *Nyquist*, this Court held that tuition reimbursements to parents of children attending nonpublic religious schools violated the Establishment Clause. This Court made the following statements in *Nyquist*, Id. 413 U.S. at 788-789, holding that said state tuition reimbursements were unconstitutional.

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion. The State notes that this law aids only "low-income parents", and without state assistance their right to have their children educated in religious environment "is diminished or even denied." It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy, for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline," and notwithstanding the "high social importance" of the State's purposes, neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted [sic]. [Footnotes and citations omitted.]

The school voucher payments have the unmistakable effect of providing direct financial assistance and support to the participating religious schools because, by statute, the Ohio school voucher checks are endorsed and deposited directly into the participating Ohio sectarian schools' checking accounts without any restrictions regarding which functions those public funds may support. This practice is manifestly more objectionable than that disallowed by this Court in *Nyquist*. Therefore, the Scholarship Program is unconstitutional because it fails the second prong of the *Lemon* Test, i. e., through this Scholarship Program the State of Ohio is directly funding the advancement of religion.

OPEARL wishes to emphasize that this Court's June 23, 1997, decision in *Agostini v. Felton*, 117 S.Ct. 1997 (1997), does not overrule *Nyquist*. *Agostini* involved a program through which the New York City Board of Education placed its own paid public school teachers in New York City parochial schools to provide secular remedial education to disadvantaged children as mandated by Title 1 of the Elementary and Secondary Education Act of 1965, as amended. No public funds were or are deposited into the coffers of the participating New York City parochial schools for providing this secular remedial education by public school teachers in those parochial schools' classrooms. This Court held in *Agostini* that the remedial instructional program implemented on a neutral basis by the New York City Board of Education does not violate the Establishment Clause. Accordingly, the decision in *Agostini* does not support the argument that the Scholarship Program is constitutional when tested against the Establishment Clause in the First Amendment to the United States Constitution.

Focusing the *Lemon* Test's third prong for the Establishment Clause on this statutory Ohio Scholarship Program, viz., whether or not government entanglement with

religion is excessive, this Court made the following statements in *Lemon v. Kurtzman*, 403 U.S. 602, (1971), at 615:

> Here we examine the form of the relationship for the light that it casts on the substance.
>
> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority.

In considering and applying this third prong of the *Lemon* Test, OPEARL wishes to direct this Court's attention to the Affidavit of Douglas Edward McCabe (Curator McCabe), which is contained in the Lodging that OPEARL has filed in these cases with the Clerk of this Court. Curator McCabe states in his Affidavit that he serves in the capacity as Curator of Manuscripts and Archivist for the George Victor Voinovich Collection and began serving in that capacity during August 1998.[10] George Victor Voinovich was elected for four-year terms as Governor of Ohio in 1990 and 1994 and served as the State of Ohio's chief executive from January 13, 1991, through December 31, 1998. Curator McCabe has custody of the public records of the Governor's Office from the George Voinovich administration from 1991 to 1999 by reason of the State Government Records Deposit Agreement, in accordance with the Ohio laws, executed between the Ohio Historical Society and The Ohio

[10] See Affidavit of Curator McCabe and his Vita on Pages 5 through 12 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

University.[11] Curator McCabe identifies twenty-one separate public records from the files of the administration of Governor George Voinovich (Gov. Voinovich), stating that each is a true copy of the copy on file at the library of The Ohio University, which copies are part of OPEARL's Lodging filed in these cases at the Clerk of this Court.[12]

Some of these public records are mentioned and referred to as sources in two investigative news articles reported by two news reporters, Douglas Oplinger and Dennis James Willard, which were published in the December 14, 1999, edition of the Akron (Ohio) Beacon Journal. These two news stories have the bold captions of "**Voucher system falls short of goals**" and "**Voucher plan leaves long list of broken vows,**" respectively.[13] These articles were part of the Beacon Journal's public-policy investigative series -- entitled "**Whose Choice?**" -- which series was published in its newspaper from December 12, 1999, through December 15, 1999.[14]

OPEARL wishes to direct this Court's attention in this amicus curiae's Lodging to the content of each of these twenty-one public records, covering the period of time from April 18, 1991, to January 21, 1998. OPEARL submits that these public records manifest and prove excessive government entanglement with religion relative to the enactment and administration of the statutory Ohio

[11] See STATE GOVERNMENT RECORDS DEPOSIT AGREEMENT and its Appendix A on Pages 13 through 28 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[12] See Pages 29 through 70 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[13] See Pages 71 through 83 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[14] See Pages 84 and 85 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

Scholarship Program, a clear violation of the Federal Establishment Clause. In support of respectfully soliciting this Court to carefully review and consider each of these identified twenty-one public records, OPEARL notes the following sentences in Justice O'Connor's concurring opinion in *Mitchell v. Helms*, 530 U.S. 793, at 844, 120 S.Ct. 2530 at 2560 (2000).

> Our school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule. As I explained in *Rosenberger*, "[r]esolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." 515 U.S., at 847, 115 S.Ct. 2510 (concurring opinion).

OPEARL urges this Court to also apply careful and thorough scrutiny when considering the excessive government entanglement with religion principle in school-aid cases, such as the ones at bar. Accordingly, this amicus curiae respectfully advocates that the members of this Court follow Justice O'Connor's above pronouncement and begin to sift and judge through the content of each of the twenty-one public records in the Lodging filed by OPEARL. At the conclusion of this close examination process, OPEARL submits that this Court will determine and rule that this challenged statutory Ohio Scholarship Program does indeed offend the Establishment Clause in the First Amendment to the United States Constitution.

Within a few months after he began his first term in office, Gov. Voinovich wrote The Most Reverend Anthony Pilla, the Bishop of the Roman Catholic Diocese of Cleveland, on April 18, 1991, to encourage him to order the Roman Catholic schools in the Cleveland Diocese to agree to participate in Ohio proficiency examinations and reminded Bishop Pilla that David Brennan and he, the Governor of Ohio, "…have begun to organize a committee which will put together an effort to get Ohio to seriously look at a voucher system,"[15] Later in this letter, Gov. Voinovich stated to Bishop Pilla: "I think the Catholic schools would do extremely well on the proficiency test, which would underscore your excellence and make it easier for us to promote the voucher system." The Catholic schools of the Diocese of Cleveland, located only in the "inner city" of Cleveland, became most of the 84 percent of the total private religious schools that participated in the ultimately enacted statutory Ohio Scholarship Program, viz. the school vouchers program.

On July 18, 1991, the Most Reverend Daniel E. Pilarczyk, Archbishop of the Diocese of Cincinnati, wrote Gov. Voinovich and included "…a list of names submitted by the six Latin Rite Bishops of Ohio for your [Gov. Voinovich] consideration for appointment to the Governor's Committee on Choice."[16] Archbishop Pilarczyk concluded in his letter, "[I]f there is anything more that we can do at this time to promote real choice in education, please do not hesitate to contact us." On that same July 18th, Gov. Voinovich wrote his friend, David L. Brennan of Akron, Ohio, advising him that he, Gov. Voinovich, is having faxed "…the list of names to you [Mr. Brennan] which were

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[15] See Page 29 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[16] See Page 30 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

provided to me [Gov. Voinovich] by Daniel E. Pilarczyk, Archbishop of Cincinnati."[17] Gov. Voinovich wrote Archbishop Pilarczyk on July 26, 1991, thanking him "…for the list of names you submitted from the six Latin Rite Bishops of Ohio[,]" reporting that he, Gov. Voinovich, "…sent those names to David Brennan, who is heading up the Governor's Committee on Choice."[18] Gov. Voinovich concluded in this letter that "…I will be in touch with …" Bishop Pilarczyk in the very near future concerning the agenda of the Governor's Committee on Choice.

During the following month, Archbishop Pilarczyk wrote Gov. Voinovich on August 27, 1993, advising him of the Ohio bishops' "…role in the proposed Ohio Scholarship legislation."[19] Archbishop Pilarczyk stated that he and his fellow Ohio Catholic bishops "…decided that, as Catholic Conference of Ohio, we would adopt a low profile position on this bill. Conference staff will formally testify in support of the legislation but will not actively lobby for its passage." Archbishop Pilarczyk stated in the next paragraph of his August 27th letter how the Ohio Catholic bishops would lobby the Ohio legislators in the "low profile" manner.

> We believe, however, that parent organizations in each diocese will play a very active role in lobbying for its passage. I am sure they will organize a strong grassroots effort within each legislative district to influence the outcome of this controversial issue. We will encourage this effort.[20]

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[17] See Page 31 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.
[18] See Page 32 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.
[19] See Page 33 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.
[20] Id.

OPEARL directs this Court's attention to another factual situation of excessive government entanglement with religion between Gov. Voinovich and the Ohio Catholic bishops that is manifested in the March 21, 1994, letter from Archbishop Pilarczyk to Gov. Voinovich. Archbishop Pilarczyk stated the following in the third paragraph of that letter.

> You will recall that in our telephone conversation on October 29, 1993, you suggested that it would be helpful if the Conference would take a neutral position on the Ohio Scholarship bill. In return you indicated a willingness to consider additional assistance for our students.[21]

Following up Gov. Voinovich's above quid pro quo agreement with the Ohio Catholic bishops, Gov. Voinovich did meet with the Catholic bishops on June 7, 1994, for the purpose of discussing, inter alia, a requested substantial increase in public funding for the administrative cost reimbursement to Ohio Catholic schools relative to these religious schools reporting of compliance with state regulations.[22] The Ohio legislature and Gov. Voinovich did, in fact, appropriate this particular per pupil public funding increase at the Catholic bishops requested rate of 100 percent per pupil.[23]

Another item on the agenda for the above June 7th meeting was the discussion with the Ohio Catholic bishops of

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[21] See Page 34 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.
[22] See Pages 38 through 45 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.
[23] See Page 78 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

school voucher legislation and the role that these bishops will perform during the legislative process.[24]

Another factual example of excessive government entanglement with religion between the Ohio Catholic Conference, whose leadership is the Ohio Catholic bishops, and Gov. Voinovich is disclosed in the last sentence of the fourth paragraph of Gov. Voinovich's May 21, 1994, letter to Mr. Brennan. "We shouldn't tinker too much with what has already been agreed to by the CC [Catholic Conference], although your idea of not doing it in all 12 grades to begin with may very well be a good one."[25] The pronoun "it" in this quoted sentence refers to the Ohio Scholarship Program. Also, Governor Voinovich is referring to his spouse, Janet Voinovich, in the second last paragraph of this May 31st letter when he asks for Mr. Brennan to send his "...correspondence on these matters directly in c/o Janet, so I am sure to receive the mail without it going through a dozen hands."[26] Gov Voinovich's recommended position with the bishops of the Catholic Conference on school vouchers was expressed almost three weeks before his above meeting with them.

During February and March of 1995, Archbishop Pilarczyk, on behalf of the Ohio Catholic Conference, and Gov. Voinovich exchanged correspondence pertaining to the details for lobbying Ohio legislators to obtain the successful enactment of their prior quid pro quo agreement , including the preserving of the increases in the administrative cost reimbursement and the auxiliary services programs for the Ohio Catholic schools.[27]

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[24] See Pages 44 and 45 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

[25] See Page 37 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[26] Id.

[27] See Pages 46, 47 and 48 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

On May 23, 1995, Gov. Voinovich wrote Bishop Pilla, informing the Cleveland Catholic leader that, in the opinion of the governor, the Ohio legislature will approve and enact as part of Ohio's biennial budget, effective July 1, 1995, the increases in auxiliary services and reimbursement for administrative costs to Ohio's Catholic schools. Gov. Voinovich then advised Bishop Pilla: "We are also working very, very hard to keep the voucher language in the budget which specifically mandates that Cleveland have the voucher experiment. Anything you can do to help us in that regard would also be appreciated."[28]

The six bishops of the Ohio Catholic Conference and Gov. Voinovich exchanged letters during late June and early July of 1995 wherein the Catholic bishops and the governor expressed their gratitude to each other for the successful inclusion in the new biennial budget of the promised and agreed public funding increases to nonpublic school pupils, which, of course, includes Ohio Catholic school pupils.[29] The statutory Ohio Scholarship Plan and its $5.5 million public funds appropriation for only the City of Cleveland was also included in this biennial budget as evidenced by Gov. Voinovich's September 20, 1995, letter and his referenced enclosure to the Most Reverend James Hickey, Archbishop of Washington, D. C.[30]

On November 16, 1995, Gov. Voinovich gave a speech in Cleveland to publicly introduce the school voucher program to be conducted in that city and to publicly announce his reasons why he supports the "Cleveland

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[28] See Page 49 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[29] See Pages 50, 51 and 52 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[30] See Pages 53 and 54 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

Scholarship and Tutoring Program."[31] However, it is interesting to note that Gov. Voinovich crossed out the following prepared written sentence from his speech. "Scholarships will be offered to all eligible students in the district, including mainstreamed and separately educated, handicapped students."[32] OPEARL submits that this action by Gov. Voinovich in the middle of November 1995 certainly conflicts with some of the argument offered over the last six years by the Petitioners for maintaining this unconstitutional school voucher program, i. e., this voucher program is to be available to inner city at risk low income children, regardless of their academic and/or physical disability.[33]

Gov. Voinovich wrote His Eminence John Cardinal O'Connor, Archbishop of New York, on October 16, 1996, informing Cardinal O'Connor, "On a per pupil basis, no state in the nation provides greater support for its private school students than Ohio."[34] The governor concluded his letter by urging the archbishop of New York to encourage his state legislature to provide more public funds to nonpublic schools in his state, including his diocese's Catholic schools.[35]

Six months later, Gov. Voinovich wrote Bishop Pilla on April 21, 1997, encouraging him, as the then President of the U. S. Catholic Conference of Bishops, to persuade the bishops of this country to explore "...how they can increase

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[31] See Pages 55 through 63 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.
[32] See Pages 57 and 81 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court
[33] See Pages 81 and 82 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court
[34] See Page 64 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court
[35] See Page 65 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

the support (i. e., public support) of our non-public schools throughout this country."[36] However, Gov. Voinovich does assure Bishop Pilla that, notwithstanding his suggestion, he is not backing away from continuing to publicly support the Cleveland school voucher program.

The Cleveland Scholarship Program resulted in exceeding its budgeted amount by millions of dollars, primarily because of the costs of transportation of the students, beginning with the 1996-97 school year.[37] One of the recommendations made by the governor's assistant, Tom Needles, to try and reduce this student transportation cost was to change one of the eligibility rules for the scholarship applicants. Needles suggested to the governor that the change in the school choice rule would be that the applicant-student's options would be limited to a private sectarian or nonsectarian school where the student could either walk or take the bus.[38] Therefore, the applicant-student would no longer have the choice of applying to a private religious or nonsectarian school that would require another means of transportation to be provided other than a bus. This is another example of excessive government entanglement with religion in connection with the administration of this Scholarship Program.

On May 27, 1999, the Ohio Supreme Court ruled the Ohio Scholarship Program, enacted in 1995, unconstitutional because it was enacted as part of the 1995-97 biennial appropriations bill in violation of Ohio's constitutional "single subject" rule. Simmons-Harris v. Goff (1999), 86 Ohio St.3d 1, 711 N.E.2d 203. Gov. Voinovich, through his

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[36] See Page 66 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court
[37] See Pages 67 and 68 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court
[38] See Pages 69 and 70 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

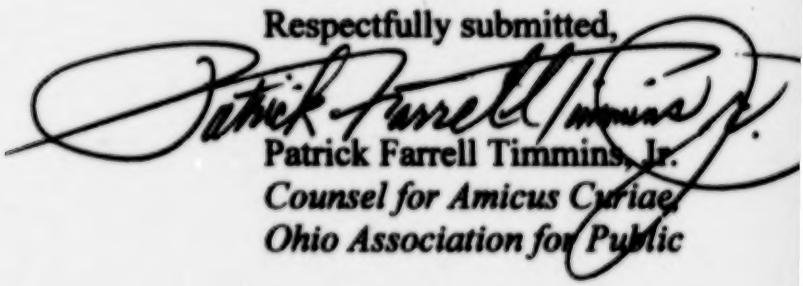
sponsors, immediately submitted, in essence, the identical school voucher program as a separate bill. This same Scholarship Program again passed in both houses of the Ohio Legislature and was signed into law, effective June 29, 1999.

CONCLUSION

The statutory Ohio Scholarship Program in question, which was enacted on June 29, 1999, fails two of the three prongs of the *Lemon* Test. The record compiled by the Petitioners and the Respondents clearly establishes that this school voucher program results in having the effect of an endorsement of religion by the government, thereby failing the second prong of the *Lemon* Test. The public records in the Lodging of OPEARL compellingly prove this Scholarship Program creates an excessive government entanglement with religion, thus failing the third prong of the *Lemon* Test. Because this Ohio statutory school voucher program has failed these two prongs of the Lemon Test, which is the constitutional review for the Federal Establishment Clause contained in the First Amendment, the Ohio statutes in question are unconstitutional because they are in violation of the First Amendment to the United States Constitution.

Accordingly, OPEARL urges this Court to affirm the decision and judgment rendered in these cases by the Sixth Circuit Court of Appeals and remand these cases to the United States District Court for the Northern District of Ohio, Eastern Division, for enforcement of this affirmed judgment.

Respectfully submitted,



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Nos. 00-1751, 00-1777, 00-1779

In the Supreme Court of the United States

Susan Tave Zelman, Superintendent of Public Instruction, *et al.*,
Petitioners,

v.

Doris Simmons-Harris, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE*

Ohio School Boards Association, Ohio Association of School Business Officials, Buckeye Association of School Administrators, Ohio Coalition for Equity and Adequacy of School Funding, Coalition of Rural and Appalachian Schools, Ohio Association of Secondary School Administrators

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39 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* OHIO SCHOOL ASSOCIATIONS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE STATE IS RESPONSIBLE FOR THE CRISIS IN CLEVELAND'S PUBLIC SCHOOLS, AND THE STATE'S ESTABLISHMENT OF AN OVERWHELMINGLY RELIGIOUS VOUCHER PROGRAM IN RESPONSE TO THAT CRISIS IN UNCONSTITUTIONAL . . . 4

II. A STATE-FUNDED PROGRAM THAT PROMOTES RELIGIOUS EDUCATION AS AN ALTERNATE TO DANGEROUS, INEFFECTIVE, AND UNCONSTITUTIONAL PUBLIC SCHOOLS VIOLATES THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT AND IS A DENIAL OF EQUAL PROTECTION 7

A. The voucher program coerces enrollment in religious schools as the price of obtaining a safe and effective education, in violation of the Free Exercise and Establishment Clauses 7

1. Voucher families do not freely and independently choose religious education for their children 8

2. The constitution is offended when one constitutional right (adequate education) is conditioned upon the surrender of another (free exercise of religion) 11

B. The Establishment Clause is also violated by the voucher program's lack of secular purpose, as evidenced by the fact that religious domination was an intended and foreseeable feature of the program from the start 16

1. The statutory framework of the program favors religious schools 16

2. The history of the enactment reveals that advancement of religion was an intended consequence of the voucher program 21

3. The "educational options" touted by petitioners as alternatives to the overwhelmingly religious voucher schools are legally irrelevant and, even if deemed relevant, are so limited as to be illusory 23

C. The guarantee of Equal Protection is violated when the state establishes two tiers of schools in Cleveland—one religious and of high quality, the other non-religious and of poor quality—and when elsewhere in Ohio, the state affords public school students a high quality *secular* education 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U.S. 203 (1997) 10

Brown v. Board of Education,
347 U.S. 483 (1954) 29, 30

Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 22

DeRolph v. State,
677 N.E.2d 733 (Ohio 1997) 1, 2, 6, 30

DeRolph v. State, 728 N.E.2d 993 (Ohio 2000) 6

DeRolph v. State, 754 N.E.2d 1184 (Ohio 2001) 6

Doe v. Beaumont Indep. School Dist.,
240 F.3d 462 (5th Cir. 2001) 24

Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981) 16

Lee v. Weisman, 505 U.S. 577 (1992) . . 8, 12, 13, 14, 15

People of State of Ill. ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign County, Ill., 333 U.S. 203 (1948) . . 12

Santa Fe Independent School District v. Doe,
530 U.S. 290 (2000) 13, 14, 22, 29

Simmons-Harris v. Zelman,
234 F.3d 945 (6th Cir. 2000) . . . . . *passim*

Thomas v. Review Bd. of Indiana Employment Sec. Division, 450 U.S. 707 (1981) 12

Statutes

Ohio Revised Code § 3313.60 25
Ohio Revised Code § 3313.61 25
Ohio Revised Code § 3313.97 29
Ohio Revised Code § 3313.974 18
Ohio Revised Code § 3313.974-3313.983 . . . . . 23, 24
Ohio Revised Code § 3313.975 25
Ohio Revised Code Chapter 3314 . . . . . 23, 24
Ohio Revised Code § 3314.03 . . . . . 24, 25
Ohio Revised Code § 3314.04 25
Ohio Revised Code § 3314.08 24
Ohio Revised Code § 3317.022 20

Constitutional Provisions

U.S. Const., Amendment I . . . . . *passim*

U.S. CONST., Amendment XIV
(Equal Protection Clause) 29, 30

Other Authorities

Cleveland City School District, Cuyahoga County, State of Ohio - 2001 District School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/043786.pdf (last visited Dec. 11, 2001) 27

East Cleveland City School District, Cuyahoga County, State of Ohio - 2001 District School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/043901.pdf (last visited Dec. 11, 2001) 21

Federally Sponsored Child Care Centers, United States Office of Personnel Management, *available at* http://www1.opm.gov/wrkfam/html/cchb508.html (last visited Dec. 5, 2001) 17-18

Find Your School, NCES: Education Information for Students Across the Nation, *available at* http://www.nces.ed.gov (last visited Dec. 4, 2001) . . 17

Hope Academy Brown St. Campus (Grades K-6), State of Ohio - 2001 Community School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134221.pdf (last visited Dec. 11, 2001) 27

Hope Academy Cathedral Campus, Cuyahoga County, State of Ohio - 2001 Community School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134205.pdf (last visited Dec. 11, 2001) 27

Hope Academy Chapelside Campus (Grades K-7), Cuyahoga County, State of Ohio - 2001 Community School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134197.pdf (last visited Dec. 11, 2001) 26

Hope Academy University Campus (Grades K-6), Summit County, State of Ohio - 2001 Community School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134213.pdf (last visited Dec. 11, 2001) 27

Piet van Lier & Caitlin Scott, *Fewer Choices, Longer Commutes for Black Voucher Students*, Catalyst for Cleveland Schools, *available at* http://www.catalyst-cleveland.org/10-01/1001extra4.htm (Oct./Nov. 2001) 17

Member Institutions: Hanna Perkins School, All About University Circle, *available at* http://www.universitycircle.org/members/hanna/htm (last visited Nov. 21, 2001) 17

ODE Local Report Card, Ohio Department of Education (2001), available at http://www.ode.state.oh.us/reportcard01/lrc.htm (last visited Dec. 10, 2001) 18

Doug Oplinger & Dennis J. Willard, *Voucher System Falls Far Short Of Goals*, Akron Beacon Journal (Dec. 14, 1999), available at http://www.ohio.com/bj/projects/whose_choice/docs/005374.htm#top (last visited Dec. 10, 2001) 22

Performance Accountability 2001: Reporting on Community Schools, Ohio Department of Education (2001), *available at* http://www.ode.state.oh.us/pa/toolkit_2001/community_schools.htm (last visited Dec. 10, 2001) 26

Pupil Tuition Report, State of Ohio Department of Education - Division of School Finance (Fiscal Year 1999-2000), available at http://www.ode.state.oh.us/sf/foundation/reports/F2000-T40256.HTM (last visited Dec. 10, 2001) 21

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1988) 11

INTEREST OF *AMICI CURIAE* OHIO SCHOOL ASSOCIATIONS

This appearance today as *amici curiae* is made by six Ohio school associations representing a broad range of interests within Ohio's K-12 educational community.[1] These organizations are: (1) the Ohio School Boards Association, a nonprofit corporation representing over 700 Ohio school districts and related educational entities; (2) the Ohio Association of School Business Officials, a nonprofit corporation representing over 950 school district treasurers, business managers, and other officials involved in the management of school operations; (3) the Buckeye Association of School Administrators, a nonprofit corporation representing over 850 school district superintendents and administrators throughout Ohio; (4) the Ohio Coalition for Equity and Adequacy of School Funding, a governmental consortium representing over 500 of Ohio's public school districts which has successfully challenged the constitutionality of Ohio's system of school funding, *see DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) ("*DeRolph I*"), and which continues to represent such districts in seeking the effectuation of a legal remedy; (5) the Coalition of Rural and Appalachian Schools, a governmental consortium which represents school districts in 34 Ohio counties located primarily in southern and eastern Ohio and which has a special cooperative relationship with Ohio University College of Education in Athens, Ohio; and (6) the Ohio Association of Secondary School Administrators, a nonprofit corporation

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[1] Counsel for the *amici* authored the brief in whole. No person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk.

which represents over 2400 middle school level and senior high school principals and other administrators in all of Ohio's 88 counties.

These Ohio school associations enter this appearance for the purpose of providing the Court with certain Ohio-specific information which may not be as readily accessible to the parties and other *amici* in this case of such intense national interest, and also to impart their unique perspective on the issues based on their collective experience as Ohio educators.

SUMMARY OF ARGUMENT

Although this brief is submitted in support of respondents, we begin by identifying two significant aspects of this controversy with regard to which these *amici* agree with petitioners. First, we agree that there is a "profound educational crisis" engulfing Cleveland's public schools. And second, we agree that Cleveland's children are entitled to something better, and we support petitioners' implicit suggestion that the inferior educational opportunities afforded Cleveland's poor and primarily minority students raise issues of federal constitutional magnitude. Where we part company with petitioners is in their advancement of publicly-funded religious education as a remedy for this crisis. According to the Ohio Supreme Court, the State of Ohio has neglected the command of the Ohio Constitution that the state ensure the provision of an adequate education to *every* public school student throughout the state; if any school district falls short of the constitutional standard, the state must remedy it. *DeRolph I*, 677 N.E.2d 733. Yet, rather than remedy its failing schools, the state here flaunts the crisis in public education for which it is responsible, seeking to advance that crisis as justification for a voucher program dominated by religious institutions.

But in addition to their educational entitlement under the Ohio Constitution, Cleveland's children also have a constitutionally protected right to free exercise of religion, and they cannot be required to sacrifice the latter in order to obtain the former. The choice the state offers Cleveland's poor and desperate families– an unsafe and academically inadequate education at a secular public school or a safe and adequate education in a voucher program dominated by private religious schools– is unconstitutional, and families that respond by enrolling their children in religious schools through the voucher program cannot be said to have freely chosen the resulting religious indoctrination of their children, especially given undisputed data indicating that the overwhelming majority of voucher students attend schools that inculcate a faith different from the students' own. The consequent diversion of public schoolchildren and public dollars to private religious institutions can only be attributed to state action and not to genuinely independent private choice, in violation of both the Free Exercise and the Establishment Clauses of the First Amendment to the United States Constitution.

Families that remain in Cleveland's public schools also pay a heavy price: their children avoid religious indoctrination but endure an education the state characterizes as not even "minimally adequate." Meanwhile, in some public schools elsewhere in Ohio, students are afforded a constitutionally adequate education without being required to compromise their religious convictions. No rational basis, let alone compelling interest, justifies this disparate treatment of Ohio's children.

Finally, an accurate assessment of the origins and nature of Ohio's voucher program is critical to an assessment of its constitutionality. While petitioners emphasize the overwhelming failures of the Cleveland public schools as

justification for the voucher program, they also inconsistently and misleadingly argue that the program exists in the context of a multitude of other educational options. It does not. As petitioners have maintained from the beginning, the voucher program is a lifeline offered to families otherwise trapped in Cleveland's failing public schools. No lifeline would be needed if adequate alternatives were truly available, and they are not. As for the nature of the voucher program, it was, from the start, "designed in a manner calculated to attract religious institutions," *Simmons-Harris v. Zelman*, 234 F.3d 945, 961 (6th Cir. 2000), and it in fact screens out public (non-religious) schools through financial disincentives. As a result, the voucher schools are today almost uniformly religious.

ARGUMENT

I. THE STATE IS RESPONSIBLE FOR THE CRISIS IN CLEVELAND'S PUBLIC SCHOOLS, AND THE STATE'S ESTABLISHMENT OF AN OVERWHELMINGLY RELIGIOUS VOUCHER PROGRAM IN RESPONSE TO THAT CRISIS IS UNCONSTITUTIONAL.

Throughout the history of this litigation, petitioners have premised their defense of the voucher program on the overwhelming failure of public education in Cleveland. The State Petitioners assert that in the mid-1990s, the Cleveland schools were "engulfed in a profound educational crisis." Brief of State Petitioners at 18, *Zelman v. Simmons-Harris*, __ U.S. __ (*cert. granted* 2001) (Nos. 00-1751. 00-1777, 00-1779). "By almost any measure – test scores, graduation rates, student discipline, judicial intervention, and financial

stability– objective assessments of the Cleveland schools' performance led to the same conclusion: a child's prospect for receiving a decent education from Cleveland's public schools was dismal." *Id.* Cleveland "was mired in a 'financial crisis that is perhaps unprecedented in the history of American education.' The crisis had reached such proportions that it prevented the district from providing even a minimally adequate education for its students." *Id.* at 2-3 (citation omitted). Moreover, as the Senel Taylor Petitioners observe, the crisis in Cleveland's schools is not abating:

> The educational crisis is severe and continuing. In 1999, the State of Ohio reported that CCSD [Cleveland City School District] failed to meet a single one of the 18 performance criteria set by the State. Among students taking ninth grade proficiency tests, only 11.6 percent of CCSD students passed, compared to 55.6 percent statewide and 22.4 percent of students in districts of similar size, poverty, geography, and tax wealth. The following year, in which expanded performance criteria were used, CCSD met zero out of 27 standards. The graduation rate for CCSD students in 1996 was an appalling 39.3 percent; by 1998 it had fallen to 32.6 percent.

Id. at 26 (citations omitted).

One cannot but be moved by the plight of the children trapped in this system, and any program that enables some to escape has undeniable appeal. But the State of Ohio, with its voucher program, is no benign rescuer of the children, and the voucher program is not a neutral "choice" program. Rather, the state is itself the agent of educational neglect,

having been entrusted by the Ohio Constitution with responsibility for the very public education system it here condemns, and the voucher program insidiously– and unconstitutionally– imposes religious indoctrination upon students whose families are willing to see them rescued even on these terms.

Over four years ago, the Ohio Supreme Court addressed the issue of educational deprivation in Ohio and found the state's system for funding public education unconstitutional; the state had failed to ensure that public schoolchildren throughout Ohio were safely and adequately educated. *DeRolph I*, 677 N.E.2d 733.[2] In the intervening years, as legal attempts to obtain a remedy have continued, unconstitutional deprivation of schoolchildren has remained a hallmark of public education in Ohio. The crisis in the Cleveland schools is particularly acute, as petitioners have argued to this Court.

It is in this context of an educational crisis created and perpetuated by the state that the voucher program must be judged. *All* of Cleveland's 78,000 (K-12) public school students are entitled by virtue of the Ohio constitution to receive *from the state's system of public schools* all of the secular benefits the voucher schools are said to confer. But

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[2] Three years later, finding the funding system "almost identical to its predecessor," the court again declared the system to be unconstitutional, *DeRolph v. State*, 728 N.E.2d 993, 1006 (Ohio 2000) ("*DeRolph II*"), and in September, 2001, the court ordered specific increases in state funding for Ohio's schools, *DeRolph v. State*, 754 N.E.2d 1184 (Ohio 2001) ("*DeRolph III*"). But the court subsequently granted the state's motion for reconsideration, *DeRolph v. State*, 757 N.E.2d 381, (2001), stayed *DeRolph III*, and ordered the parties to mediation, *DeRolph v. State*, 93 Ohio St.3d 628, – N.E.2d –, 2001 WL 1539131 (Ohio, Nov 16, 2001) (No. 99-570, 121367), which at the time of this writing, has yet to begin.

for the state's unconstitutional neglect of public education, there would be no need for a voucher program; but for the voucher program, public funds and public school students would not be diverted to religious schools.

II. A STATE-FUNDED PROGRAM THAT PROMOTES RELIGIOUS EDUCATION AS AN ALTERNATIVE TO DANGEROUS, INEFFECTIVE, AND UNCONSTITUTIONAL PUBLIC SCHOOLS VIOLATES THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT AND IS A DENIAL OF EQUAL PROTECTION.

The state's implicit acknowledgment, in the context of this case, that the state has failed to produce a system of public schools compliant with the mandates of the Ohio Constitution requires the state to provide such schools. To the extent that the voucher program offers an alternative to the state-created crisis in the public schools, it does so at an impermissible cost to rights guaranteed by the First Amendment to the United States Constitution.

A. The voucher program coerces enrollment in religious schools as the price of obtaining a safe and effective education, in violation of the Free Exercise and Establishment Clauses.

The critical shortcomings of the Cleveland schools and the lack of adequate non-religious alternatives outside the voucher program create a scenario in which families are unable to freely and independently choose to send their

children to religious schools. A program that offers fearful and hopeless families the opportunity to escape a failed public school system by enrolling their children in religious schools is inherently coercive and burdensome of the First Amendment right to freely exercise one's own religion – or to abstain from the exercise of religion altogether. *See Lee v. Weisman*, 505 U.S. 577, 621 (1992) (Souter, J., concurring) ("[L]aws that coerce nonadherents to 'support or participate in any religion or its exercise,' would virtually by definition violate their right to religious free exercise." [citations omitted]).

1. Voucher families do not freely and independently choose religious education for their children.

The goals and characteristics of the voucher families plainly contradict the contention that voucher families genuinely exercise free choice when they enroll their children in religious schools. In terms of socio-economic characteristics, voucher families are vulnerable, lacking financial resources to access, on their own, alternatives to the failed public schools, and yet particularly susceptible to the harms inflicted by those schools.[3] Not surprisingly, two studies commissioned by the state determined that voucher

[3] *See, e.g.*, Brief of State Petitioners at 6, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) ("Scholarship [voucher] recipients are predominantly low-income minority children from families headed by a single mother. Indeed, 70 percent of the households of scholarship students are headed by a single mother, and the mean income of those families is $18,750. These socioeconomic characteristics suggest that these children are more likely to suffer academic setbacks than the average student." [citations omitted]).

families are drawn to the program not for the religious training their children consequently receive but for the secular benefits the program offers– most notably, educational quality and safety. *See* Brief of State Petitioners at 11, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) (citations omitted). The voices of the parents are chilling:

> I attended public school in the Cleveland Public School District and my current disability is related to the unsafe conditions to which I was exposed in the Cleveland public schools. I want to ensure that my daughter is not exposed to the same unsafe conditions.

See Brief of Petitioners Hanna Perkins School at 27-28, *Hanna Perkins School* (No. 00-1777) (comment by parent, Dawn Call, whose child is enrolled at Westpark Lutheran School).

> At the public schools my child often complained that there was no toilet paper or hand soap in the restrooms. In some of the classrooms there were buckets to catch water dripping from the ceiling. The classes were overcrowded. He is receiving a much better education in math and reading than he did at the public school.

Id. at 30 (comment by parent, Regena Hunter, whose child is enrolled at St. Francis School).

> If the Scholarship Program is ended and I am unable to raise the necessary financial resources, I will likely home-school Byron. Going back to a Cleveland Public School would destroy all the good things that have been accomplished during the past three years. Not only will his academic progress be

stunted, I would fear for the safety of my son.

Id. at 32-33 (comment by parent, Angela Grandberry, whose child is enrolled at Luther Memorial School). That any parent would feel compelled to turn to a religious school, using state funding, because his or her child would be unsafe and lacking basic necessities in a public school is an outrage, and it is violative of both the Ohio and the federal constitutions.

The state's contention that "any indoctrination that occurs in religious schools is attributable to parental choice, not governmental action," Brief of State Petitioners at 16, *Zelman* (Nos. 00-1751, 00-1777, 00-1779), is patently unbelievable, especially given the overwhelming dissimilarity between the religious affiliations of the families and the voucher schools to which they send their children.[4] Voucher parents tell us they are choosing *physical safety* and *effective educational programs* for their children; they do not tell us they are deliberately choosing religious indoctrination. The fact that the benefits sought by these families are not otherwise available to them distinguishes the voucher program from the remedial instruction approved in *Agostini v. Felton*, 521 U.S. 203, 232 (1997) ("The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school, 20 U.S.C. § 6312(c)(1)(F)§§. *The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.*" [emphasis added]).

[4] *See, e.g.*, Brief of State Petitioners at fn.3, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) ("Sixty-two percent of the [voucher] scholarship students enrolled in the registered Catholic schools are not of the Catholic faith"). And even families that share the faith of the voucher school to which they send their children may have been unconstitutionally influenced by the state to do so, since they, too, might prefer an adequate, secular, public school if that option were available to them.

The voucher families' expressions of gratitude for the "lifeline" offered them by the program does not negate the fact that their acceptance of the lifeline is the product of state coercion nor does it alter the legal analysis. When petitioners deny the coercive effect of the voucher program, arguing the absence of financial or social incentive, they disingenuously close their eyes to the desperation created by the intolerable conditions in the public schools. The mantra of "free choice" rings hollow when the alternative is "a school system beset by virtually every conceivable problem, from poor academics to administrative problems to chronic violence." Brief of Petitioners Senel Taylor at fn. 26, *Senel Taylor v. Simmons-Harris*, ___ U.S. ___ (*cert. granted* 2001) (No. 00-1779).

2. The constitution is offended when one constitutional right (adequate education) is conditioned upon the surrender of another (free exercise of religion).

The doctrine of unconstitutional conditions prohibits the government from conditioning even a discretionary benefit (one the government has no obligation to confer) upon the surrender of a constitutional right.[5] In a long line of cases,

[5] *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1988) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power

the Court has applied this principle to strike down conditions, attached to discretionary benefits, that burden the free exercise of religion:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd. of Indiana Employment Sec. Division, 450 U.S. 707, 716-18 (1981).

Ohio's voucher program is especially repugnant to the Constitution because it effectively conditions not a discretionary benefit but a state constitutional entitlement- adequate education- upon the waiver of the right to free exercise of religion. This Court has frequently and forcefully articulated the right of schoolchildren to be free of religious coercion in the school setting. *See, e.g., People of State of Ill. ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 231 (1948).

The Court has never wavered from this position. Considering the issue of school-sponsored prayer exercises at a graduation ceremony in *Lee*, 505 U.S. at 596, the Court admonished that "[i]t is a tenet of the First Amendment that the state cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." As here, the challenged

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to impose a condition on its receipt").

practice was defended on the basis of its importance, a defense the Court viewed as ironic and categorically rejected:

> The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail.... We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation.

Id. at 595. Responding to the claim that attendance at *Lee*'s graduation ceremony was voluntary- the analogue of the instant petitioners' claim that the voucher program is a matter of "choice"- the Court concluded "[t]he argument lacks all persuasion. Law reaches past formalism....[T]he fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise." *Id.* at 595-96.

Two terms ago, the Court extended *Lee's* analysis to high school football games. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). Again an argument was advanced that attendance was voluntary, and again the Court rejected the argument.

> To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme."
>
> . . .The constitutional command will not permit the District "to exact religious conformity from a student as the price" of

> joining her classmates at a varsity football game.

Id. at 311-12 (citations omitted).

If the state cannot exact religious conformity as the price of attending high school graduation ceremonies or a varsity football game, how much greater is the affront to the Constitution when such conformance is exacted in exchange for a safe and adequate education? Beyond question, the harm to those involved and the constitutional infirmity are incalculably greater here than they were in *Lee* and *Santa Fe*. A student's desire to attend graduation ceremonies or a high school football game, however strongly held, pales in comparison to the fundamental imperative (and state constitutional right) to be adequately educated in a safe environment. Moreover, whereas students in *Lee* and *Santa Fe* were at most compelled to sit through a religious invocation (in *Santa Fe*, there was only the threat of such an event), the proselytizing to which students must submit at many of the religious schools in issue here is omnipresent and essentially inescapable for this "captive audience."[6]

The trade-off the voucher program demands is more than just profoundly troubling. It is unconstitutional. The state can no more condition a Cleveland student's receipt of a constitutionally-adequate education on submission to religious indoctrination than it could routinely subject prisoners to unconstitutional conditions of confinement in state-operated prisons, offering the option to transfer to superior prison facilities operated by a religious order and infused with religious practice.

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[6] *See Simmons-Harris*, 234 F.3d at 949 ("The sectarian schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects").

When the state coerces families into "choosing" a religious education for their children, the consequent flow of public funds and otherwise public schoolchildren to religious institutions violates the Establishment as well as the Free Exercise Clauses, coercion alone being sufficient– although not necessary– to support an Establishment Clause challenge. *Lee*, 505 U.S. at 604 (Blackmun, J., concurring) ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion").

Finally, there can be no serious argument that any legitimate state interest is served when the state influences voucher families to "choose" private religious education over a public one that fails to meet constitutional standards. The only interest the state constitutionally may seek to advance in these circumstances is the one ordered by the state courts: reform of the system so that every public school student is assured a constitutionally-adequate education.[7]

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[7] Whether the state could operate its voucher program in tandem with a system of constitutionally-adequate public schools is a hypothetical question that need not be addressed in the context of this litigation, and it is one that is unlikely ever to arise in Ohio. The voucher program exists as a response to the failing public school system; once the state remedies the public system, the *raison d'être* for the voucher program will no longer exist.

B. The Establishment Clause is also violated by the voucher program's lack of secular purpose, as evidenced by the fact that religious domination was an intended and foreseeable feature of the program from the start.

Petitioners misunderstand the legal consequences of the state's conduct when they argue that "'[t]he critical issue is not whether children go to private or public schools, to religious or nonsectarian schools, but whether they go to good schools or bad schools.'" Brief of Petitioners Senel Taylor at 28-29, *Taylor* (No. 00-1779) (quoting Dr. Howard Fuller). When the government rejects purely secular means of accomplishing an otherwise legitimate purpose in favor of means that clearly aid religion, the chosen means cannot be said to serve a secular purpose. *See Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) ("The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests").

Here, however, there is something more at work than a neutrally-designed program that just happens to result in massive public aid to religious institutions. An examination of the statutory framework of the program and the circumstances surrounding its enactment reveal that the religious effects of the program were intended from the start.

1. The statutory framework of the program favors religious schools.

As an initial matter, it is absolutely essential to recognize the extent to which the Ohio voucher program is dominated by religious schools. Petitioners may make grand allusions to a "range of options," but the facts are clear: a student seeking a secular education will be hard-pressed to find it in this program. Only 10 of the 56 schools participating in the voucher program during the 1999-2000 school year were described as non-religious, *Simmons-Harris*, 234 F.3d at 949, and it appears that today, there may be as few as *four* non-religious schools among the 50 in the program.[8] Of these few remaining secular schools, three serve children in pre-kindergarten and kindergarten only. The Hannah Perkins School, an intervenor petitioner in the instant case, offers pre-kindergarten and kindergarten for children with emotional problems, *Member Institutions: Hanna Perkins School,* All About University Circle, *available at* http://www.universitycircle.org/members/hanna/htm (last visited Nov. 21, 2001), and it serves only 21 students according to the National Center for Education Statistics. *Find Your School,* NCES Education Information for Students Across the Nation, *available at* http://www.nces.ed.gov (last visited Dec. 4, 2001). Covenant Kindergarten, with slightly more than one teacher (1.1), serves 53 students in pre-kindergarten and kindergarten. *Id.* Lewis Little Folks school serves only 17 students in pre-kindergarten and kindergarten, *id.*; furthermore, because it is a federally sponsored child care

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[8] *See* Study, Piet van Lier & Caitlin Scott, *Fewer Choices, Longer Commutes for Black Voucher Students*, Catalyst for Cleveland Schools, *available at* http://www.catalyst-cleveland.org/10-01/1001extra4.htm (Oct./Nov. 2001).

center, it is required to give priority to the children of federal employees, and such children must comprise at least 50% of the enrollees, *Federally Sponsored Child Care Centers*, United States Office of Personnel Management, *available at* http://www1.opm.gov/wrkfam/html/cchb508.html (last visited Dec. 5, 2001). Given these known limitations, it appears that a Cleveland parent seeking a secular school that provides education beyond the kindergarten year may have very few schools– and perhaps only one school– from which to choose.

The overwhelming presence of religious schools in the voucher program is not mere happenstance; it reflects, first, the lower costs associated with parochial schools together with the special ability of these schools to augment through other funding sources the otherwise-insufficient vouchers provided by the state. *Simmons-Harris*, 234 F.3d at 959. Second, the near-complete dominance of religious schools is a function of the voucher program's strong financial disincentives to participation by *public* school districts adjacent to the Cleveland schools. Perhaps the most striking errors these Ohio school *amici* have observed in the various briefs filed in support of the voucher program are the misstatements relating to Ohio's methodology for funding its public schools and, in particular, the amount of state funding actually received by the individual public districts adjacent to the Cleveland Municipal School District. (These are the public school systems which *could* participate in the voucher plan, but do not. *See* Ohio Revised Code ["R.C."] 3313.974[G]).

The following table lists the total per pupil expenditures for each of the adjacent districts, together with

an amount representing the state's share of those expenditures for the 1999-2000 school year:[9]

Adjacent District (Public)	**Total Per Pupil Expenditures**	**State Funding Per Pupil**
1 Berea City SD	$8,283	$1,452
2 Brooklyn City SD	$8,462	$1,245
3 Cleveland Hts-Univ Hts City SD	$10,803	$3,177
4 Cuyahoga Heights Local SD	$14,572	$1,385
5 East Cleveland City SD	$9,306	$5,936
6 Euclid City SD	$8,194	$2,410
7 Fairview Park City SD	$8,509	$2,072
8 Garfield Heights City SD	$7,546	$2,758
9 Lakewood City SD	$8,633	$3,081
10 Maple Heights City SD	$7,175	$3,181
11 Parma City SD	$7,250	$1,861
12 Rocky River City SD	$8,823	$1,401
13 Shaker Heights City SD	$11,604	$2,548
14 South Euclid-Lyndhurst City SD	$9,001	$1,947
15 Warrensville Heights City SD	$9,279	$3,774
(Average)	**$9,163**	**$2,548**

[9] Data from *ODE Local Report Card*, Ohio Department of Education (2001), *available at* http://www.ode.state.oh.us/reportcard01/lrc.htm (last visited Dec. 10, 2001).

Comparing the low voucher amount ($2,250) with the per-pupil expenditures of the public schools adjacent to the Cleveland schools, it is evident that the adjacent districts simply cannot afford to participate in the voucher program. A participating adjacent district would receive, on account of each enrolling voucher student, two amounts: the voucher, plus the per-pupil funding provided to the district by the state – the latter generally amounting to only a fraction of the district's per-pupil costs. In the adjacent district of Rocky River, for example, the state's share is only $1,401, meaning this district would receive at most $3,651 ($2,250 plus $1,401) if it enrolled a voucher student– far short of the $8,823 necessary to educate each student in the Rocky River district. In essence, petitioners expect the adjacent districts to accept from voucher students an amount far less than is necessary to educate the voucher student *in that district,* and petitioners are then mystified that this proposal is declined.[10]

The same phenomenon described above can also be demonstrated by looking at the official tuition rates of the adjacent public districts. The official tuition rate is the

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[10] Petitioners have repeatedly misrepresented the operation of the voucher program with respect to the adjacent districts. *See* Brief of State Petitioners at fn.2, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) (public district might get "as much as $6,544" from state); *see also,* Brief of Petitioners Senel Taylor at 39, *Taylor* (No. 00-1779) ("$6,544"); Brief of Petitioners Hannah Perkins School at 23, *Hanna Perkins School* (No. 00-1777) ("6,750 provided by the State"). These grossly erroneous figures appear to rest on a false assumption that the state pays the *total* "base cost" amount (R.C. 3317.012) to school districts each year for every student enrolled. In fact, the "base cost" or "formula" amount– which represents the hypothetical cost of an adequate education– is a combination of *state and local funds*. The portion of this "base cost" figure paid by the state is highly variable, depending on the property tax wealth of the district. (*See* R.C. 3317.022.)

amount which an Ohio school district is *required by law* to charge non-resident students which it admits to its schools. *See* R.C. 3327.06. It represents the local tax component of educational costs– that is, the amount that must be added to state funds to pay the total cost of educating one child in that district. The *average* of the official tuition rates for the fifteen adjacent public school districts is $6,761/year[11]; and in every district but one– the East Cleveland City School District– the voucher amount is far less than the district would ordinarily be required to charge for an out-of-district student. Indeed, in all the districts but two, the voucher amount is *less than half* of the regular tuition rate.[12]

2. The history of the enactment reveals that advancement of religion was an intended consequence of the voucher program.

This Court has recognized that while the text of a challenged enactment may be the starting point for Establishment Clause analysis, it is not the end of that

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[11] Data at *Pupil Tuition Report*, State of Ohio Department of Education – Division of School Finance (Fiscal Year 1999-2000), *available at* http://www.ode.state.oh.us/sf/foundation/reports/F2000-T40256.HTM (last visited Dec. 10, 2001).

[12] It should be noted that the East Cleveland City School District, like the Cleveland district itself, is categorized by the state as an "academic emergency" district. *See East Cleveland City School District, Cuyahoga County*, State of Ohio – 2001 District School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/043901.pdf (last visited Dec. 11, 2001).

analysis. "Whether a government activity violates the Establishment Clause is 'in large part a legal question to be answered on the basis of judicial interpretation of social facts....' [W]e refuse to turn a blind eye to the context in which this policy arose...." *Santa Fe*, 530 U.S. at 315.

The context in which Ohio's voucher program arose is telling. Certainly, the financial disincentives to participation by secular private and adjacent public schools were foreseeable at the time of the program's enactment. Furthermore, there is considerable evidence that the program was motivated by an intent to aid parochial schools and to fulfill certain political commitments of financial assistance previously made to these schools. *See* Doug Oplinger & Dennis J. Willard, *Voucher System Falls Far Short Of Goals*, Akron Beacon Journal (Dec. 14, 1999), *available at* http://www.ohio.com/bj/projects/whose_choice/docs/005374.htm#top (last visited Dec. 10, 2001).[13]

The context in which the voucher program was created additionally refutes petitioners' argument that the program sends no message of state endorsement of religion. The state has plainly and publicly posited the program it designed to favor religious schools as superior in quality to Cleveland's public schools. In these circumstances, it strains credulity to claim the state has not sent Cleveland's families a powerful message that the city's religious schools, and those who attend them, are preferred by the state. *See Santa Fe*, 530 U.S. at 308 ("The text and history of this policy, moreover, reinforce

[13] Note, too, that like the aid struck down in *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Ohio voucher program was enacted in the wake of precipitously declining enrollment in Catholic schools. *See* Brief of Petitioners Senel Taylor at fn. 8, *Taylor* (No. 00-1779) ("Between 1965-90, enrollment in Catholic schools nationwide decreased by 50%").

our objective student's perception that the prayer is, in actuality, encouraged by the school").

3. The "educational options" touted by petitioners as alternatives to the overwhelmingly religious voucher schools are legally irrelevant and, even if deemed relevant, are so limited as to be illusory.

All of the petitioners, to a greater or lesser degree, invite this Court to venture beyond the scope of issues presented by the Pilot Project Scholarship Program (the Ohio voucher plan) (R.C. 3313.974-3313.983) and to consider other Ohio programs which provide public funds to *non*-religious schools. Each of the petitioners, for example, suggests that the Court consider the impact of Ohio's community school legislation (Chapter 3314 of the Ohio Revised Code) when evaluating the constitutionality of the Ohio voucher program. This attempt to draw community (charter) schools into the analysis is understandable: standing alone, the voucher program presents a virtually monolithic religious presence (96% of the Cleveland voucher recipients are enrolled in religious schools).[14] *Simmons-Harris v. Zelman*, 72 F.Supp.2d 834 (Ohio 1999). For petitioners, adding non-religious community schools to the mix is absolutely essential in order to advance their central

[14] Indeed, it appears the participation of non-religious schools in the Ohio voucher plan (always limited) is in fact dwindling. *See* fn. 8 *supra* and accompanying text.

argument– *i.e.*, that the parents holding vouchers are presented with a *true choice* between religious and non-religious institutions– with any plausibility whatsoever. Both the District Court and the Sixth Circuit wisely rejected what may be called petitioners' "Gestalt theory" of constitutional jurisprudence. *See Simmons-Harris*, 234 F.3d at 958. *Accord*, *Doe v. Beaumont Indep. School Dist.*, 240 F.3d 462, 484 (5th Cir. 2001) ("Like the [Cleveland] voucher program, Clergy in Schools is a free-standing program, which must therefore be tested *independently*").

No compelling reason has been advanced for considering the community school program (R.C. Chapter 3314) as an adjunct to the voucher plan (R.C. 3313.974-3313.983). The two are physically separate legislative enactments and functionally unrelated. Furthermore, it would be unseemly for this or any other court to allow the sins of one state program to be atoned for by good works of another. For example, would this Court seriously consider upholding a state law that restricted minority enrollment at certain state universities, if the state could also show that it had enacted substantial subsidies and scholarships that enhanced the *overall* educational opportunities for racial minorities? In the final analysis, such an approach simply cannot stand.

If, however, community schools are to be viewed as relevant in the present case, it then becomes necessary to focus for a moment on just what kind of "option" the community schools actually present for Cleveland parents. Charter schools in Ohio are known as "community schools" and are governed by Chapter 3314 of the Ohio Revised Code (enacted 1997). Community schools are organized as nonprofit corporations. R.C. 3314.03(A)(1). They must be nonsectarian in their programs, admission, policies, and operations. R.C. 3314.03(A)(11)(c). Community schools are funded by a deduction from the funding of each student's

"home" school district. R.C. 3314.08. Community schools are subject to the Ohio laws governing student discipline, health and safety, workers' compensation, employment compensation, student records, public records, and employment discrimination. *See* R.C. 3314.03. Otherwise, however, community schools are generally "exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grant certain rights to parents." R.C. 3314.04. Most significantly for present purposes, *community schools are not subject to any state minimum standards relating to the educational program and are exempt from all course of study and graduation requirements except their own. Compare* R.C. 3313.60 and 3313.61 *with* R.C. 3314.03(A)(11)(d), (f).

The record in the instant case reflects that there were just three community schools operating in the Cleveland Municipal School District during the 1998-99 school year: Old Brooklyn Montessori (1-4), Hope Chapelside Academy (K-8), and Hope Cathedral Academy (K-8). Affidavit of Steven M. Puckett at ¶12 (Jt. App. at 160a). During the 1999-2000 school year, seven other community schools were expected to be in operation. Puckett Aff. at ¶12 (Jt. App. at 160a-161a). Thus, petitioners argue that, at the time the record in this case was made, there were ten community schools in Cleveland serving as a "secular alternative" to the 46 "religiously affiliated" voucher schools. Brief of State Petitioners at 6, *Zelman* (Nos. 00-1751, 00-1777, 00-1779).

Although superficially appealing, this "secular alternative" touted by the petitioners quickly evaporates once the facts are examined. First of all, it must be remembered that students may enter the Cleveland voucher program only in grades K-3, R.C. 3313.975(C)(1); therefore, a community school offering higher grade levels is *not* an option for a parent considering the voucher program. This simple fact

means that two of the schools referenced in the record (Horizon Science and Life Skills) cannot be claimed as "secular options" to the voucher program. Of the remaining eight schools, two- the Cleveland Alternative Learning Academy and the International Preparatory Academy- present only a restricted option to Cleveland parents, since they are designated as "special population" schools.[15] Parents considering these schools might also be dissuaded by the lack of performance information on these schools. The Ohio Department of Education has indicated that it "currently does not create report cards for community schools that focus on students with special needs."[16] Of the six schools remaining, four are Hope Academies. Only two of these have been in existence long enough to have a state "Report Card" indicating the performance of students on the state proficiency tests. What do those "Report Cards" show? *Performance well below the Cleveland Municipal School District itself*, the failed school system from which voucher families seek escape. The following performance figures for the 4th-grade proficiency tests are taken directly from the school district "Report Cards" prepared and published by the Ohio Department of Education:[17]

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[15] *Performance Accountability 2001: Reporting on Community Schools*, Ohio Department of Education (2001), *available at* http://www.ode.state.oh.us/pa/toolkit_2001/community_schools.htm (last visited Dec. 10, 2001).

[16] *Id.*

[17] Scores may be found on the Report Cards for 1990-2000 (the "2001 Report Cards) posted on the Ohio Department of Education Web Site. *See Hope Academy Chapelside Campus (Grades K-7), Cuyahoga County*, State of Ohio - 2001 Community School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134197.pdf (last visited Dec. 11, 2001); *see also Hope Academy Cathedral Campus,*

Grade 4	State Perf. Std.	Cleveland District Average	Hope Chapel-side	Hope Cathe-dral
Citizenship	75%	41.4%	13.3%	10.3%
Math	75%	34.3%	3.3%	0.0%
Reading	75%	33.3%	13.3%	20.7%
Writing	75%	62.5%	23.3%	48.3%
Science	75%	30.1%	6.7%	3.4%
Passed All		**16.1%**	**3.2%**	**0.0%**

It is reasonable to assume that this abysmal performance by the students in these two Hope Academies would be duplicated in two other Hope Academies (Hope Broadway and Hope Lincoln Park) based upon the performance of these and other Hope academies elsewhere in Ohio.[18]

Cuyahoga County, State of Ohio - 2001 Community School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134205.pdf (last visited Dec. 11, 2001), and *Cleveland City School District, Cuyahoga County*, State of Ohio - 2001 District School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/043786.pdf (last visited Dec. 11, 2001).

[18] *See, e.g.*, officially posted results for Hope Academy University Campus in Akron (6.3% pass rate on 4th-grade math proficiency test, 0.0% pass rate on 6th-grade reading and science tests) and Hope Academy Brown Street Campus in Akron (4.2% pass rate on 4th-grade math and science tests and 0.0% pass rate on 6th-grade math and reading tests). *Hope Academy University Campus (Grades K-6), Summit County*, State of Ohio - 2001 Community School Report Card, *availableat* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134213.pdf (last visited Dec. 11, 2001); *see also Hope Academy Brown St. Campus (Grades K-6)*, State of Ohio - 2001 Community School Report Card, *available at* http://odevax.ode.state.oh.us/lrc_www/00_Dist/134221.pdf

In view of the above, it can be seen that of the original ten community schools named in the record, *only two* represent non-religious choices which are unfettered by the most obvious concerns of age-level eligibility, appropriateness, and quality of instruction. And of these two, only one (Old Brooklyn Montessori) has been in existence long enough (two and one-half years) to have "Report Card" data. As with most community schools, parents considering enrollment in the other remaining school (Citizens' Academy) have little objective information upon which to base a decision of very great importance to their child's development.

In conclusion, then, it is clear that the community schools available to parents within the Cleveland Municipal School District do not provide a "secular option" which is meaningful in the context of the present case. At the present time, these community schools (as a whole) are simply too new, too few, too ineffective, too unregulated, and too insubstantial to be anything other than a risky proposition for Cleveland parents who are seeking a non-religious alternative to the voucher schools.[19]

(last visited Dec. 11, 2001).

[19] Though hardly deserving of the Court's attention, some reference must be made here to petitioners' various arguments relating to "magnet" schools. These arguments are specious in the extreme. The term "magnet school" has no specific definition in Ohio law. Indeed, the phrase "magnet school" appears only once in the Ohio Revised Code, in a section enumerating program options for gifted students. R.C. 3324.07. Any district may create a "magnet" school simply by adopting a building-wide theme or curriculum designed to appeal to certain students. To say that the State of Ohio has created "magnet schools" as a distinct nonsectarian "alternative" is simply a false statement. "Magnet schools" are created in each instance as a local curricular decision. If petitioners want to inflate the number of nonsectarian "choices" available to Cleveland parents, they might as

C. The guarantee of Equal Protection is violated when the state establishes two tiers of schools in Cleveland– one religious and of high quality, the other non-religious and of poor quality– and when elsewhere in Ohio, the state affords public school students a high quality *secular* education.

The Senel Taylor petitioners write movingly of the "sacred promise of equal educational opportunities" set forth by this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) . Brief of Petitioners Senel Taylor at 4-5, *Taylor* (No. 00-1779); *see generally id.* at 4-10. In their evident view of the case, the voucher program equals the playing field and serves as a life preserver for students otherwise condemned to failed public schools. *Id.* at fn.4; *see also id.* at 10.

The purpose of this Brief is not to oppose the rescue of Cleveland's public schoolchildren, but to challenge the constitutionality of the lifeboat sent by the state. In our view, petitioners pervert *Brown* when they use it to advance the cause of state-funded religious education for desperate students willing to endure it. Where is the concern for the remaining 78,000 students in Cleveland's public schools? We may not know how many students have eschewed the voucher program because of its religious burdens, but there are undoubtedly some, and the lack of certainty will not immunize the program. *See Santa Fe*, 530 U.S. at 316 ("Government efforts to endorse religion cannot evade

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well include *every building in the Cleveland district.* Ohio law requires public schools to have "open enrollment" *within* each district. O.R.C. 3313.97. Thus, *every* Cleveland school building represents a nonsectarian "option" under petitioners' analysis.

constitutional reproach based solely on the remote possibility that those attempts may fail"). Most importantly, if the goal truly is educational opportunity and not aid for religious institutions, why must the opportunities come with a religious price tag?

When *Brown* dismantled the notion of separate but equal half a century ago, the Court could not have envisioned that a state would today ask the Court's blessing upon separate and *unequal* schools, this time founded on religion. Yet the Court is now confronted with two tiers of state-supported education for Cleveland's children: superior schooling for those willing to accept it in a religious context, with others denied educational opportunity and exposed to physical risks in the bargain. Meanwhile, elsewhere in Ohio, children are afforded a high quality public education free of religious influence.

All of Ohio's 1.8 million public school children are the state's responsibility. *DeRolph I*, 677 N.E.2d 733. When the state deliberately provides its children with varying levels of educational opportunity, sometimes conditioned upon submission to religious indoctrination and sometimes not, the state denies equal protection of the laws, to the detriment of the schoolchildren of Cleveland.

CONCLUSION

For all of the foregoing reasons, the *amici* respectfully urge the Court to uphold the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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Nos. 00-1751, 00-1777 & 00-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, *et al.*, *Petitioners*,

v.

DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

HANNA PERKINS SCHOOL, *et al.*, *Petitioners*,

v.

DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

SENEL TAYLOR, *et al.*, *Petitioners*,

v.

DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICAN EDUCATION REFORM COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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34 pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. VOUCHER PROGRAMS HELP TO EQUALIZE EDUCATIONAL OPPORTUNITY AND TO BRING COMPETITIVE FORCES TO BEAR TO IMPROVE FAILING PUBLIC SCHOOLS. 3

A. Vouchers Help To Equalize Educational Opportunity. 3

B. Vouchers Put Competitive Pressure on Underperforming Public Schools, Motivating Them To Improve Their Performance. 11

II. THE CLEVELAND SCHOLARSHIP PROGRAM DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE. 17

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Page(s)

Agostini v. Felton, 521 U.S. 203 (1997) 18
Board of Education v. Allen, 392 U.S. 236 (1968) 25
Brown v. Board of Education, 347 U.S. 483 (1954) 11
Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 21
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Davis v. Grover, 480 N.W.2d 460 (Wis. 1992) 24
Engel v. Vitale, 370 U.S. 421 (1962) 21
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Lemon v. Kurtzman, 403 U.S. 602 (1971) 26
Mitchell v. Helms, 530 U.S. 793 (2000) 2, 18, 19
New State Ice v. Liebmann, 285 U.S. 262 (1932) 16, 17
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 3
Quick Bear v. Leupp, 210 U.S. 50 (1908) 21
Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995) 21
Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 17
Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) 17, 19, 21, 23, 24
Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) 19, 21, 23, 24
Walz v. Tax Commission, 397 U.S. 664 (1970) 26
Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 18, 20, 26
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 26

STATUTES

20 U.S.C. § 1070a *et seq.* 20

38 U.S.C. § 3011 *et seq.* 20
Ohio Rev. Code Ann. § 3313.975 17
Ohio Rev. Code Ann. § 3313.976(A) 8, 18
Ohio Rev. Code Ann. § 3313.976(C) 17
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Ohio Rev. Code Ann. § 3313.978 21
Ohio Rev. Code Ann. § 3313.978(A) 17, 18, 22
Ohio Rev. Code Ann. § 3313.979 18
Ohio Rev. Code Ann. § 3313.979(B) 22
Ohio Rev. Code Ann. § 3314.03(A) 22
Ohio Rev. Code Ann. § 3314.08(A) 22
Ohio Rev. Code Ann. § 3314.08(D) 22
Ohio Rev. Code Ann. § 3317.02(B) 22
Ohio Rev. Code Ann. § 3317.03(I) 22
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This *amicus curiae* brief is submitted in support of the Petitioners in these consolidated cases. By letters filed with the Clerk of the Court, all parties have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

The American Education Reform Council (AERC) is a Milwaukee-based non-profit organization whose mission is to provide accurate and credible information about school choice. A long-established school-choice program together with a strong charter-school program make Milwaukee an active laboratory for education reform. AERC regularly plans and conducts study tours to explain Milwaukee's school-choice program. Visitors include elected officials, religious leaders, community activists, and members of the media—both supporters and opponents of choice—who seek a fuller understanding of the impact of school choice in a community.

Because of its experience in Milwaukee, AERC believes that it can provide information and analysis about school choice that will be helpful in resolving the legal issues in this case. Drawing on this experience, AERC seeks in this brief to persuade the Court that school choice promotes both better education and greater fairness; that school choice works; and that school choice is constitutional.

SUMMARY OF ARGUMENT

I. School-choice programs improve educational achievement in failing school districts. Students from poor families are often trapped in substandard public schools because their

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

parents cannot afford private schools or to move to better school districts. School-choice programs help to equalize educational opportunity by giving poor parents some of the educational choices that families of greater means take for granted, and rigorous empirical studies show that students who receive vouchers and attend private schools improve their academic performance. Just as important, empirical evidence shows that voucher programs, by stimulating competition, motivate underperforming public schools to improve. Promising experiments such as Cleveland's voucher program should be permitted to continue.

II. Cleveland's voucher program is not "an establishment of religion." Under the approaches of a majority of the Court in *Mitchell v. Helms*, 530 U.S. 793 (2000), the Cleveland program is constitutional because it has a secular purpose, is neutral towards religion both on its face and in its application, and assists religious schools only as a result of private choices by individual recipients of aid who are free to spend the aid where they choose. The program is neutral because it provides benefits to a broad class of citizens without regard to religion and does not give students or their families any financial incentive to choose a religious school over a secular school. The Sixth Circuit's concern that only a small number of secular schools currently participate in the program is misplaced: the participation level of secular schools reflects the newness of the program and the legal uncertainty that has shadowed the program through virtually its entire history. Experience elsewhere suggests that more opportunities to use vouchers at secular schools will develop over time once legal uncertainties are removed. This Court's decision in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), on which the Sixth Circuit relied heavily, is distinguishable and, in any event, is inconsistent with the Court's more recent jurisprudence.

ARGUMENT

I. VOUCHER PROGRAMS HELP TO EQUALIZE EDUCATIONAL OPPORTUNITY AND TO BRING COMPETITIVE FORCES TO BEAR TO IMPROVE FAILING PUBLIC SCHOOLS.

The educational benefits of school choice programs are clear. The evidence shows that expanding educational options for low-income parents can improve an entire urban education system—increasing both the educational achievement of voucher recipients and (through competition) the educational quality of inner-city public schools. The Ohio Legislature adopted the Ohio Pilot Project Scholarship Program (the "Cleveland Scholarship Program" ("CSP")) to achieve these educational benefits in the state's most distressed school district. This state's experimental effort to solve an educational crisis should be encouraged, not obstructed, by the courts.

A. Vouchers Help To Equalize Educational Opportunity.

The parents of America's schoolchildren do not have equal educational opportunity. The poorest children, and particularly minorities, are often trapped in failing public schools in the inner cities, while more affluent children have the opportunity to attend private schools or better public schools. Vouchers attempt to reduce this disparity by giving poor parents more options for educating their children. The evidence shows convincingly that vouchers work, significantly improving the educational achievement of students who receive them.

The right of parents to send their children to the school of their choice is guaranteed by the Constitution, *see Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), but this right is largely illusory for low-income parents who can afford neither private-school tuition nor the cost of housing in

neighborhoods with better public schools. Even parents who could afford to pay some tuition often cannot realistically afford to turn down the free-tuition option provided by local public schools. The U.S. Department of Education found in 1997 that 41 percent of elementary and secondary students effectively had no choice in the school they attended, and that children from families with incomes over $50,000 were "much less likely" than children from poorer families to attend "an assigned public school over which they had not exercised any choice."[2] Though the law, in its majestic equality, gives rich and poor alike the constitutional right to choose, the poor often have no actual choice other than an assigned inner-city school.[3]

No one doubts that in many urban school systems the achievement gap between white students and minority students is unacceptably wide. New results from the National Assessment of Educational Progress (NAEP)—the most respected and comprehensive source of national education data[4]—are particularly disheartening. The NAEP classifies students' educational performance into three categories—Advanced, Proficient, and Basic. For fourth-graders, the Ba-

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2 U.S. Dep't of Educ., National Ctr. for Educ. Statistics, *Findings from The Condition of Education 1997: Public and Private Schools: How Do They Differ?*, at 4-5 (July 1997), *available at* http://nces.ed.gov/pubs97/97983.pdf.

3 The phrase is from Anatole France, *The Red Lily* ch. 7 (1894) ("The law, in its majestic equality, forbids the rich and poor alike to sleep under bridges, beg in the streets or steal bread.").

4 Commonly known as the "The Nation's Report Card," the NAEP measures academic achievement of 4th, 8th, and 12th grade students in reading, mathematics, and other subjects. *See* U.S. Dep't of Educ., Office of Educ. Research and Improvement, National Ctr. for Educ. Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* (Apr. 2001) ("*NAEP Fourth-Grade Reading 2000*"), *available at* http://nces.ed.gov/nationsreportcard/pdf/main2000/2001499.pdf.

sic category in reading requires only that students be able to "demonstrate an understanding of the overall meaning of what they read" and "make relatively obvious connections between the text and their own experiences and extend the ideas in the text by making simple inferences."[5] Yet last year, 60 percent of fourth-graders from families in poverty (defined by eligibility for federal school-lunch aid) had reading skills *below* the Basic level; by contrast, 27 percent of non-poor fourth-graders could not meet that minimal measure of competence.[6] Forty-seven percent of fourth-graders in urban schools read below Basic, compared to 32 percent of students in suburban areas and large towns.[7] And 63 percent of African-American and 58 percent of Hispanic-American fourth-graders read below the Basic level, compared to 27 percent of whites.[8]

In response to such educational disparity, elected state officials have enacted school-choice programs to help students from poor families in low-performing public schools. These programs, born of decades of frustration with inner-city public schools, give such students some of the educational choices now enjoyed by families of greater means. The CSP, for example, was created by the Ohio Legislature only after a federal court placed the Cleveland City School District under state control following years of mismanagement by the local school board.[9] Like most voucher programs, Cleveland's program targets students from the poorest

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5 *NAEP Fourth-Grade Reading 2000*, *supra*, at 14.

6 *Id.* at 40-41.

7 *Id.* at 38.

8 *Id.* at 30-32.

9 Rene Sanchez, *Cleveland Charts New Educational Course; State Vouchers for Poor Families Include Religious Schools as Options*, Wash. Post, Sept. 10, 1996, at A1.

families: the vouchers (called "scholarships") are focused on students from families with incomes less than two times the poverty level. *See* Ohio Rev. Code Ann. § 3313.978(A).

Numerous recent studies have demonstrated that students from the worst public schools can do better if given vouchers to attend private schools. Studies of voucher programs, of course, must be done carefully to control for the numerous variables that affect educational performance, including students' backgrounds. The most reliable studies involve programs that assign vouchers by lottery within the eligible group. This randomness allows researchers to compare the achievement of voucher recipients with that of students who applied for but did not receive vouchers (who form a valid control group because the only systematic difference between the groups is the outcome of the lottery). Seven such "random-assignment" studies of five different school-choice programs have been conducted in the past three years, and *all seven studies have found statistically significant academic benefits for at least some subgroups of the students receiving vouchers.*[10]

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10 Paul E. Peterson et al., *School Vouchers: Results from Randomized Experiments* (June 2001) (evaluating Washington, New York City, and Dayton), *available at* http://www.nber.org/books/schools/peterson6-8-01.pdf; David Myers et al., *School Choice in New York City After Two Years: An Evaluation of the School Choice Scholarships Program, Interim Report* (Aug. 2000) (analyzing New York City), *available at* http://www.mathematica-mpr.com/PDFs/school2.pdf; Jay P. Greene, *The Effect of School Choice: An Evaluation of the Charlotte Children's Scholarship Fund* (Aug. 2000) (analyzing Charlotte), *available at* http://www.manhattan-institute.org/html/cr_12a.htm; Cecilia Elena Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Q. J. Econ. 553 (1998) (analyzing Milwaukee); Jay P. Greene, Paul E. Peterson & Jiangtao Du, *School Choice in Milwaukee: A Randomized Experiment*, in *Learning from School Choice* 335 (Paul E. Peterson & Bryan C. Hassel eds., 1998) (analyzing Milwaukee).

The Harvard Program on Education Policy and Governance (PEPG), for example, analyzed three privately funded school-choice programs in New York City, Washington, D.C., and Dayton, Ohio. The Harvard PEPG study showed that, after two years in private school, African-American voucher recipients performed significantly better in each of the three cities, jumping an average of 6.3 percentile points ahead of comparable public-school students on the Iowa Test of Basic Skills.[11] Similarly, Princeton economics professor Cecilia Rouse analyzed the Milwaukee school-choice program and found that students receiving vouchers "scored 1.5-2.3 percentile points per year in math more than students in the comparison groups."[12]

In Cleveland, no random-assignment studies have been conducted. But two non-random-assignment studies in 1999—one by the Harvard PEPG researchers and one by the Indiana Center for Evaluation—found positive effects for Cleveland scholarship recipients.[13] And the most recent study of the Cleveland program found that a group of

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11 Peterson et al., *supra*, at 35.

12 Rouse, 113 Q. J. Econ. at 558, 592-93.

13 *See* Kim Metcalf, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program: 1996-1999*, at 25 (Sept. 1, 1999) ("Available data indicate small but statistically significant [positive] effects on students' achievement in two of five cognitive domains (language and science) after two years in the program."), *available at* http://www.schoolchoiceinfo.org/servlets/SendArticle/45/metcalf3.pdf; Paul E. Peterson, William G. Howell & Jay P. Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, at 10, 12 (June 1999) ("[T]est score gains are observed in both math and reading between the fall of 1996 and the spring of 1998 for all students who took tests at these two points in time. . . . Parents of voucher recipients are more likely to be 'very satisfied' with nearly every aspect of the schools they attend than are parents of students in Cleveland public schools."), *available at* http://www.ksg.harvard.edu/pepg/clev2rpt.pdf.

voucher recipients, which the study tracked from kindergarten through second grade, performed "at significantly higher levels" than one control group of public-school students, although no better than a second control group.[14] No study (in Cleveland or elsewhere) has found that voucher recipients do measurably worse than students who remain in their assigned public schools.

In addition to improved learning, vouchers offer recipients social and civic benefits. Public schools are today often quite segregated by both race and socioeconomic status, in part because many parents lack meaningful school choice. Since most poor minority children must attend assigned public schools, our current educational system replicates the segregation of America's neighborhoods and extends it into the schools.

Vouchers, however, allow students to choose schools with more diverse student bodies. The CSP (like other tax-supported voucher programs) prohibits participating private schools from discriminating on the basis of race, *see* Ohio Rev. Code Ann. § 3313.976(A)(6), and the evidence from Cleveland shows that the schools there do not discriminate.[15]

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[14] Kim K. Metcalf, *Evaluation of the Cleveland Scholarship Program 1998 - 2000, Technical Report*, at 49-50 (Sept. 2001), *available at* http://www.ode.state.oh.us/comm/news/Sep_2001_news/clev4techrep.pdf. This study appears to apply a random-assignment methodology to define its second control group ("Public Applicant/Non-Recipients"), but that group is not a true random-assignment control group, since it consists not only of students who were not selected in the random lottery but also of "those whose family income was above the federal poverty level and, as a result, . . . were given low priority in the selection process and may not have been included in the lottery." *Id.* at 14 n.11. Thus, the study cannot fully isolate the effect of receiving a scholarship because other factors (such as family income) may be at work.

[15] The latest study of the Cleveland program found that, though whites were more likely to apply for scholarships than minorities, applicants were still over 70 percent minority, and the racial mix of the students who received vouchers and attended choice schools was not statistically different from the racial mix of applicants who did not receive vouchers. Metcalf, *Evaluation of the Cleveland Scholarship Program 1998 - 2000, supra*, at 24-25; *see also* Jay P. Greene, William G. Howell & Paul E. Peterson, *Lessons from the Cleveland Scholarship Program*, in *Learning from School Choice* 357, 362 (Paul E. Peterson & Bryan C. Hassel eds., 1998) (finding that 72.6 percent of applicants were minorities and that applicants in choice schools had similar racial mix as applicants who did not receive scholarships).

Two studies (one in Cleveland, one in Milwaukee) show that the private schools that voucher recipients attend are, in fact, more likely to be integrated than public schools.[16] In Cleveland, 19 percent of scholarship recipients attend private schools with a racial composition resembling the overall racial composition of the Cleveland metropolitan area, compared to only 5 percent of public-school students in the area.[17] Similarly, only 50 percent of voucher recipients attend schools that are almost entirely white or almost entirely minority, compared to 61 percent of public-school students in metropolitan Cleveland.[18]

Vouchers also enable recipients to attend schools that instill a sense of responsibility and civic virtues. Four recent studies have shown that, after controlling for numerous demographic variables, students in private schools show

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[16] Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* (Nov. 5, 1999), *available at* http://www.ksg.harvard.edu/pepg/parclev.pdf; *see also* Howard L. Fuller & George A. Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools* (June 2000) (finding that 50% of public-school students in Milwaukee "attended racially isolated schools—where 90% or more of the enrollment is minority or white—compared to 30% of students at religious choice schools"), *available at* http://www.schoolchoiceinfo.org/servlets/SendArticle/6/integ600.pdf.

[17] Greene, *Racial, Economic, and Religious Context*, *supra*, at 7-8.

[18] *Id.*

greater tolerance, political participation, and social involvement than public-school students.[19] Harvard education professor Nathan Glazer attributes this phenomenon to the relative freedom from political pressure and bureaucracy that private schools enjoy, which he says has "enhanced their relative ability, vis-à-vis the public schools, to transmit the common culture."[20]

Whatever the reason, it is clear that—contrary to those who argue that school choice undermines America's common values—school choice promises to reduce division in American society. Harvard sociologist Christopher Jencks noted that "if racial equality is America's goal, reducing the black-white test-score gap probably would do more to promote this goal than any other politically plausible strategy."[21] Reducing that test-score gap, however, will require giving the poor (who are disproportionately members of racial and ethnic minorities)[22] access to better schools. What this Court said in *Brown* is just as true today:

> [E]ducation is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954). School choice is an effort by elected officials, frustrated by decades of failure and inequality, to provide children with education on more "equal terms."

B. Vouchers Put Competitive Pressure on Underperforming Public Schools, Motivating Them To Improve Their Performance.

Just as important as the number of students who use vouchers to escape failing public schools is the effect that voucher programs will have on those same schools. The Ohio Legislature was entitled to conclude, in enacting the CSP, that increasing competition would improve the performance of public schools, just as competition improves performance in other sectors of the economy. In fact, the empirical evidence shows that public schools do respond favorably to competition and that vouchers, even when implemented on a rather small scale and over a short period of time, do motivate public schools to improve.

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19 *See* Jay P. Greene, Joseph Giammo & Nicole Mellow, *The Effect of Private Education on Political Participation, Social Capital and Tolerance: An Examination of the Latino National Political Survey*, 5 Geo. Pub. Pol'y Rev. 53 (1999), *available at* http://www.georgetown.edu/publications/GPPR/; Patrick J. Wolf et al., *Private Schooling and Political Tolerance, Evidence from College Students in Texas* (Mar. 2000) (forthcoming from Brookings Institution Press in *Charters, Vouchers, and Public Education* (Paul E. Peterson & David E. Campbell eds., 2001)); David Campbell, *Making Democratic Education Work: Schools, Social Capital and Civic Education*, Education Next, Fall 2001, *available at* http://www.educationnext.org/unabridged/20013/campbell.pdf; Kenneth Godwin, Carrie Ausbrooks & Valerie Martinez, *Teaching Tolerance in Public and Private Schools*, 82 Phi Delta Kappan 542 (2001).

20 Nathan Glazer, *Seasons Change*, Education Next, Fall 2001, at 34, *available at* http://www.educationnext.org/20013/24glazer.pdf.

21 Christopher Jencks & Meredith Phillips, *Closing the Black-White Test-Score Gap*, in *Harvard Program on Education Policy and Governance 1998-99 Annual Report* 3, *available at* http://www.ksg.harvard.edu/pepg/pepg9899.pdf.

22 In 1998, 26.1 percent of African Americans and 25.6 percent of Hispanics were below the poverty level, compared to only 10.5 percent of whites. *See* U.S. Census Bureau, *Statistical Abstract of the United States* 476 (2000), *available at* http://www.census.gov/prod/2001pubs/statab/sec14.pdf.

The providers of educational services, like the providers of any other good or service, will work harder to improve their product when they face competition than when they enjoy a monopoly and captive consumers. No school—public or private—is immune to its comparative reputation or to the need to attract skilled teachers and administrators, ambitious students, and dedicated parents. Giving parents a school choice, through competition, is one way to replace parental apathy with energetic involvement in their children's education.

What theory predicts, experience confirms. In a series of widely respected studies,[23] Harvard economics professor Caroline Hoxby has demonstrated empirically that increasing public-school and private-school competition within a metropolitan area significantly increases the quality of public schools in that area.[24]

In one study, Hoxby found that a metropolitan area with more public school districts (what Hoxby termed more "interdistrict choice") will have significantly higher student per-

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23 Professor Hoxby's work "inspires a kind of awe among many economists: for its clarity, its empirical thoroughness, and its wonderful ingenuity in finding ways to answer hard questions." *The difference that choice makes*, The Economist, Jan. 25, 2001, *available at* http://www.cba.uiuc.edu/seppala/econ101/hoxby.html.

24 Caroline M. Hoxby, *School Choice and School Productivity (Or, Could School Choice Be a Tide That Lifts All Boats?)* (Feb. 2001), *available at* http://www.nber.org/~confer/2001/hoxby01/hoxby.pdf; Caroline M. Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, 90 Am. Econ. R. 1209 (2000), *available at* http://post.economics.harvard.edu/faculty/hoxby/papers/amongpub_oct2000.pdf; Caroline Minter Hoxby, *Markets and Schooling: The Effects of Competition from Private Schools, Competition Among Public Schools, and Teachers' Unions on Elementary and Secondary Schooling*, *in* National Tax Association, *Proceedings of the Eighty-Seventh Annual Conference on Taxation* 124 (1994), *available at* http://post.economics.harvard.edu/faculty/hoxby/papers/mkts_schooling_oct2000.pdf.

formance—all other things being equal—than a metropolitan area with fewer districts.[25] After controlling for various socioeconomic factors, Hoxby found that a city like Boston, which has 70 school districts within a 30-minute drive of downtown, will have "substantial[ly]" higher student achievement than a city like Miami, which has just one school district for virtually the entire metropolitan area.[26] Why? Because "[i]n a metropolitan area where one school district contains the vast majority of jobs and residences and the commute to the nearest alternative district is long, the cost of being able to exercise choice is high."[27] And where the cost of exercising choice is high, fewer parents are able to compare schools and choose the best one for their children. Without this competitive process, schools have less incentive to improve.

This same principle—that more educational choice creates more competition and higher student achievement—is demonstrated in another pair of Hoxby studies analyzing the effect of private-school competition on public schools. Hoxby found that "increasing the potential of private schools

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25 *See* Hoxby, *Competition Among Public Schools*, *supra*. Hoxby examined competition between districts, not competition between schools in a single district. Some school districts offer parents such "*intra*district" choice through magnet schools or open-enrollment policies. These programs do give parents more options, but because it is the public school district that controls the supply of these options, the school district never faces any more competition than it chooses.

26 Hoxby, 90 Am. Econ. R. at 1215, 1237; *see also* Hoxby, *School Choice and School Productivity*, *supra*, at 29 (concluding that schools in areas with the most inter-district choice had, compared to schools in areas with zero inter-district choice, eighth-grade reading scores that were 3.8 national-percentile points higher, tenth-grade math scores 3.1 national-percentile points higher, and twelfth-grade reading scores 5.8 national percentile points higher).

27 Hoxby, 90 Am. Econ. R. at 1215.

to compete with public schools has a beneficial effect on public schooling outcomes."[28] More specifically, Hoxby found that after controlling for a variety of socioeconomic factors, public schools in areas with "moderately high" private-school choice do better than public schools with "moderately low" private-school choice: eighth-grade reading scores are 2.7 national-percentile points higher; eighth-grade math scores are 2.5 national-percentile points higher; and twelfth-grade reading scores are 3.7 national-percentile points higher.[29]

Vouchers increase school competition, and, perhaps more important, focus it on inner-city schools, which historically have had the most captive students and therefore have been the most insulated from competition. The effect of this competition is already apparent. Professor Hoxby's latest study shows that Milwaukee's voucher program has motivated the city's worst public schools to improve significantly in only a few years.[30] Hoxby studied Milwaukee's program because it has all the prerequisites for creating real competitive pressure on the public schools: (1) the program has operated uninterrupted for a number of years; (2) it gives public schools a financial incentive to improve by reducing funding when students transfer to private schools; and (3) it has sufficient funds to allow at least five percent of public-school students to attend private schools.[31]

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28 Hoxby, *Markets and Schooling*, *supra*, at 127.

29 Hoxby, *School Choice and School Productivity*, *supra*, at 31; *see also* Hoxby, *Markets and Schooling*, *supra*, at 125 (finding that every 10 percentage-point increase in the share of a county's secondary school enrollment in parochial schools increased the average public-school student's educational attainment by .33 years and wages by 2 percent).

30 Hoxby, *School Choice and School Productivity*, *supra*, at 33-40. For a less technical presentation of Professor Hoxby's findings, see Caroline M. Hoxby, *How School Choice Affects the Achievement of* Public *School Students* (Sept. 2001), *available at* http://post.economics.harvard.edu/faculty/hoxby/papers/choice_sep01.pdf.

Professor Hoxby determined the effect of vouchers by comparing those Milwaukee public schools with the most students eligible for vouchers against those with the fewest such students. Hoxby found that in the schools where at least two-thirds of students were poor enough to be eligible for vouchers (the schools Hoxby says were most "treated" to competition), achievement in math, science, and language improved at a significantly faster rate than in schools subjected to no competition.[32] "The schools that faced the most potential competition from vouchers had the best productivity response. In fact, the schools that were most treated to competition had dramatic productivity improvements."[33]

Nor is the positive effect of private-school choice on public-school performance confined to Milwaukee. A separate study of Florida's school-choice program, which gives vouchers to students in schools that perennially fail to perform, also finds that schools threatened by vouchers show greater achievement. "[S]chools receiving a failing grade from the state in 1999 and whose students would have been offered tuition vouchers if they failed a second time achieved test score gains more than twice as large as those achieved by other schools."[34]

Dr. Howard Fuller, former superintendent of the Milwaukee Public Schools, has explained specifically how the

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31 Hoxby, *School Choice and School Productivity*, *supra*, at 32-33.

32 *Id.* at 39-40, 67-68.

33 *Id.* at 40.

34 Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (Feb. 2001), *available at* http://www.ksg.harvard.edu/pepg/pdf/Florida%20A+.pdf.

Milwaukee district improved in response to competition. Among other things, the school district offered parents a guarantee that if their children were not reading at grade level by third grade, the district would hire private tutors for them. J.A. 234a (Fuller Decl. ¶ 17). The district also gave a dozen public schools the flexibility to hire teachers outside the seniority system. *Id.* And the district responded to parents' longstanding requests by creating new schools with popular curricula such as Montessori. *Id.*

Just as the introduction of competition from companies like Federal Express prompted the United States Postal Service to improve its service,[35] so too vouchers are stimulating competition and pushing the public schools to improve their performance. Since voucher programs are still relatively new, public schools can be expected to make more dramatic progress in the future, as existing voucher programs are given more time to work and as new, even more effective voucher programs are designed and implemented.

Justice Brandeis called states the laboratories of democracy. "It is one of the happy incidents of the federal system," he wrote, "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). He warned, however, that "[t]his Court has the power to prevent an experiment" and that "in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles." *Id.* The laboratories of democracy are now percolating with bold

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35 Postmaster General Marvin Runyon stated that "[c]ompetition is giving us plenty of incentive to improve. It's making us realize that if we're to be an innovative leader in the communications industry, we've got to get out there and compete for every postal dollar we get." *Privatize the Postal Service*, Cato Policy Report (Sept./Oct. 1995), *available at* http://www.cato.org/pubs/policy_report/pr-so-po.html.

school-choice experiments, and these reforms are yielding very promising early results, as shown by the educational achievement gains already made by low-income and minority students in choice programs. In the interest of more equal educational opportunity and increased academic achievement, these experiments should be permitted to continue.

II. THE CLEVELAND SCHOLARSHIP PROGRAM DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The purposes of the Cleveland Scholarship Program are secular: to improve educational opportunity for students who are trapped in poorly performing assigned public schools by their lack of family resources and to improve those schools themselves through the stimulus of increased competition. *See* Ohio Rev. Code Ann. § 3313.975 (authorizing scholarships only in districts "under federal court order requiring supervision" by the state).[36] On its face, the CSP is neutral with respect to religion: all students in the Cleveland district are eligible to apply for the scholarships, and no preference is given to children based on religion; the only statutory preference is for students from low-income families, *see id.* § 3313.978(A); students are free to choose non-religious schools or religious schools of any denomination, *see id.* §§ 3313.976(A), (C), 3313.978(A)(1), (2); the schools, however, must accept scholarship students without regard to a student's religious affiliation and must select new scholarship students by lottery, *see id.* §§ 3313.976(A)(4), (6),

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36 The district court acknowledged that the CSP has valid secular purposes, *see* 72 F. Supp. 2d 834, 847, 864 (N.D. Ohio 1999), and the court of appeals did not disturb this finding. *See also Simmons-Harris v. Goff*, 711 N.E.2d 203, 208 (Ohio 1999) ("Nothing in the statutory scheme, the record, or the briefs of the parties suggests that the General Assembly intended any [religious] result.").

3313.977(A).[37] Finally, the selection of the schools the students will attend, which will therefore be the ultimate recipients of the scholarship funds, is made by parents of students, as a matter of individual private choice. *See id.* §§ 3313.978(A)(1), (2), 3313.979.

Under this Court's modern Establishment Clause jurisprudence, a state program passes constitutional muster if it (a) has a secular purpose; (b) is neutral with respect to religion on its face and as applied; and (c) is so designed that any benefits that ultimately reach sectarian institutions do so through the mechanism of genuine individual private choice. That is the clear position of a majority of the Court in *Mitchell v. Helms*, 530 U.S. 793 (2000), in which the Court upheld a state program providing "secular" materials and equipment to public, private, and parochial schools, allocated on the basis of enrollment. In reaching that result, the plurality opinion of Justice Thomas (for four Justices) said, "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" *Id.* at 816 (citation omitted). The concurring opinion of Justice O'Connor (for herself and Justice Breyer) disagreed that in the case of direct aid a mere "figurative" passage through private hands, such as allocation of aid on a per-capita basis after private selections of schools have been made, would be sufficient; but the concurrence accepted the principle established in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), that benefits may reach a religious school if "the aid [is] provided directly to the individual student who, in turn, ma[kes] the choice of where to put

[37] The CSP thus does not directly or indirectly "define its recipients by reference to religion." *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

that aid to use." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring). A program satisfies the requirements of the Establishment Clause on this point if "'any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of [individual] aid recipients.'" *Id.* (quoting *Witters*, 474 U.S. at 487).

The CSP involves the actual individual private choice of schools that the concurring opinion in *Mitchell* would require, and it therefore meets the standards articulated by the six Justices who joined in the judgment in that case. Nevertheless, the courts below raised four grounds of objection: (1) the aid reaching schools is not limited to secular uses but may support religious instruction and activities; (2) the CSP is non-neutral because it is available only to students attending private schools; (3) the CSP is non-neutral because most of the schools willing to participate in fact have religious affiliations; and (4) the case is controlled by *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). None of these objections survives close inspection.

(1) *Secular Uses*

Both the district court, *see* 72 F. Supp. 2d at 847-48, and the court of appeals, *see* 234 F.3d 945, 958-59 (6th Cir. 2000), expressed concern that funds made available through students to private religious schools under the CSP are not limited to "secular uses" but may be used by the school to support a school's religious programs and activities. But whatever relevance the secular-vs.-religious nature of the ultimate uses of the aid may have in other contexts, it is surely irrelevant to religion-neutral programs involving actual individual choice. If a student selected on a strictly neutral basis makes a genuine individual choice to attend a parochial school, the *government* is not supporting the school's religious activities, either actually or apparently; it is merely allowing the student to attend the school that provides a combination of instruction and other programs that he chooses.

The government should *not*, as a matter of either constitutional law or sound public policy, be dictating the content of programs at the selected schools.

Witters, *supra*, is squarely in point. The State of Washington had a religion-neutral program of monetary vocational assistance to the blind, to be spent at an institution of the blind beneficiary's choosing. Petitioner Witters' choice was bible studies at a Christian college, looking toward a career in religious work. There was no dispute that the state aid to Witters would ultimately be put to use to support religious instruction: that is precisely what Witters wanted it for. But the Court, per Justice Marshall, ruled that Witters could receive such aid: the Court noted that the aid "is paid directly to the student," that the aid to the blind is "made available generally without regard to the sectarian-nonsectarian . . . nature of the institution benefited," and that aid would flow to the religious institution only as a result of Witters' genuinely independent and private choice, 474 U.S. at 488 (citation omitted), so that "the decision to support religious education is made by the individual, not by the State," *id.* That is the situation in Cleveland.

Other examples abound. The federal government has made financial aid available to individuals under various programs to help them pay for higher education. *See* 38 U.S.C. § 3011 *et seq.* (G.I. Bill); 20 U.S.C. § 1070a *et seq.* (Pell Grants). The individual recipients are free to use them at qualified institutions of their own choosing, including sectarian institutions,[38] and the institutions are free to treat the

[38] "Veterans receiving money under the 'G.I.' Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools." *Engel v. Vitale*, 370 U.S. 421, 437 n.1 (1962) (Douglas, J., concurring) (internal citations omitted).

payments they receive as part of their general revenues. No one has ever seriously suggested that individual recipients should *not* be allowed to spend their assistance at, say, Holy Cross, or that Holy Cross must somehow segregate the tuition and other payments it receives from them and spend such funds only on secular activities. On the contrary, either restriction would raise obvious severe problems under the Free Speech and Free Exercise Clauses. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-37 (1995); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Quick Bear v. Leupp*, 210 U.S. 50, 82 (1908). In sum, where an aid program is neutral and operates through private individual choices, there is no room for a separate constitutional test based on the ultimate use of the funds.

(2) *Limitation to Private Schools*

Both the district court, *see* 72 F. Supp. 2d at 864, and the court of appeals, *see* 234 F.3d at 959-60, also expressed concern that the CSP discriminates in favor of *private* schools. But that assertion, whatever its constitutional relevance, is simply false in several senses: (a) The eligible students are for the most part *public*-school students[39] with family incomes below a specified level, an entirely neutral class. *See* Ohio Rev. Code Ann. § 3313.978. (b) The public school students who receive scholarships may use them, under the statute, to attend either a private school or another public school (although the CSP does not require public schools to participate as in-takers of such students, and to date no public school has elected to do so). *See id.* § 3313.978(A)(1), (2).

[39] In the CSP's first year, only 25 percent of the scholarship recipients (496 of 1989) had previously attended private schools. *See* Jay P. Greene, William G. Howell & Paul E. Peterson, *Lessons from the Cleveland Scholarship Program*, in *Learning from School Choice*, *supra*, at 362; *id.* at 359.

(c) The State supports public schools and secular private schools with far more funds, per student, than the scholarships made available under the CSP;[40] students are thus in no way induced to choose private schools by the prospect of greater state financial support than they would receive if they remained in their assigned public schools; the scholarship student's only logical reason for changing schools is to attend what he and his family judge to be a *better* school. (d) The CSP itself benefits public schools, both by reducing their expenses as scholarship recipients elect to go elsewhere, and by providing the stimulus of competition. There is no sense in which the State's educational programs favor private education. What they favor is giving students trapped in poorly performing assigned public schools an additional education choice.

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40 Compared to the up to $2,250 that the State provides each student attending a private school under the CSP, the State would provide both the scholarship *and* the State's ordinary per-pupil aid contribution (called "state base cost funding" and up to approximately $4,800 this year) for a student attending a public school under the CSP. *See* Ohio Rev. Code Ann. §§ 3313.979(B), 3317.02(B), 3317.03(I)(1), 3317.012(A), 3317.022(A). For students in the State's secular charter schools (called "Community Schools"), the State provides the entire $4,800 ordinary per-pupil contribution. *See id.* §§ 3314.03(A)(15), 3314.08(A)(1), (D)(1), 3317.02(B); *see generally* J.A. 56a (Hoxby Aff. ¶ 4). And for students attending assigned public schools in Cleveland, the State's ordinary per-pupil expenditure of up to $4,800 is supplemented by local government funds to create an overall per-pupil expenditure that exceeded $6,300 in 1997-98. *See* Ohio Dep't of Educ., *Current Expenditures Summary and Other Expenditures, Public Elementary and Secondary Education, 1997-98 Revised* (Mar. 26, 1999), *available at* http://ode000.ode.state.oh.us/www/ims/costpp/table2_98.txt; *see also* Ohio Dep't of Educ., *Tax Valuation and Current Revenue Receipts by Source, Public Elementary and Secondary Education, 1997-98* (Mar. 26, 1999), *available at* http://ode000.ode.state.oh.us/www/ims/costpp/table3_98.txt.

(3) *The Number of Religious Schools*

Both the district court, *see* 72 F. Supp. 2d at 863, and the court of appeals, *see* 234 F.3d at 959, also suggested that since the great majority of private schools now willing to accept scholarship students are religious schools, the CSP is effectively encouraging religious rather than secular education.

First, this suggestion confuses the external facts of the moment with the CSP as established by statute. The program itself is neutral with respect to the religious or non-religious character of the participating schools, and the larger number of pre-existing religious schools who have elected to participate is neither a deliberate nor a permanent result. The court of appeals suggests darkly that the CSP fits the financial requirements of religious schools better than it fits the needs of secular private schools, 234 F.3d at 959, but there is no evidence and no district-court finding that the Ohio Legislature devised the program in a way that, despite its facial neutrality, would favor the creation, or growth, or student selection of religious rather than secular schools.

Second, there is no evidence or finding that any scholarship recipient seeking to attend a secular rather than religious private school has been unable to find such a place.

Third, there is every reason to assume that more secular schools will be created and will grow to serve the needs of scholarship recipients, as well as other students who wish to attend them, now that the State has given more students an opportunity to escape from their assigned public schools. The CSP is relatively new and has been under continuous legal challenge since its inception, discouraging initiatives to create new secular schools for the students the CSP serves. The number of participating secular schools rose sharply in

Milwaukee once the Wisconsin Supreme Court upheld that city's voucher program.[41]

In sum, the fact that for reasons of history a large fraction of the alternatives now available to students trapped by poverty in assigned public schools are sectarian is not a reason to refuse to give such students a choice. When there are customers able to choose, additional suppliers of educational services will come forward to serve them: that is the way competition works, in education as in everything else.

(4) *Nyquist*

Finally, both the district court, *see* 72 F. Supp. 2d at 850, and the court of appeals, *see* 234 F.3d at 955, felt bound by this Court's opinion in *Nyquist*, *supra*, to strike down the CSP. Lower federal courts are of course not at liberty to decide for themselves that one of this Court's decisions, never explicitly overruled, has been overtaken by events. This Court does have that prerogative, and if the Court agrees that *Nyquist* would otherwise be controlling, the Court can and should overrule it as inconsistent with the Court's modern approach to the Establishment Clause. But *Nyquist* is also distinguishable, because it did not involve individual private choice *after* a grant was made.

Nyquist focused, as a matter of analytical structure, on the use to which the state aid was put. The Court first exam-

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[41] The Milwaukee program began in 1990-91 with only 7 participating secular private schools. *See* Wisconsin Legislative Audit Bureau, *An Evaluation: Milwaukee Parental Choice Program*, Report 00-2, at 14, 26-27, App. I, VII (Feb. 2000), *available at* http://www.legis.state.wi.us/lab/reports/00-2full.pdf. After the final legal challenge to the secular component of the program ended in 1992, *see Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992), the number of participating secular schools increased to 23 by 1998-99. *See Evaluation*, *supra*, at 14, 16, App. I. Of those 23 schools, 4 were founded between 1990 and 1995, and 9 were founded between 1996 and 1998. *Id.* at App. I; *see also* J.A. 235a (Fuller Decl. ¶ 18).

ined a provision of the New York statute there at issue that "authorize[d] direct payments to nonpublic schools, virtually all of which are Roman Catholic," for purposes of assisting the maintenance and repair of school facilities but "largely without [any] restrictions on usage." 413 U.S. at 774. The repair and maintenance grants were measured by the pupil population, but there was no active individual choice in deciding which institutions would receive payments. The Court struck down these direct, unintermediated grants on the ground that the grantees were free to use them for sectarian purposes.

The Court then followed a parallel analysis to strike down provisions authorizing reimbursement of some tuition expenses incurred by low-income parents. The Court said the amounts granted could not have been given directly to sectarian schools to be used for unrestricted (including sectarian) purposes, *see* 413 U.S. at 780, and, the Court said, the program was not saved by the fact that the grants went to parents, rather than to the schools themselves, because the Court's cases sustaining programs of grants to parents, *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968), were distinguishable.

At least as applied to the present case, the Court's *Nyquist* approach starts at the wrong end. It is now clear that as long as a grant program is neutral as respects religion and involves actual individual private choice in the determination of the ultimate recipients of funds, the program does not have the impermissible effect of government enhancement of religion. The reason is not that the money is somehow carefully boxed to avoid supporting sectarian activities (a result that the fungibility of money makes unrealistic in any event) but that the private choice of individuals, rather than any decision of the government, is providing whatever enhancement those activities enjoy. The Court began following this approach of looking at the structure of the program, rather than

the ultimate use of any particular dollars, even before *Nyquist*. *See Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *see also Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971) (distinguishing *Everson* and *Allen* on the ground that in those cases "state aid was provided to the student and his parents—not to the church-related school"). The Court has repeatedly followed the same approach since, *see Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters*, *supra*, and the Court should follow it here.

CONCLUSION

The decision of the U.S. Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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